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**BEFORE THE UNITED STATES  
TRADE REPRESENTATIVE  
Docket Number USTR-2013-0001**

**COMMENTS CONCERNING THE PROPOSED  
INTERNATIONAL SERVICES AGREEMENT**

**FILED BY  
PUBLIC CITIZEN**

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Public Citizen welcomes the opportunity to comment on the proposal by the Office of the U.S. Trade Representative (USTR) to enter into negotiations on an International Services Agreement (ISA) with an initial group of 20 trading partners.

## **Overview**

The merits of U.S. involvement in prospective ISA negotiations and the terms of reference for such an agreement should be judged with respect to whether such an undertaking offers benefits for the majority of U.S. consumers and workers. ISA negotiations will only meet this standard if they are designed to preserve policy space to regulate the service sector in the public interest. Past U.S. trade agreement service sector rules have prioritized service sector industry demands to constrain governments' ability to regulate, reaching behind the border to undermine domestic policies regarding quality, safety and affordability of services.

It is our understanding that the current Parties considering ISA negotiations have agreed to use the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) rules as the framework for possible ISA commitments. Even so, the ISA's status would be as a free-standing Free Trade Agreement (FTA) in services, and not part of the WTO, given most WTO members are not interested in joining these negotiations. Before binding the United States to a new array of service sector obligations under the ISA – and thus possibly limiting the policy space needed to pursue stated Obama Administration priorities and needed by Congress and state legislatures to regulate services in the public interest – USTR should examine the impact and implications of existing U.S. service sector commitments under GATS strictures. And, any ISA should only go into effect with explicit congressional approval.

The prospect for the ISA to safeguard consumer interests, much less further them, is limited by the preliminary decision to premise “liberalization” on the GATS framework, which Public Citizen urges USTR to reconsider. GATS rules conflate liberalization and deregulation. Under GATS rules, countries may not maintain or establish certain forms of regulation commonly applied in the United States on the national and state levels with respect to service sectors for which market access commitments are taken, even if such policies apply to domestic and foreign suppliers alike. This includes limiting the number or size of service suppliers, banning a particular service, employing economic needs tests, or requiring that services be provided through a particular type of legal entity. Agreeing to limit regulation of service sectors, in the context of rules that are not subject to alteration absent consent by all involved countries, is not a prudent approach. From the Enron energy debacle to the global financial crisis, American consumers have been severely damaged by the deregulatory agenda promoted by the service sector industry. Yet, GATS rules have not been updated since the global financial crisis or other prominent examples of the perils of extreme deregulation, despite U.S. and worldwide efforts to reregulate financial and other services in the wake of various deregulation-spurred debacles. And, new emerging challenges, such as relates to climate and energy services, require even greater flexibility.

The ISA could be an opportunity to revise the model of past trade agreements' service sector rules to reprioritize the needs of consumers and restore needed domestic policy space to ensure the service sector is regulated in the public interest. When Public Citizen has raised concerns

about past trade agreements' requirements that liberalized services must also meet various deregulation requirements, we have been told that there is nothing inherently deregulatory about liberalization. This is true in the abstract, but unfortunately is not an accurate description of the actual terms for liberalization included in past pacts.

To limit the threats an ISA poses to consumer and environmental protection, certain principles must undergird talks:

- The existing GATS rules should not be the basis for liberalization. By conflating liberalization and deregulation, the GATS Market Access rules prohibit *non-discriminatory* public interest regulations – policies that apply equally to domestic and foreign firms to promote financial stability, consumer safety, public health, environmental quality and educational access. The GATS contains additional limits on domestic regulation with respect to qualification requirements and procedures, technical standards and licensing requirements. The United States must not commit any new service sectors to such deregulatory restrictions under the ISA, nor ask other nations to do so. Rather, the ISA could be the venue to reform the outdated GATS substantive terms, designing a more balanced approach to liberalization that does not impose limits on non-discriminatory forms of regulation. Doing so would remedy one of the significant problems of the GATS: assigning each Party the impossible task of anticipating tomorrow's unforeseen regulatory needs today when scheduling commitments. In his letter notifying Congress of the intent to negotiate an ISA, U.S. Trade Representative Ron Kirk stated, "The agreement must also permit comprehensive coverage of all services, including services that have yet to be conceived."<sup>1</sup> The notion of such expansive coverage under deregulatory terms is extremely threatening to the effective protection of consumer rights, public health and the environment.
- The deregulatory requirements already imposed in the GATS rules must not be expanded in ISA terms. Thus for instance, the sort of proposals previously discussed by the GATS Working Party on Domestic Regulation (WPDR) must remain outside ISA talks. We appreciate the work that USTR has done to date to counter proposals in the WPDR that would impose new "necessary" and other tests on additional forms of non-discriminatory domestic regulation. Ensuring that such proposals are not revived in the ISA is critical to maintain policy space needed for nondiscriminatory public interest licensing criteria (e.g. liquor licenses, commercial drivers licenses, safety requirements for hospitals), service supplier qualification rules (e.g. minimum education levels for doctors, accreditation of schools) and technical standards (e.g. an almost limitless array of safety, environmental and consumer standards). We appreciate the United States' longstanding opposition to the inclusion of a necessity test and urge maintenance of that position in the face of demands brought by other ISA negotiating countries.
- ISA rules and commitments taken under them must not be subject to investor-state dispute resolution. It is our understanding that USTR does not wish to incorporate an investor-state mechanism in the ISA. We strongly back that position, as the sweeping investor-state provisions of other U.S. FTAs have resulted in a proliferation of direct foreign investor challenges to public health, environmental, energy and other public interest policies of general application, costing taxpayers in an array of countries hundreds of millions of dollars.

- A positive list approach must be used for any commitments made under the ISA. Regardless of the rules of the agreement, each negotiating Party must maintain the prerogative to name the specific sectors that it intends to bind to such rules, whether concerning market access or national treatment. A positive list approach better equips negotiators to exclude those sectors that are particularly sensitive as non-negotiable domestic priorities, such as energy, water, etc. In addition, a positive list approach allows countries to maintain the policy space to implement future regulations to respond to crises (e.g. climate change, financial instability) or respond to newly created services (e.g. the emergence of derivatives). We urge USTR to reconsider the negative list approach for national treatment currently supported by USTR. This is especially critical if the GATS terms will be the basis for commitments in an ISA, as the GATS National Treatment provisions require not only equal treatment, but also specify that “[f]ormally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.”<sup>2</sup> A limitless number of facially neutral regulatory policies, designed with no intent to discriminate, could alter the conditions of competition based on the business decisions of foreign firms. This is an intolerable limitation on the prerogatives of Congress and state legislatures to regulate the service sector in the public interest.
- Public services must be excluded from the agreement with a broad and authentic carve-out. GATS’ current “exception” for public services only excludes government services that are “supplied neither on a commercial basis nor in competition with one or more service suppliers.”<sup>3</sup> However, most government services (like water, electricity, health care and education) involve some public/private mix or fee structure and/or compete with private providers. Such sensitive sectors fall outside of this exception and thus are subject to GATS’ deregulatory rules. Instead, the ISA should include an unconditional carve-out for public services.
- The agreement must include an *effective* general exception for public interest policies that excludes the self-defeating language of the GATS Article XIV “exception.” Of the 35 times in which WTO members have attempted to use the GATS Article XIV exception or the related General Agreement on Tariffs and Trade (GATT) Article XX exception to defend a policy measure, only one attempt has succeeded. The rest have failed on one of three threshold tests required by the GATS and GATT general exceptions.<sup>4</sup> Included in this 97 percent failure rate is the failure of the United States to defend its anti-Internet gambling laws against a challenge from Antigua and Barbuda, which the WTO has now authorized to sell \$21 million worth of U.S. copyrighted material in retaliation. In this case, and in many of the other failed attempts to apply the exception, the *chapeau* of the GATT and GATS exceptions was the basis for the failure. The ISA presents an opportunity to design a general exception with a broader scope covering emerging issues, such as consumer data privacy and anti-abuse language that is more narrowly crafted so that it can adequately safeguard existing and proposed public interest policies.

### **Projected ISA Gains Are Small while Other Critical USTR Responsibilities Loom Large**

In addition to considering what prospective ISA terms would best serve the public interest, it is worth considering whether the expected benefits of an ISA would justify expenditure of

significant USTR resources and exposure to the prospective risk of important U.S. regulatory policies being undermined. Unfortunately, the economic benefits that can be predicted from an ISA appear to be quite low. Of the 20 trading partners expressing interest in participation in the ISA (after much effort to engender interest in the process), all are WTO members that have already significantly liberalized their service sectors through commitments under the GATS. In addition, 10 of the 20 trading partners already have active FTAs with the United States, which include further services liberalization provisions, while FTAs are under discussion with an additional three would-be ISA partners.<sup>5</sup> These current and prospective deals cover a majority of the economies on the ISA list, including the six largest ones, diminishing the degree of additional services commitments that the United States can hope to wrest from ISA partners.

As a result, even ISA proponents have acknowledged that little market access or other gains are likely to be seen from the current list of ISA members, and that the “real value of the effort will come if and when China, India and Brazil are convinced to join.”<sup>6</sup> The Peterson Institute for International Economics, in calculating a “tariff equivalent of service barriers” for potential ISA countries, estimates an enormous gap between the current barriers of the major economies in the initial ISA partner list, and those of China, India and Brazil. The average estimated tariff-equivalent barrier for those three emerging economies is 64 percent, while the average estimated barrier for the three largest economies among current ISA partners (the European Union, Japan and Canada) is just 13 percent, leaving little room for negotiated gains unless the large emerging economies join.<sup>7</sup>

However, there is little reason to expect that the major emerging economies will indeed join. India has made clear that it is “fundamentally opposed to the talks,”<sup>8</sup> while all five BRICS nations (Brazil, Russia, India, China and South Africa) have denounced such plurilateral negotiations, saying they “go against fundamental principles of transparency, inclusiveness and multilateralism.”<sup>9</sup> With very limited potential gains from current ISA partners and even more limited prospects that partners yielding major prospective gains will join, even those who foresee economic advantages in an ISA are forced to recognize that such advantages currently look minute.

With such meager prospective gains, is it worth the expenditure of USTR’s limited resources to negotiate such a deal? Other priorities would certainly seem higher on the current agenda, not the least of which should be negotiating settlements that safeguard U.S. consumer policy in the face of the three final WTO rulings last year against the popular U.S. country-of-origin meat labeling regime, our successful “dolphin-safe” labeling program for tuna, and the Obama administration’s ban on clove-, candy- and cola-flavored cigarettes to curb youth smoking. In addition, the Obama administration goal of doubling U.S. exports by 2014 (relative to 2009) lags behind. With two years left, the United States should be 60 percent of the way toward achieving this goal. Instead, the 2012 Census data showed that we are just 37 percent of the way toward Obama’s export growth goal, with U.S. goods exports growing at less than one-sixth of the promised pace in 2012.<sup>10</sup> Congressional leaders have noted that the currency rate policies of major U.S. trade partners, such as China, have inhibited U.S. goods exports. In 2012, the U.S. deficit in goods excluding oil actually rose six percent to \$628 billion, the largest non-oil U.S. trade deficit in the last five years. The U.S. trade deficit with China (even with oil included) broke all past records, topping \$321 billion.<sup>11</sup>

In addition to such pressing concerns, USTR is simultaneously trying to conclude negotiations this year on the sweeping Trans-Pacific Partnership FTA, while also planning to launch a major trade and investment pact with the European Union. Perhaps it is not surprising that 58 percent of USTR staff reported that they do not have enough resources to carry out their work, while only 12 percent say they do have sufficient resources, according to a December 2012 survey of federal agencies, which ranked USTR as the worst place to work among small federal agencies.<sup>12</sup> It would be ill-advised to task an already overburdened agency with an additional international pact that promises tiny possible gains and large possible costs, undermining the critical work that the agency must perform. That work includes safeguarding successful U.S. policies threatened by trade disputes and expanding U.S. goods exports, a key element of the Obama administration's declared focus on rebuilding the U.S. manufacturing sector.

### **Negotiators Should Use a Positive List Approach to Preserve Needed Policy Space**

Public Citizen supports the long-standing policy of the bipartisan National Conference of State Legislatures that urges USTR to use the "positive list" approach of scheduling commitments in any services agreement.<sup>13</sup> Such an approach helps ensure that the United States and other negotiating Parties can adequately exclude sensitive domestic sectors (e.g. energy, water, health care, education) that should not be bound by international rules that are immutable except through agreement by all Parties. Also, in order to preserve policy space to address future policy challenges, the positive list approach is critical to avoid the inadvertent commitment of services *related to* these sensitive sectors. To address the emerging challenges presented by climate change, for example, federal or state governments may find it necessary to take measures not just affecting the energy sector, but related services (e.g. distribution, storage, emissions monitoring, etc.). A negative list approach would burden the U.S. federal government, state governments and other negotiating Parties with the nearly impossible burden of anticipating all such services that may one day be implicated by an array of possible policy measures that may be required to address climate change. Similarly, a negative list approach would, by default, indefinitely bind the United States to ISA rules for all emerging services not yet conceived at the time of negotiation. To remain on the cutting edge of service sector development, the United States should preserve the policy space necessary to accompany new services with policies to promote the growth of the fledgling sectors, and to ensure their coherence with health, safety and environmental goals.

We understand that USTR supports a "negative list" approach for national treatment commitments within an ISA. This position should be reconsidered. If an ISA would include expansive national treatment obligations that extend beyond merely providing identical treatment to domestic and foreign firms and services, an innumerable array of facially neutral public interest policies could become "illegal barriers to trade." To respond to future financial, environmental and other challenges, certainly the United States will employ facially nondiscriminatory policies that may have an inadvertent disproportionate impact on foreign firms. That was certainly the case in the U.S. response to the financial crisis. For example, while the \$3.8 trillion that the Federal Reserve lent to banks at preferential rates under the Term Auction Facility was formally available to "U.S. branches and agencies of foreign institutions that maintain deposits," the bulk of the privileged lending went to U.S.-headquartered banks.<sup>14</sup>

Might such components of the bailout have “modified[] the conditions of competition” in favor of U.S. firms, as prohibited by GATS National Treatment rules?<sup>15</sup> Might not future financial challenges require similar policy responses that, while facially neutral, have the effect of privileging domestic firms? USTR should plan for this probability by using a positive list approach for any national treatment commitments, as well as any market access commitments.

### **Negotiators Must Create a Legitimate Carve Out for Essential Public Sector Services**

The ISA must include an unconditional carve-out for public sector services that rectifies the serious flaws of the GATS public sector “exception.” GATS Article I:3 is written in such a way that it only applies to government services that are provided neither on a “commercial basis” nor “in competition with one or more service suppliers.”<sup>16</sup> It is hard to imagine a U.S. public service that actually would qualify under this exclusion.

As noted in a paper by the Organization for Economic Cooperation and Development, “This [the GATS public sector] 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.”<sup>17</sup> Perhaps one U.S. “sector” that might fit under this exception is national security provided by the military. However, certain military elements, such as transport of troops and equipment, increasingly have been bid out to private services.

Indeed, most public services in the United States are provided *both* by government and in the private sector – such as education, electricity, water, medical and hospital services, and transportation. In addition, almost all forms of public services involve some kind of commercial participation in the delivery of health, education and social services. In the United States, as in most countries, federal, state and local governments provide public services through a “mixed system of delivery” that includes both public and private components. And, under the GATS construct, even for services provided *exclusively* by the government, only non-commercial direct government-to-people delivered services are exempt from the GATS. Yet, public utilities provide their services on a commercial basis, with consumer paying rates set by utility boards. The postal service is fee-based. Even government approvals, such as for licenses or pharmaceutical safety approvals, involve fees.

To adequately protect public services from binding international commitments that would be extremely difficult to alter, USTR should use the ISA as an opportunity to draft an effective public sector carve-out.

### **To Safeguard Existing Obama Administration Priorities, the ISA Must Include an Effective General Exception and Change GATS’ Uniform Deregulatory Rules**

The ISA also presents an opportunity to fix the GATS and GATT general exceptions that have proven woefully inadequate to preserve necessary space for public interest policymaking. Respondents in WTO cases have invoked GATT Article XX in 34 cases and GATS Article XIV in one case (US – Gambling). Of the 35 cases, the general exception was determined to be relevant enough to be considered in 27 cases. Twenty-six of those 27 cases failed to satisfy one

of three threshold tests, all of which are required for successful application of the general exception:

- Two cases failed on the subject matter/scope threshold, with a tribunal concluding that the Respondent failed to show that the measure was designed for the protection of human health or for securing compliance with laws or regulations which were not inconsistent with WTO provisions;
- Eighteen cases failed on the "necessary" or "related to" threshold, with a tribunal typically finding that the policy objective was not legitimate (as determined by the panel or Appellate Body), that the policy measure did not contribute to the policy objective (in the view of the panel or Appellate Body), or that the policy measure was more trade restrictive than necessary to accomplish the legitimate objective; and
- Six cases failed on the chapeau threshold, with a tribunal finding arbitrary or unjustifiable discrimination in the measures' application.<sup>18</sup>

In the only case of a Respondent invoking the GATS general exception, the United States lost both the Article XIV defense and the case to Antigua and Barbuda's claim that several U.S. laws that functioned to ban Internet gambling violated U.S. GATS commitments by inhibiting the cross-border supply of gambling services. The United States invoked Article XIV(a) and (c), arguing that "gambling by remote supply is particularly vulnerable to various forms of criminal activity, especially organized crime. Maintaining a society in which persons and their property exist free of the destructive influence of organized crime is both a matter of 'public morals' and one of 'public order.'"<sup>19</sup> The United States further stated that the gambling laws in question "are necessary to secure compliance with all the various WTO-consistent US criminal laws violated by organized crime activities."<sup>20</sup>

In a November 2004 report, a WTO panel found that the United States failed the "necessity" threshold for both of the claimed subparagraphs by not fully exploring and exhausting WTO-consistent alternatives to its gambling laws.<sup>21</sup> While noting that it would not be necessary to proceed further, the panel opted to also assess the laws' compliance with the *chapeau* "so as to assist the parties in resolving the underlying dispute in this case."<sup>22</sup> The panel then found that the U.S. defense also failed the *chapeau* threshold.<sup>23</sup> Though the Appellate Body overturned the panel's finding on the necessity threshold, it upheld the panel's decision that the U.S. Article XIV defense failed to comply with the *chapeau*, on the basis that the United States had failed to demonstrate that measures against remote gambling, such as those embodied in the Wire Act, "are applied to both foreign and domestic service suppliers of remote betting services for horse racing."<sup>24</sup> At issue was a narrow provision of the Wire Act that allows credit card transactions explicitly related to off-track betting on horse racing to be processed across U.S. state lines. As a result of the severe flaws of the GATS general exception, the United States now faces a recent WTO decision that authorizes Antigua to freely sell \$21 million of U.S. copyrighted material as retaliation.

Clearly a more effective general exception for services is needed in the ISA, which could not only safeguard public interest policymaking for ISA members, but build toward an eventual WTO replacement of the current GATS and GATT exceptions that have proved ineffective. The most important changes that must be made in the ISA relative to the GATS exception are:



- Ensuring coverage of a wide range of domestic policies. GATT Article XX covers natural resources, but GATS Article XIV does not. Neither cover historical, cultural or artistic treasures nor consumer privacy nor countries' obligations under other international treaties, such as those covering indigenous rights, culture, tobacco control and more;
- Lowering the thresholds for successful use of the defense by clarifying what standard of proof is required, especially if terms associated with a body of WTO jurisprudence, such as “necessary” or “arbitrary or unjustifiable discrimination” are employed; and
- Lowering the thresholds for successful use of the defense by clarifying that the burden of proof rests with the Claimant with respect to showing a measure does not meet the requirements of the exception.

A genuine general exception is critical not just to preserve policy space for future policies in response to emerging policy challenges, but to safeguard existing Obama administration policy proposals that respond to very real and current policy challenges. Current U.S. GATS commitments could undermine the Obama administration's first-term achievements and second term goals of expanding healthcare access, restoring financial sector oversight and stabilizing the climate, among others. Indeed, current GATS strictures compromise many of the core policy proposals that President Obama recently named in his 2013 State of the Union address. Such limiting contradictions once again make clear that a) the ISA must include a general exception that actually can be applied successfully to safeguard public interest policies, and (b) the ISA must not replicate the sweeping deregulatory rules of the GATS.

One of the few things that supporters and critics of the GATS agree on is that the goal of imposing uniform rules over the entire realm of countries' service sector *non-trade* domestic policies was a revolutionary one. 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...”<sup>25</sup> In 1994, the United States committed almost 100 service sectors – such as banking, insurance, telecommunications, construction and gambling – to GATS constraints with little public discussion, congressional debate or understanding.<sup>26</sup>

As the USTR approaches negotiations for an ISA, a thorough review of past GATS commitments must provide a guide for how to avoid further undermining U.S. domestic service-sector regulatory policy space. Here we provide only a few examples of how the expansive existing GATS commitments could conflict with Obama administration policy priorities. A comprehensive review of existing regulatory constraints and a careful analysis of policy space that must be preserved in sectors under consideration for ISA commitments are critical before USTR binds policymakers, regulators, workers and consumers to any new commitments in an ISA.

### ***Healthcare: Cost-saving Affordable Care Act Provisions Conflict with GATS Obligations***

Existing U.S. GATS commitments include (and thus constrain) many health services, including health insurance; health services provided by hospitals, HMOs and other health care facilities; distribution services, including wholesale and retail distribution of prescription drugs and

tobacco; and data processing services, including medical records and insurance claim processing.<sup>27</sup>

The binding of U.S. health sectors to such GATS rules could compromise several key elements of the Obama administration's major health care reforms incorporated in the Affordable Care Act (ACA) of 2010. For example, the ACA establishes a system of health insurance exchanges to pool risk and offset costs for unhealthy clients. The law sets requirements on the level of coverage that all health insurance firms must meet to gain access to the pool of prospective customers. These requirements include that all health insurance plans offered on the exchange must cover ten broad categories of health care, including at least two plans with higher degrees of coverage ("silver" and "gold" plans).<sup>28</sup> Such requirements, intended to ensure affordable, high quality care, could violate GATS Market Access or National Treatment rules if a foreign firm is unable to meet the criteria and thus excluded from the exchanges.

Why? The GATS Market Access rules prohibit "limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, [or] **exclusive service suppliers**,"<sup>29</sup> [emphasis added]. Outside the WTO, there is a clear distinction between policies that set requirements that *may* knock certain firms out of the market, and policies which name specific exclusive providers and allow them only to provide a service. However, the GATS rules make clear that a specific listing of named exclusive suppliers is not required for a policy to create GATS-prohibited quantitative limits. GATS Article VIII on "Monopolies and Exclusive Service Suppliers" includes circumstances in which "a Member, formally or **in effect**, authorizes or establishes a small number of service suppliers" [emphasis added].<sup>30</sup> ACA's high-standard health care exchange system could be seen by a WTO tribunal as having the effect of excluding some ineligible health insurance suppliers, thereby restricting access to "exclusive service suppliers."

In addition, the hallmark achievement of the Obama administration's first-term may violate the GATS National Treatment rule that bars policies, even ones that are "formally identical" for domestic and foreign suppliers alike, if they "modify[] the conditions of competition in favor of [domestic] services or service suppliers."<sup>31</sup> If the ACA exchange system has the inadvertent effect of stopping foreign insurance firms from establishing new insurance business – for instance, because as start-ups they cannot meet the broad and deep coverage requirements of exchange insurance plans – it could qualify as a WTO-forbidden national treatment restriction, even though discrimination against foreign firms is not the intent of the policy. Under these expansive GATS rules, if another WTO member were to challenge the ACA criteria on behalf of a foreign firm, it would ultimately be up to a WTO tribunal to determine whether the ACA requirements should be watered down, or revoked, to conform to GATS rules.

### ***Climate Change: Green Policies Slated for Enactment Could Spark WTO Dispute***

In his 2013 State of the Union address, President Obama asked that Congress "pursue a bipartisan, market-based solution to climate change, like the one John McCain and Joe Lieberman worked on together a few years ago."<sup>32</sup> The referenced market-based proposal from McCain and Lieberman was the Climate Stewardship and Innovation Act, a cap-and-trade bill.<sup>33</sup> Beyond the current political difficulties that would face such a bill, a cap-and-trade program, if implemented, could be challenged under existing U.S. GATS commitments. While carbon

credits themselves are seen to be outside WTO jurisdiction, the tradable allowance system is a classic securities market – and as such may well fall under the broad U.S. WTO commitments regarding financial services. Because establishment of such a system could not be foreseen when the United States made its various WTO financial service commitments, no exceptions for such a program were listed to U.S. commitments. In the expansive WTO category called “Trading of Securities and Derivative Products and Services Related Thereto,” the only policy space that the United States preserved was for onion futures. All other U.S. securities are bound to GATS Market Access rules, which forbid the establishment of new monopolies – which a government-run futures market in emissions rights would appear to be.

Given the seeming current infeasibility of a cap-and-trade system, President Obama stated in his State of the Union address that even without legislative action, his administration would take “executive actions...to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy.”<sup>34</sup> One administrative climate initiative that likely forms part of the Obama administration’s second-term plan is a new set of Environmental Protection Agency (EPA) regulations on fossil-fuel-fired power plants, executed under the Clean Air Act. Though the exact form that new regulations will take is not yet clear, a proposed EPA rule for new carbon-emitting power plants would set emissions limits for the new plants and likely require usage of carbon capture and sequestration (CCS) technology.<sup>35</sup> The United States has extensive GATS commitments in areas pertinent to such rules, including “services to reduce exhaust gases and other emissions to improve air quality,” which could compromise forthcoming environmental regulations.<sup>36</sup>

### ***Financial Regulation: Implementation Being Threatened as Violating Trade Obligations***

In July 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act, calling the sweeping package of post-crisis reforms “the strongest consumer financial protections in history.”<sup>37</sup> But as regulators now seek to implement the reforms to counteract the excessive Wall Street deregulation that led to the largest financial crisis since the Great Depression, other countries and financial sector interests seek to thwart robust regulations by claiming that they would violate U.S. trade agreement obligations. In December 2011, the Investment Industry Association of Canada sent a letter to U.S. financial sector regulators that criticized the Volcker Rule, designed to curb the dangers of proprietary trading, alleging that the proposed U.S. regulation contravened U.S. trade commitments.<sup>38</sup> Canada’s Office of the Superintendent of Financial Institutions also criticized the Volcker Rule in a letter to then Secretary of Treasury Tim Geithner.<sup>39</sup> In a widely-reported December 2012 letter to U.S. Trade Representative Ron Kirk, the U.S. Chamber of Commerce cited such Volcker Rule complaints from “Canada, Japan, the United Kingdom, and Singapore,” and asked that USTR examine whether “the Volcker Rule does not violate any of our trade obligations.”<sup>40</sup> Such pressure shows how current U.S. financial commitments under the GATS can be used as an attempt to chill the implementation of promised financial sector reform.

One possible Dodd-Frank conflict with U.S. GATS obligations concerns the aspect of the law that prohibits any mergers that would result in a single bank or financial firm holding more than 10 percent of the liabilities of the entire U.S. financial sector.<sup>41</sup> This provision was included in effort to tamp down the “too-big-to-fail” mentality that contributed to undue risk-taking and

systemic risk build-up in the years before the crisis. But in the 2008 U.S. WTO Trade Policy Review, the WTO Secretariat described the nearly identical precedent to this regulation (part of the Riegle-Neal Interstate Banking and Branching Efficiency Act) as a “size limitation.”<sup>42</sup> This designation relates to the GATS rule against “limitations on the total value of service transactions or assets in the form of numerical quotas...”<sup>43</sup> Seen as a numerical quota in GATS terms, the now-enacted 10% banking concentration limit may be deemed to contravene U.S. GATS obligations even if it is facially agnostic between U.S. and foreign banks *and* even if it equally affects domestic and foreign banks.

### **The ISA Must Not Commit New Sectors to GATS-Like Rules or Incorporate Bush-era Proposals to Expand those Rules**

Given the threats that current U.S. GATS obligations could pose to the policy objectives at the very core of what the Obama administration hopes will be its legacy, the administration must not undermine yet greater swaths of U.S. regulatory policy space through the ISA. Unfortunately, unless the ISA’s substantive rules for liberalization are designed to preserve regulatory space, unlike the GATS rules, that is precisely what commitment of additional service sectors could do. In his letter notifying Congress of the intent to negotiate an ISA, U.S. Trade Representative Ron Kirk stated, “The agreement must also permit comprehensive coverage of all services, including services that have yet to be conceived.”<sup>44</sup> Similarly, in a statement on the ISA before the House Committee on Ways and Means Trade Subcommittee in September, Deputy U.S. Trade Representative Michael Punke stated, “the agreement would encompass all service sectors and modes of supply and impose a high standard for liberalization.”<sup>45</sup>

### ***Binding New Sectors to GATS-Like Rules Would Limit the U.S. Government’s Ability to Regulate in the Public Interest***

While the United States has already committed nearly 100 service sectors to the sweeping strictures of the GATS, policy space was preserved for some particularly sensitive sectors that could not be subjected to the GATS due to intense political pressure. However, new GATS negotiations started in 2000 (dubbed “GATS-2000”), and in 2005 the George W. Bush administration unveiled a negotiating proposal that would bind additional U.S. service sectors to GATS’ deregulatory rules, including higher education (as discussed below). Meanwhile, leaked documents show that Europe, as part of the GATS-2000 process, demanded that its corporations be granted access to U.S. municipal water and public power systems, and demanded changes to state laws regarding insurance, professional services, alcohol distribution and more. The GATS-2000 negotiations were folded into the now-defunct WTO Doha Round, and thus did not result in new binding commitments.

The Obama administration must ensure that its ISA agenda is a progressive pro-consumer, pro-environment one, not a continuation of the extreme deregulatory agenda pursued by the George W. Bush administration in GATS-2000 talks. The Obama administration’s domestic policy goals related to education, energy and other uncommitted services sectors contrast starkly with those pursued by the prior administration. So too should its goals with regard to the ISA.

Several sectors implicated by GATS-2000 proposals once again lie at the center of the Obama administration's policy agenda, namely higher education. The Bush II administration's proposal to commit higher education to GATS mandates could compromise a policy success touted by President Obama in his 2013 State of the Union address. He stated, "Through tax credits, grants and better loans, we've made college more affordable for millions of students and families over the last few years."<sup>46</sup> The GATS rules on national treatment could be interpreted as requiring that such public sector funding for education must be shared on an equal basis between foreign and domestic institutions unless public funds are specifically exempted from the terms of the agreement. The Bush administration attempted to safeguard certain domestic subsidies in a broadly worded exemption to its higher education proposal, but as noted in a letter from the American Association of University Professors,<sup>47</sup> it is unclear if the language would actually protect subsidies for public and nonprofit institutions.<sup>48</sup> As President Obama pursues wider access to education through federal assistance, replicating the GATS-2000 proposal in the ISA would be senseless and possibly contradictory. Furthermore, if the United States commits any new sectors under an ISA, it should continue its standard practice of listing a horizontal exception for subsidies so as to safeguard such critical goals as education access.

### ***Requiring New Commitments of Trade Partners Could Destabilize Them and Us***

If the sweeping restrictions of the GATS threaten to roll back U.S. healthcare, climate, and financial policies, they likely pose an even greater threat to the more extensive national health insurance provisions, climate policies and financial regulations of many nations in the current ISA list. Kirk's congressional ISA notification stated, "...we need to surmount a range of barriers that lock out, constrain, or disrupt the international supply of services."<sup>49</sup> But insofar as the countries have not already bound such public interest policies to the GATS, the United States should not ask that they be bound further under the ISA. This warning is not just for the sake of the policymakers and consumers in those countries, but for the United States' own interests. It is not in the interests of the United States, for example, to see some of the world's largest economies bind themselves to rules that compromise their efforts to reduce carbon emissions.

It is also not in the interests of the United States to have these same economies bind themselves to additional deregulatory financial sector commitments. The 2008 financial crisis and ensuing cross-border bank failures made clear the interconnected nature of the world's financial centers, showing that credit, liquidity and systemic risk can quickly traverse borders as banks facing financial distress in one country become unable to repay lending banks in another. In an era of globalized banking, the United States should encourage countries to which U.S. banks are exposed to have strong financial sector regulation, not ask those countries to commit to further GATS-like rules that impede such regulation. GATS rules may not only conflict with committed members' limits on bank size, as described above, but also conflict with attempts to impose firewalls between different types of banks (to contain risk and protect depositors' money). Clearly GATS Market Access rules forbid imposition of bans on risky financial products, such as the credit default swaps that played a critical role in fueling the crisis, if the related sector is committed to the pact.<sup>50</sup> There are 11 nations in the world in which residents, businesses and/or government bodies owe private U.S. banks a combined total of more than \$100 billion. Ten of these 11 are in the initial list of ISA partners.<sup>51</sup> Using the ISA to ask the nations to which U.S.

banks are most exposed to bind themselves to diminished risk regulation would be a strategy for self-inflicted destabilization.

### ***New Rules on Domestic Regulation Would Undercut Wide Swaths of Public Policymaking***

In a speech delivered to the Coalition of Service Industries in September, Kirk stated, “The ISA also offers a means of building international consensus on new trade rules that someday could be introduced into the WTO.”<sup>52</sup> Similarly, in his September speech before the Ways and Means Trade Subcommittee, Punke stated, “The agreement also would provide a new platform where we could work to build a stronger international consensus on new and improved rules to address new issues.”<sup>53</sup> USTR officials’ stated aspiration for the ISA to contain “new rules” on services is worrisome, given the history of proposed new GATS-supplementing rules. The original GATS text contained a provision in Article VI:4 stating that additional rules should be created to “ensure[] that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.”<sup>54</sup> In 1999 the Working Party on Domestic Regulation (WPDR) formed to draft these new requirements. Analysts suspect that some ISA-involved nations plan to revive these draft rules by incorporating them into the ISA as binding obligations.

According to current plans, the new restraints on domestic regulation envisioned by the WPDR would not be limited to service sectors that members have committed under the GATS. The WTO states that the new rules developed by the working party would “apply to all measures affecting trade in services within the scope of the GATS.”<sup>55</sup> The specific domestic regulations that would be explicitly subject to these cross-cutting rules are:

- Licensing requirements, such as those required for hospitals;
- 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.”<sup>56</sup> Few service sector regulations do not address the way in which a service is performed; and
- Qualification requirements for individual service suppliers, such as doctors, engineers, and teachers.

To avoid binding such sensitive public interest regulations to nearly immutable international rules, particularly if they are GATS-like deregulatory rules, the United States should not commit, or ask other nations to commit, to WPDR proposals under an ISA.

### **Congress Must Guide and Decide On a Pact that Implicates Vast Swaths of Domestic Policy Space**

The United States and ISA negotiating Parties are pursuing the ISA as an FTA outside of WTO auspices under the GATS Article V provisions allowing such negotiations under certain conditions. This is the only tenable legal framework for the agreement given that most WTO countries chose not to participate in these negotiations. (The ISA cannot become an official

plurilateral agreement under the WTO, given that under Article X:9 of the Marrakesh Agreement Establishing the WTO all members must “decide exclusively by consensus” for such a pact to be incorporated,<sup>57</sup> and other WTO signatory countries have indicated that they will not do so.)

However, there appears to be confusion among some in Congress and in the press as to the legal status of the deal, to no small degree because the administration has described the ISA as part of its WTO agenda. Thus, some errantly believe that the ISA will be a WTO agreement that simply expands on existing WTO commitments.

Before engaging in formal ISA negotiations, USTR must expressly communicate to Congress that the ISA, as a free-standing FTA on services, will be subject to a congressional vote before it can go into effect. As a matter of its legal status, the ISA would be no different from the North American Free Trade Agreement (NAFTA), the Central America Free Trade Agreement (CAFTA) or the Colombia FTA, each of which aroused significant and deserved debate before Congress exercised its constitutional authority over trade policy (albeit truncated, due to Fast Track) by voting on the deals. USTR should clarify the legal status of the ISA by publicly informing members of Congress that they will need to vote on the ISA before it can be enacted. In addition, USTR should send notice to negotiating partners that the ISA will require a favorable congressional vote to take effect.

Further, members of Congress must be involved in developing USTR’s proposals for the ISA process – not just because their vote is legally required, but because many of their policymaking domains would be deeply implicated by the deal. Any deal that contemplates making binding commitments with respect to U.S. health, education, environmental, financial or other sectors must not only be designed in cooperation with Congress, but be directed by congressionally-set goals, with frequent consultations to ensure compliance. In addition, given that the GATS and the service sector provisions of past U.S. trade agreements have included terms that threaten policies designed to promote the interests of consumers and workers, the U.S. public and public interest groups must also be meaningfully consulted throughout the ISA process. Meaningful consultation requires being transparent about the content of negotiations by releasing U.S. negotiating proposals and draft negotiating texts to both Congress and the public. It requires early and regular solicitation of input from the diverse array of civil society groups, businesses, state and local legislators and the numerous congressional committees with direct jurisdiction over regulation of the service sector. Such transparency and consultation can help ensure that the ISA fundamentally breaks from the GATS legacy of undermining policies created for, and supported by, the majority, providing instead a model of international commercial agreements that promotes the interests of consumers and workers.

## ENDNOTES

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<sup>1</sup> Letter from U.S. Trade Representative Ron Kirk to The Honorable John Boehner, Office of the U.S. Trade Representative, Jan. 15, 2013. Available at:

[http://www.ustr.gov/sites/default/files/01152013%20ARK%20letter%20to%20Speaker%20Boehner\\_0.pdf](http://www.ustr.gov/sites/default/files/01152013%20ARK%20letter%20to%20Speaker%20Boehner_0.pdf).

<sup>2</sup> WTO, General Agreement on Trade in Services, Article XVII:3.

<sup>3</sup> WTO, General Agreement on Trade in Services, Article I:3(c).

<sup>4</sup> Of the 35 cases, the general exception was determined to be relevant enough to be considered in 27 cases. Twenty-six of those 27 cases failed to satisfy one of the three threshold tests required for application of the general exception. Two cases failed on the subject matter/scope threshold, with a tribunal concluding that the Respondent

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failed to show that the measure was designed for the protection of human health or for securing compliance with laws or regulations which were not inconsistent with WTO provisions. Eighteen cases failed on the "necessary" or "related to" threshold. Six cases failed on the *chapeau* threshold, with a tribunal finding arbitrary or unjustifiable discrimination in the measures' application.

<sup>5</sup> The ten nations with existing FTAs are Australia, Canada, Colombia, Chile, Costa Rica, Israel, Panama, Peru, Korea and Mexico. In addition, the Obama administration has announced plans to negotiate an FTA with the European Union, is currently negotiating the Trans-Pacific Partnership FTA with New Zealand, and is in discussion with Japan about also joining the latter deal.

<sup>6</sup> Inside U.S. Trade, "In Services Talks, Members Look To Balance Ambition And Expediency," Oct. 26, 2012.

<sup>7</sup> Gary Clyde Hufbauer, J. Bradford Jensen, and Sherry Stephenson, "Framework for the International Services Agreement," Peterson Institute for International Economics, Policy Brief PB12-10, April 2012, at 17. Available at: <http://www.iie.com/publications/pb/pb12-10.pdf>.

<sup>8</sup> Inside U.S. Trade, "Immigration Reform Effort Could Give USTR Flexibility in Services Talks," Feb. 1, 2013.

<sup>9</sup> Council on Foreign Relations, "BRICS Summit: Delhi Declaration," March 29, 2012. Available at: <http://www.cfr.org/brazil/brics-summit-delhi-declaration/p27805>.

<sup>10</sup> U.S. Census Bureau, "U.S. Trade in Goods and Services - Balance of Payments (BOP) Basis," Feb. 8, 2013. Available at: <http://www.census.gov/foreign-trade/statistics/historical/gands.pdf>.

<sup>11</sup> U.S. International Trade Commission, "Interactive Tariff and Trade Dataweb," accessed Feb. 11, 2013. Available at: <http://dataweb.usitc.gov/>.

<sup>12</sup> Inside U.S. Trade, "New USTR Will Face Many Challenges, Including Staff Dissatisfaction," Feb. 15, 2013.

<sup>13</sup> The policy states, "NCSL encourages USTR to utilize the 'positive list' approach for making services, procurement, and investment commitments in trade agreements." National Conference of State Legislatures, "Free Trade and Federalism," accessed Feb. 25, 2013. Available at: <http://www.ncsl.org/state-federal-committees/sclaborecon/free-trade-and-federalism.aspx>.

<sup>14</sup> Federal Reserve, "Term Auction Facility," accessed Feb. 25, 2013. Available at: [http://www.federalreserve.gov/newsevents/reform\\_taf.htm](http://www.federalreserve.gov/newsevents/reform_taf.htm).

<sup>15</sup> WTO, General Agreement on Trade in Services, Article XVII:3.

<sup>16</sup> WTO, General Agreement on Trade in Services, 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."

<sup>17</sup> 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.

<sup>18</sup> This analysis was performed by Public Citizen, based on a thorough review of all GATT and GATS cases since the creation of the WTO. WTO member countries have invoked the Article XX defense in 34 cases and the GATS Article XIV defense is one case, each with distinct "DS" numbers. However several of the GATT Article XX cases were consolidated, with one ruling issued on claims brought by two or three Claimants.

<sup>19</sup> Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, 10 November 2004, at para. 3.279.

<sup>20</sup> Panel Report, US – Gambling, at para. 3.275.

<sup>21</sup> Panel Report, US – Gambling, paras. 6.533-6.535 and 6.564-6.565.

<sup>22</sup> Panel Report, US – Gambling, at para. 6.566.

<sup>23</sup> Panel Report, US – Gambling, at para. 6.607.

<sup>24</sup> Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, 7 April 2005, at paras. 370-372.

<sup>25</sup> Renato Ruggiero, "Toward GATS 2000 -- a European Strategy," speech, conference on trade in services, organized by the European Commission in Brussels, Jun. 2, 1998.

<sup>26</sup> Joyce Barrett, "Clinton, business leaders ready lame-duck session GATT push," *News Record* (Calif.), Nov. 16, 1994; Joan Lowy, "GATT Lobby Turns Effort to Pivotal Senate," *Pittsburgh Post Gazette*, Nov. 28, 1994.

<sup>27</sup> Taken in part from Pat Arnold and Terrie Reeves, "International Trade and Health Policy: Implications of the GATS for U.S. Healthcare Reform," *Journal of Business Ethics*, Vol. 63, 2006, at 313-332. The service sectors the United States committed to the WTO GATS are contained in a document called the "U.S. schedule of commitments"; WTO, United States of America, Schedule of Specific Commitments, GATS/SC/90 April 15, 1994 and related supplements. The text of the U.S. schedule, along with a glossary of terms and other materials to help



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decipher often inaccessible trade jargon, can be found in Public Citizen's GATS directory, available at:

[http://www.citizen.org/trade/forms/gats\\_search.cfm](http://www.citizen.org/trade/forms/gats_search.cfm).

<sup>28</sup> Bernadette Fernandez and Annie L. Mach, "Health Insurance Exchanges Under the Patient Protection and Affordable Care Act (ACA)," Congressional Research Service, Jan. 31, 2013. Available at:

<http://www.fas.org/sgp/crs/misc/R42663.pdf>.

<sup>29</sup> WTO, General Agreement on Trade in Services, Article XVI:2(a). Under GATS rules, a country must list previously existing government policies that establish monopolies or exclusive service supplier arrangements it sought to preserve, otherwise a country is forbidden from enacting policies that establish such limits unless it alters its WTO commitments to allow for such new policies.

<sup>30</sup> WTO, General Agreement on Trade in Services, Article VIII:5.

<sup>31</sup> WTO, General Agreement on Trade in Services, Article XVII:3.

<sup>32</sup> President Barack Obama, "Remarks by the President in the State of the Union Address," The White House, Feb. 12, 2013. Available at: <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

<sup>33</sup> Various iterations of this bill exist, the most recent of which was submitted in 2007. For description of the bill, see Library of Congress, "Bill Summary & Status: 110th Congress (2007 - 2008): S.280: CRS Summary," Jan. 12, 2007. Available at: <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN00280:@@D&summ2=m&>.

<sup>34</sup> President Barack Obama, "Remarks by the President in the State of the Union Address," The White House, Feb. 12, 2013. Available at: <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

<sup>35</sup> The proposed rule states, "The EPA is also soliciting comment on what additional requirements would be necessary to implement the 30-year averaging requirement. Specifically, if the owners or operators did not intend to install CCS when the unit commenced operation, they could be required to submit a plan that includes a location to store CO<sub>2</sub> and a schedule for construction and operation of their carbon capture system. The schedule would include key milestone dates such as soliciting proposals, obtaining financing, beginning construction, and beginning operation." Environmental Protection Agency, "Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units," Federal Register Volume 77, Number 72, RIN: 2060-AQ91 (proposed April 13, 2012). Available at: <http://www.regulations.gov#!documentDetail;D=EPA-HQ-OAR-2011-0660-0001>.

<sup>36</sup> See: [http://www.citizen.org/documents/gats\\_enviro\\_protectambiente\\_remed\\_noise.pdf](http://www.citizen.org/documents/gats_enviro_protectambiente_remed_noise.pdf). This sector is defined at the most granular level as: "Cleaning services of exhaust gases: Emission monitoring and control services of pollutants into the air, whether from mobile or stationary sources, mostly caused by the burning of fossil fuels. Concentration monitoring, control and reduction services of pollutants in ambient air, especially in urban areas."

<sup>37</sup> President Barack Obama, "Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act," The White House, July 21, 2010. Available at: <http://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act>.

<sup>38</sup> Letter from the Investment Industry Association of Canada to U.S. financial sector regulators, Dec. 21, 2011. Available at: [http://www.federalreserve.gov/SECRS/2011/December/20111222/R-1432/R-1432\\_122111\\_88616\\_421807699291\\_1.pdf](http://www.federalreserve.gov/SECRS/2011/December/20111222/R-1432/R-1432_122111_88616_421807699291_1.pdf).

<sup>39</sup> Letter from James Flaherty to Sec. of Treasury Timothy Geithner, December 2011. Available at: [http://www.fin.gc.ca/n12/data/12-016\\_1-eng.asp](http://www.fin.gc.ca/n12/data/12-016_1-eng.asp).

<sup>40</sup> Letter from the U.S. Chamber of Commerce to U.S. Trade Representative Ron Kirk, Dec. 10, 2012. Available at: <http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2012-12.10-Volcker-Rule-USTR-Letter.pdf>.

<sup>41</sup> *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Public Law 111-203, *U.S. Statutes at Large* 124 (2010): 1633, Sec. 14(b).

<sup>42</sup> As the Secretariat wrote, "Certain size limitations apply: the merged bank may not control more than 10% of the total deposits of insured depository institutions in the United States, and there are deposit limitations at state level." See WTO Document WT/TPR/S/200/Rev.1, Dec. 8, 2008, at 107.

<sup>43</sup> WTO, General Agreement on Trade in Services, Article XVI:2(b).

<sup>44</sup> Letter from U.S. Trade Representative Ron Kirk to The Honorable John Boehner, Office of the U.S. Trade Representative, Jan. 15, 2013. Available at:

[http://www.ustr.gov/sites/default/files/01152013%20ARK%20letter%20to%20Speaker%20Boehner\\_0.pdf](http://www.ustr.gov/sites/default/files/01152013%20ARK%20letter%20to%20Speaker%20Boehner_0.pdf).

<sup>45</sup> Michael Punke, "Remarks by Deputy U.S. Trade Representative Michael Punke before the House Committee on Ways and Means Trade Subcommittee regarding Prospects for an International Services Agreement," Office of the

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U.S. Trade Representative, Sep. 20, 2012. Available at: <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2012/september/remarks-deputy-us-trade-representative-mic>.

<sup>46</sup> President Barack Obama, “Remarks by the President in the State of the Union Address,” The White House, Feb. 12, 2013. Available at: <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

<sup>47</sup> Letter from the American Association of University Professors to U.S. Trade Representative Susan Schwab, July 25, 2006. Available at: <http://www.citizen.org/documents/AAUP%20Letter%20to%20Scwab%20072506.pdf>.

<sup>48</sup> WTO, Revised Services Offer of the United States, TN/S/O/USA/Rev.1, 2005, at 68. Available at: [http://www.ustr.gov/archive/assets/Trade\\_Sectors/Services/2005\\_Revised\\_US\\_Services\\_Offer/asset\\_upload\\_file777760.pdf](http://www.ustr.gov/archive/assets/Trade_Sectors/Services/2005_Revised_US_Services_Offer/asset_upload_file777760.pdf).

<sup>49</sup> Letter from U.S. Trade Representative Ron Kirk to The Honorable John Boehner, Office of the U.S. Trade Representative, Jan. 15, 2013. Available at:

[http://www.ustr.gov/sites/default/files/01152013%20ARK%20letter%20to%20Speaker%20Boehner\\_0.pdf](http://www.ustr.gov/sites/default/files/01152013%20ARK%20letter%20to%20Speaker%20Boehner_0.pdf).

<sup>50</sup> The firewall restriction refers to the rule against “measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.” WTO, General Agreement on Trade in Services, Article XVI:2(e). The ban on bans refers to the requirement, “A Member shall permit financial service suppliers of any other Member established in its territory to offer in its territory any new financial service.” WTO, *Understanding on Commitments in Financial Services*, B.7.

<sup>51</sup> The ten ISA nations are Canada, France, Germany, Japan, the Netherlands, the United Kingdom, Australia, Mexico, Switzerland and Korea. The one non-ISA nation is Brazil. This data comes from the “country risk” calculations of the Country Exposure Lending Survey used by U.S. government agencies. Federal Financial Institutions Examination Council, “Country Exposure Lending Survey: September 30, 2012,” published Dec. 28, 2012. Available at: [http://www.ffiec.gov/pdf/e16/E16\\_201209.pdf](http://www.ffiec.gov/pdf/e16/E16_201209.pdf).

<sup>52</sup> U.S. Trade Representative Ron Kirk, “Remarks by U.S. Trade Representative Ron Kirk at the Coalition of Service Industries 2012 Global Services Summit,” Office of the U.S. Trade Representative, Sep. 19, 2012. Available at: [http://insidetrade.com/iwpfile.html?file=sep2012%2Fwto2012\\_1966a.pdf](http://insidetrade.com/iwpfile.html?file=sep2012%2Fwto2012_1966a.pdf).

<sup>53</sup> Michael Punke, “Remarks by Deputy U.S. Trade Representative Michael Punke before the House Committee on Ways and Means Trade Subcommittee regarding Prospects for an International Services Agreement,” Office of the U.S. Trade Representative, Sep. 20, 2012. Available at: <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2012/september/remarks-deputy-us-trade-representative-mic>.

<sup>54</sup> WTO, General Agreement on Trade in Services, Article VI:4.

<sup>55</sup> WTO, “WTO negotiations on domestic regulation disciplines,” accessed Feb. 22, 2013. Available at: [http://www.wto.org/english/tratop\\_e/serv\\_e/dom\\_reg\\_negs\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm).

<sup>56</sup> 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.

<sup>57</sup> WTO, Marrakesh Agreement Establishing the World Trade Organization, Article X:9.