

# **Under Threat:**

## **Democracy and Jobs Under the FTAA and WTO**

A quick guide to the new generation of  
global trade agreements

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# The Logic of Free Trade

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The issue is not whether we will have globalization or not -- that question is long resolved. We live in a global world and work in a global economy. What we are still fighting over are the rules that will *govern* our global economy.

Trade agreements once dealt primarily with the trade in physical goods -- either manufactured goods or agricultural commodities. Trade disputes revolved around tariffs (taxes on imported goods) and "at the border" restrictions (quotas or outright bans on certain goods for political, economic, or other reasons).

In the early 1990s this all changed with the North American Free Trade Agreement (NAFTA) and the creation of the World Trade Organization (WTO). Now a new generation of agreements, including the Free Trade Area of the Americas (FTAA) and the General Agreement on Trade in Services (GATS), threaten to expand the scope of traditional trade subjects well beyond manufactured goods and agricultural commodities to trade in services.

These new trade agreements espouse a neo-liberal economic theory of "liberalized trade," which asserts that increasing the flow of trade is, by itself, the highest good. These agreements mean to tear down *all* barriers to *all* trade, regardless of national borders or national and local laws. They aim to liberalize trade, not only for goods, but also for public and private services, capital investment, intellectual property, government procurement, and even the movement of workers across national borders.

This pamphlet explains the perspective of this new generation of trade agreements and the implications they hold for many of the rights we currently enjoy. We focus extensively on GATS, both because of its immediate challenges and because it presents the clearest articulation of the new free trade perspective. What quickly becomes clear is that democracy itself is at stake.

## History of the New Trade Agreements

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### Creating the WTO.

Toward the end of World War II, political and business leaders of the allied nations met in Bretton Woods, New Hampshire, to sketch out the contours of the postwar world economy. Out of these discussions came the World Bank and International Monetary Fund (IMF) which help direct global investments and the movement of global capital through a variety of "structural adjustment programs." These discussions also created the framework for a global trade body called the International Trade Organization (ITO).

The ITO had a very different mandate than the present WTO. Most notably, the ITO promoted global trade under the jurisdiction of the new United Nations, including the U.N.'s Universal Declaration of Human Rights. The ITO was short-lived, however, and it dissolved after the United States refused to ratify it in 1947.

In its place, the United States, along with 22 other countries, negotiated the GATT (General Agreement on Tariffs and Trade) in 1947. GATT focused primarily on opening markets by reducing tariffs on goods and commodities. GATT was an agreement, not a trade organization, like the proposed ITO and current WTO. In 1995, when the WTO formed, GATT simply became another trade agreement under the WTO's authority.

The WTO is the global trade organization that is responsible for monitoring and enforcing over 20 major and even more minor global trade agreements. The WTO is a member organization with 146 member nations. Its top decision-making body is the Ministerial Conference, comprised of trade ministers appointed by each country. Under this main body are the General Council along with many committees and working groups comprised of representatives who are also appointed by each member country.

## **Defining a New Free Trade Philosophy**

Under GATT there were eight major rounds of negotiations to expand trade. The last two rounds shaped the trade philosophy of the new WTO. The "Washington Consensus" emerged from the Tokyo Round of GATT negotiations (1973-1979). Pushed by growing multi-national corporations, this new economic "consensus" emphasized privatization, unrestricted access to new markets and deregulation.

The most recent round of negotiations, the Uruguay Round (1986-1994), focused on trade areas other than goods and commodities and included what are called non-tariff trade barriers -- such as rules, policies, government regulations, and public subsidies -- not directly related to trade but having an impact on trade.

During the 1980s, the United States and the global economy moved toward a "service" rather than a "goods" economy. Today, over 70% of the United States economy and 60% of the world's economy is in services, rather than goods. Not surprisingly, global service corporations had great interest in bringing trade in services under the same type of rules as trade in goods. Thus, the Uruguay talks produced framework agreements for many different trade subjects, including trade in services, intellectual property, regulation of environmental and health standards, government procurement, and even the movement of workers across national borders to perform services.

The Uruguay Round also created the WTO, a new global trade organization with greatly expanded powers. Unlike GATT, the WTO is a member organization with the status of

"legal personality" (like the United Nations). The WTO's "main function is to ensure that trade flows as smoothly, predictably, and freely as possible." To ensure this free flow of trade, the WTO also has enforcement powers and can effectively strike down those practices and policies it considers inconsistent with the agreed on principles of free trade. This enhanced mandate presents an unprecedented intrusion into national sovereignty and legislative authority.

## **NAFTA and a new generation of regional trade agreements**

At the same time world trade representatives were creating the WTO and negotiating the new global trade rules, trade representatives from the United States, Mexico and Canada met to negotiate a regional free trade agreement for North America.

NAFTA (North American Free Trade Agreement) took effect January 1, 1994. Although principally targeted toward goods and commodities, NAFTA was also the first trade deal to ever include rules governing trade in services. These services were limited to energy services, government procurement of certain services, financial, telecommunications, and certain professional services (legal, engineering, and land transportation like busing and trucking).

NAFTA sought to eliminate virtually every barrier to trade, including government regulations that even indirectly affect trade (e.g. zoning restrictions and environmental regulations). NAFTA also introduced a new, and alarming, enforcement mechanism with its "Chapter 11." Chapter 11 allows corporations to sue governments and seek damages for "measures tantamount to nationalization or expropriation." While few would interpret local zoning laws banning toxic waste dumping or state laws banning cancer-causing fuel additives "tantamount to nationalization or expropriation," these are only two of the successful corporate challenges brought under Chapter 11.

NAFTA is now nearly 10 years old and provides the first glimpse of what we can expect from the new generation of trade agreements. NAFTA was heralded by supporters as a way to create U.S. jobs through trade and raise living standards in developing

### **NAFTA's Chapter 11 in practice**

NAFTA's Chapter 11 allows corporations to sue governments and seek damages for lost profits.

- Metalclad successfully argued that a Mexican community that rejected its application for a hazardous waste facility permit and the Mexican government's decree establishing a ecological reserve where it wished to build its waste facility illegally restricted its right to make a profit under NAFTA's investment provisions.
- Ethyl Corporation successfully argued that a ban on MMT, a Canadian gasoline additive, violated NAFTA's free trade principles.
- A NAFTA trade tribunal found a temporary Canadian ban on the export of PCBs violated NAFTA.
- Restrictions by California on MTBE, a Canadian cancer causing gasoline additive, and Canada's phase-out of an agricultural pesticide are both under challenge.

nations. Its real results are devastating. The U.S. has lost over 3/4 of a million high paying jobs since NAFTA took effect, and Mexico has experienced a 23% drop in manufacturing wages.

## **FTAA: "NAFTA on steroids"**

Since NAFTA passed, the United States began negotiating a new, far more expansive regional trade agreement for all of the Americas. The FTAA (Free Trade Area of the Americas) is based on NAFTA, but will expand its coverage to all western hemisphere nations except Cuba.

FTAA also greatly expands coverage on services. The FTAA is what is called a "top-down" agreement, meaning that for all 34 member nations, all services will be subject to FTAA rules, unless all 34 nations agree to exclude specific services from the agreement. The FTAA will also likely retain NAFTA's Chapter 11 enforcement provisions, which allow a corporation to sue a nation for losses (real or potential) stemming from measures that might restrict trade or reduce corporate profits.

Both NAFTA and FTAA, as regional trade agreements, are specifically permitted under the WTO as long as they are *at least* as "trade liberalizing" as the various WTO agreements. Thus, the FTAA can permit more freedom to corporations than they already exercise under the WTO; it cannot impose additional protections that are more trade restrictive.

Negotiations for the FTAA are on an aggressive time table and aim to be completed by December 31, 2004. The 34 member nations will ratify (or reject) the agreement during 2005. In the United States, under the "fast track" authority granted to the President by Congress in 2002, the negotiated FTAA treaty will be presented to Congress with one choice: approve or reject. Fast track authority prohibits Congress from amending the treaty, for example, to include environmental or labor protections.

## **GATS goes after services**

GATS -- the General Agreement on Trade in Services -- was agreed to at the same time the WTO was created in 1995. GATS is the first international trade deal to focus exclusively on trade in services. Services are the fastest growing sector in international trade. Global service providers have a powerful economic self-interest in claiming a greater share of the \$1 trillion spent each year on water services, \$2 trillion spent on education and \$3.5 trillion spent on health care. GATS applies trade liberalization to private and public services, which makes it especially troubling.

Unlike NAFTA and the FTAA, GATS covers only those services that individual governments agree to have covered (called service commitments). These complicated

lists from the 146 WTO member nations make it exceedingly difficult to determine which specific services are in fact covered by GATS.

One of GATS' unique requirements is continual renegotiation with the aim to secure "a progressively higher level of [trade] liberalization." While over 30,000 pages of specific national service commitments are already agreed upon, the first round of renegotiations is now underway to dramatically expand these commitments. These negotiations began in 2000 and are expected to be completed by the end of 2004. All member nations plan to ratify (or reject) the agreement during 2005.

## **GATS in a nutshell**

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GATS is what is called a "bottom-up" agreement -- meaning that member nations have the flexibility to include only those trade sectors and service delivery modes that they wish to have covered by GATS. There are, of course, many mitigating circumstances to this "flexibility," such as differences in economic power and fear of retaliation by other member countries if a nation becomes too restrictive. These make the process far less flexible and democratic than it is presented on paper.

GATS starts with a potential universe that includes *all* services, *all* methods for delivering services, and *every* governmental measure that might affect trade in services. Each member nation begins by offering (negotiating) a "schedule of commitments" -- which is a detailed list of specific types of services it is willing to have covered under specific conditions. Once committed, these service sectors are subject to the rules of GATS with only two exceptions: exemptions for regulations that protect the public interest under very narrowly defined circumstances and for national security reasons.

Nations who believe another member nation is not fulfilling its obligations under GATS have a right to challenge the member nation under the authority of the WTO. A WTO trade tribunal becomes the final arbitrator for these trade disputes. This appointed tribunal meets in secret and has the authority to assess substantial trade sanctions (e.g. tariffs) to force a member nation to eliminate or modify any practice it finds inconsistent with GATS rules.

## **Scope and Coverage of GATS**

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GATS Article 1 defines which services and which measures affecting trade in services the agreement covers:

***"This Agreement applies to measures by Members affecting trade in services."***

## Definitions.

The language is deceptively simple, but the scope and implications of this simple sentence are vast. Its intent is to open up *all services* and *all government measures* to the application of GATS rules.

Measures. GATS defines a "measure" to be any "form of a law, regulation, rule, procedure, decision, administrative action, or any other form [of government action]." This language is meant to include *all* government actions that might affect trade in services, and WTO panels have established that "no measures are *a priori* excluded ...."

Services. Similarly, what constitutes a "service" is left broad by remaining undefined. In common usage, a service is any activity that provides for some human need that is not a tangible product or commodity. A review of the WTO's list of service sectors illustrates the breadth of this understanding of services.

Trade in Services. GATS defines "trade in services" according to four different "modes of supply" that cover virtually every means of providing a service internationally. GATS rules apply to any of these four modes of supply:

1. Cross border supply. This is a more traditional understanding of trade where a service itself crosses a border. Examples might include a British legal firm that gives legal advice to clients in the U.S. via the phone, mail, or internet; or telemarketing calls from an Indian call center to U.S. consumers.
2. Consumption abroad. This applies to consumers who cross a border to consume services in another country.

### Examples of Services Covered

(from the WTO Services Sectoral Classification List)

- **Professional services** (e.g. legal, nursing and midwives, computer, real estate, advertising, security)
- **Communication services** (e.g. postal, courier, telecommunications, motion picture and video, radio and television)
- **Construction Services** (e.g. general building construction, installation and assembly)
- **Distribution Services** (e.g. wholesale and retail trade)
- **Educational Services** (e.g. primary, secondary and higher education)
- **Environmental Services** (e.g. sewage, waste disposal, sanitation)
- **Financial Services** (e.g. health and other insurance, banking and financial)
- **Health and Social Services** (e.g. hospital and social services)
- **Tourism and Travel Services** (e.g. hotels, restaurants, travel agencies, tour guides)
- **Recreational and Cultural Services** (e.g. theater, live music, news agencies, libraries, museums, sports)
- **Transport Services** (e.g. passenger and freight transport for water, road, air, space and rail, pipelines)

Examples might include a U.S. airline sending its aircraft to Indonesia for maintenance, or hospitality services provided to foreign tourists, or a Saudi patient who comes to the U.S. to purchase medical services (e.g. surgery) from Mayo Clinic.

3. *Commercial presence.* This applies to a service provider from one country who sets up a subsidiary in another country to provide a service. Examples might include a French construction business that establishes a subsidiary in the U.S. to build a ball stadium, or a U.S. bank that buys a Mexican bank to provide banking services in Mexico.
4. *Natural persons.* This applies to workers who move to another country on a temporary basis to provide services. Examples might include Philippine nurses hired to fill U.S. hospital positions that were advertised in Philippine newspapers, or an Indian construction company that brings Indian workers into Britain to work on construction projects.

## **Government Services.**

Free trade proponents claim that government services are exempt from GATS coverage, but such claims are misleading. GATS does exempt government services *but only* if the service "is supplied neither on a commercial basis, nor in competition with one or more service providers." If a government provides a service that is "commercial" (e.g. charges a fee for service) and/or is "competitive" (e.g. if there is a private sector service provider) then it is to be treated just as if it were a private sector service provider (e.g. subject to all of the obligations of GATS). There are extraordinarily few government services that do not have at least some private sector competitors. Consequently, for all practical purposes, most observers believe GATS applies to most government services.

## **Summary.**

GATS defines services broadly. It targets all *measures* that affect trade in services including all governmental laws, regulations, and decisions (including court decisions) that *affect* trade in services, whether intentional or not, and whether there is a direct effect, an indirect effect, or only a potential effect. GATS also applies to all levels of government -- national, state, county, municipal, school district -- as well as non-governmental bodies that exercise power in the government's name -- such as governing boards and regulatory agencies and the United States Postal Service.

# Rules of GATS

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## General Obligations and Exemptions

Although most of GATS rules apply only to those services and modes of delivering services that individual member nations specifically agree to have covered, there are a few rules that apply to all services and member nations. Those covering *Most Favored Nation Treatment* and *Domestic Regulation* are the most significant.

**Most Favored Nation Treatment (MFN).** Under the GATS "Most Favored Nation" rule a member country must treat the service providers of all other member nations as favorably as it treats the service provider of any one member nation.

Conversely, no WTO member government can implement any measure that discriminates between similar foreign-service providers. There are many examples of measures that make precisely this type of discrimination in the trade of goods -- e.g. state universities that prohibit their logo on apparel made in sweatshops, or prohibitions by states on doing business with military dictatorships. Most Favored Nation Treatment under GATS would make similar types of laws illegal if applied to services.

### **Most Favored Nation Treatment in practice**

Assume that the U.S. is concerned with losing control over its domestic oil supply and passes a law that limits ownership of domestic pipelines to less than 50% foreign ownership. However, BP (British Petroleum) already wholly owns U.S. pipelines. Pakistan challenges the new U.S. law. Under GATS Most Favored Nation Treatment, the WTO would likely find that the U.S. must treat pipeline companies in Pakistan (and all other member countries) the same as they do BP. They must either restrict *all* countries to 50%, including BP (subject to challenge under other GATS provisions). More likely they would have to extend the more favorable 100% ownership enjoyed by BP to Pakistani pipeline companies.

**Domestic Regulation.** Proponents insist that GATS permits governments to regulate services within their national boundaries. While this may be true in theory, in practice GATS severely limits domestic regulation. GATS addresses a government's right to regulate in two ways: by defining a narrow list of exemptions and by obligating member nations to develop rules that ensure their domestic regulations are the "least trade restrictive" alternatives possible.

General exemptions. The whole thrust of GATS is to target government regulations that restrict trade. However, it does permit exemptions for certain domestic regulations that otherwise would violate GATS, but only under two very limited circumstances: for national security and for the public interest.

On its face, regulation in the public interest would seem to be quite encompassing. But again, GATS defines what a legitimate public interest regulation means narrowly: (1) regulations cannot be a hidden way of restricting trade; (2) they cannot be arbitrarily discriminatory; and (3) they must only apply to one of the following four "legitimate goals":

1. to protect public morals
2. to protect human, animal, or plant health (the *conservation* of natural resources is deliberately excluded)
3. to protect personal privacy or consumer safety
4. to avoid double taxation

Any regulation that does meet these criteria is not considered under GATS to have been done in the public interest. But even if a regulation does meet these criteria, and many would, a nation must also prove that that the regulation is "necessary," which means that (1) no reasonable alternative measure that is consistent with GATS exists, and (2) no other less commercially-restrictive alternative is possible.

This "necessity test" is a very tough standard to meet. Not surprisingly, there have been no general exemption claims so far under GATS.

"Least trade restrictive" rules. GATS also obligates member nations to develop new rules that ensure domestic regulations "do not constitute unnecessary barriers to trade" or "are more burdensome than necessary to ensure the quality of the service." These new rules are a major focus of the new round of renegotiations.

GATS specifically targets regulations that pertain to:

- *qualification requirements and procedures* (e.g. the professional accreditation of schools or certain educational requirements for teachers);
- *licensing requirements* (e.g. the professional licensing of doctors or the licensing of waste storage facilities)
- *technical standards* (e.g. rules governing the performance of a service or its technical standards like water quality standards, pipeline safety codes, and waste water treatment thresholds).

Under any new rules, GATS will again likely apply a "necessity test" to all government regulations, which means that a nation would have to prove its regulations are *both* (1) necessary for ensuring the quality of a service, and (2) no other less commercially-restrictive alternative is possible. In

practical terms, these requirements would disqualify many health and safety, human rights, and labor regulations.

Domestic Regulation Summary. GATS severely restricts a government's ability to regulate. The WTO Secretariat candidly admits that "Governments are free *in principle* to pursue any national policy objectives *provided* the relevant measures are compatible with the GATS" [emphasis added]. In order to be compatible with GATS, regulations must either be (1) for national security reasons; or (2) done for a narrowly defined public interest; or (3) necessary to ensure the quality of a service. In all cases they must be the *least* trade restrictive alternative possible.

## Rules Governing Specific National Commitments

Beyond the general rules listed above, which cover all member nations and services, there are also a number of "bottom up" rules that cover only those services and modes of supplying services that a member nation specifically agrees to list on its schedule of commitments.

The three most important of these specific rules cover market access, national treatment, and monopolies and exclusive service providers.

**Market Access.** Market access rules aim to eliminate any laws, regulations, rules, procedures, court decisions, or administrative actions that limit access to another nation's markets for services where specific commitments have been made. These measures do not need to be targeted toward foreign competitors for the WTO to find them impermissible; rather they need only to have the *potential* effect of limiting access to markets.

The market access rule specifically says there must not be any limitations placed on:

- *the number of service suppliers* (e.g. U.S. restrictions on the number of foreign bank branches, or Canada's limitations on the

### A "schedule of commitments" in practice

Assume the U.S. excludes accounting services from its schedule of commitments. This means that the GATS rules covering market access, national treatment and monopolies will not cover accounting services.

Assume the U.S. includes legal services on its schedule of commitments. It then must also declare which modes of supplying legal services will be covered -- say the U.S. agrees to include the first three modes of supply, but not the fourth mode -- that concerning the movement of workers across national borders. In this case, GATS rules defining market access, national treatment, and monopolies will apply to American consumers buying legal services from a foreign country (mode 1), foreign consumers who buy U.S. legal services (mode 2), and foreign legal firms that establish a U.S. office to provide legal services in the U.S. (mode 3), but they will not apply to importing foreign workers to provide legal services in the U.S., since mode 4 was not applied to legal services.

number of whale watcher operators, or a government sanctioned monopoly such as national health care)

- *the value of service transactions* (e.g. limitations on the maximum interest that can be charged on rental agreements)
- *the number of service operations* (e.g. restrictions on the number of nursing home beds in a geographical region or limits on the number of hotels in an area for environmental reasons)
- *the number of natural persons employed in a service sector*
- *the type of legal entity or joint venture delivering services* (e.g. Minnesota's requirement that HMOs be run as non-profits)
- *limitations on foreign capital participation in providing a service* (e.g. restrictions on the maximum percent of foreign investment in certain services like an oil pipeline, health care, or insurance)

Once a nation commits a service sector to its schedule of commitments it risks WTO sanctions if it limits access to that sector in any of the ways listed above. The only way a nation can exempt current "inconsistent measures" is to specifically list them on its schedule when it initially offers its schedule of commitments, and only when it first offers it.

If a nation wants to negotiate a restriction retroactively, under the Most Favored

Nation Treatment it must compensate *all* of the member nations for *all* their service providers who *might* suffer loss as a result of the new limitation. Obviously, this virtually eliminates any reasonable negotiation of new exemptions once a schedule of service commitments has been offered.

**National Treatment.** One of the most troubling aspects of GATS is its National Treatment provisions. National Treatment means that a country must afford all service providers from other member countries treatment *at least as favorable* as that provided its own domestic service providers. While the Most Favored Nation rule prohibits giving preference to service providers in one foreign nation over another, National Treatment prohibits giving preference to one's own domestic service providers over those from other nations.

### Market Access in practice

The Market Access rule targets any government measure that potentially restricts access to another nation's markets.

- Laws that require health care organizations to be run as non-profits might be found to deny competing foreign for-profit health care providers from providing health care services.
- A local ordinance limiting the number of hotels on a beach might be challenged for restricting access to foreign hotel chains.
- A state law that requires a certain percentage of construction work done on publicly funded projects be done by local workers might be challenged as limiting a foreign construction firm from bidding on a project.

National Treatment is a long standing principle in trade agreements that ensures that once goods cross the border they can not be treated differently than domestically produced goods. For example, shoes imported from Italy can have a tariff placed on them, but once they enter the United States they cannot be singled out for discriminatory treatment compared to domestically produced shoes.

GATS takes this longstanding trade principle and applies it to trade in services with a very broad prohibition against *de facto* discrimination. What this means is that domestic regulations can be found to be "illegal" if they "modify the conditions of competition in favor of domestic service providers." This is true even if such regulations are impartial and non-discriminatory on their face. For example, incentives to encourage women-owned businesses are not intended to discriminate against foreign companies, but if they have that effect they would likely violate the GATS National Treatment rule.

#### **National Treatment in practice**

National Treatment targets government regulations that give preference to domestic businesses by modifying the conditions of competition.

- Regulations that require toxic waste to be processed on site might be found too burdensome for foreign waste disposal firms who rely on waste processing facilities outside the area.
- Government subsidies to small businesses (or women and minority owned businesses) might be found too restrictive if competing foreign companies are generally larger or do not fit the qualifying categories.
- Restrictions on foreign ownership of farmland, or tax breaks for owners that live on their farmland, might be challenged on grounds they discriminate against foreign agricultural firms.
- Requirements that local service providers be given priority when awarding publicly funded contracts might be subject to challenge as discriminating against foreign competitors.
- Prevailing wage laws and local apprenticeship requirements might be challenged on the grounds they discriminate against foreign construction firms who do not have such laws in their own country.

Furthermore, restrictions do not need to have an actual effect to be found "illegal"; they merely need to be *capable* of having an effect.

**Monopolies and Exclusive Service Providers.** The GATS Monopolies and Exclusive Service Provider rules require that (1) all the actions of monopolies and exclusive service providers follow the Most Favored Nation requirements; and (2) no monopoly or exclusive service provider can use its exclusive status to leverage more favorable treatment for providing services outside of its direct monopoly rights.

GATS prohibits monopolies and exclusive service provider arrangements under its Market Access rules. To maintain an existing monopoly or exclusive service provider arrangement, a nation must specifically list it as an exemption on their initial schedule of commitments. Once a schedule has been offered, the only way a nation can create a new monopoly is to negotiate compensation for losses suffered by all competing foreign-service providers -- a highly unlikely and extraordinarily expensive scenario.

Examples of some national monopolies and exclusive service provider arrangements threatened by GATS include:

- *postal services* (such as the U.S. Post Office and Canada Post)
- *exclusive alcoholic beverage distributors* (such as Canada's provincially owned liquor stores)
- *health insurance* (such as Canada's national health insurance service)
- *water distribution* (such as most municipally owned water plants)
- *waste treatment* (such as the WLSSD [Western Lake Superior Sanitation District] regional waste treatment agreement)
- *electrical generation and transmission* (such as the municipal owned power plant in Virginia, MN and other cities)

### **Monopoly and Exclusive Service Providers in practice**

GATS prohibits monopolies unless they are specifically listed on a nation's schedule of commitments, and then it prohibits them from providing services outside their immediate service scope.

- UPS is challenging Canada Post over delivery of overnight mail. UPS contends that Canada Post (as a service monopoly) is given an unfair advantage (government buildings, trucks, etc.) when providing overnight parcel service (a service UPS contends is outside the scope of Canada Post's service monopoly -- regular mail delivery).
- If the U.S. expands Medicare coverage to include prescription drugs, it may be challenged for using Medicare's monopoly status (providing health insurance for the elderly and the benefit of its hefty government price discounts) to unfairly compete with foreign private health insurance programs.
- GATS also effectively prohibits a nation from creating a new monopoly (say the U.S. decides to create a national health care system) by requiring the nation to pay compensation to other member nations who have competing service providers that might suffer losses as the result of the monopoly.

**Non-reversibility of scheduled commitments.** GATS makes it very difficult (or at least very costly) for a nation to change its mind. Although GATS allows a nation to withdraw a service sector or mode of service supply from its schedule of commitments, to do so it must negotiate and pay compensation to *all* member nations that have service providers that are affected by the withdrawal of the commitment. For all practical purposes this makes it impossible to change the schedule of committed service sectors once it has been offered.

# **Dispute Resolution Process**

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## **WTO Dispute Settlement Overview**

Disputes under GATS, like all WTO agreements, are resolved under terms spelled out by the WTO Dispute Settlement Understanding (DSU). Unlike NAFTA and FTAA's Chapter 11 provisions -- where individual corporations can sue foreign governments -- under the WTO, only member nations can file challenges. Thus, a service provider who believes a foreign nation is violating its WTO or GATS obligations must ask its government to file a challenge under the WTO.

Disputes are first encouraged to be worked out between member nations. If resolution is not possible, the challenge goes to a dispute resolutions panel comprised of three "trade experts" appointed by the WTO. This tribunal hears the case in secret with only the representative member governments present. This means that if a Minnesota law is challenged under the WTO, Minnesota representatives would not be present unless the United States administration asked them to be present.

After hearing the case, the tribunal makes a ruling. This ruling is essentially final and can only be appealed within the WTO appeals process. Such appeals are limited to a review of the panel's interpretation of WTO rules. New or existing evidence going to the merits of the case cannot be introduced or reviewed.

## **Penalties**

If the trade tribunal rules that a nation has violated obligations under GATS or other WTO agreements, the offending nation has only two options: (1) comply and eliminate or revise the measure to make it WTO compatible; or (2) face trade sanctions roughly equivalent to the value of losses to service providers claimed by the challenging country. These trade sanctions are in place until the offending nation removes the measure or revises it to be consistent with the WTO.

# What can be done?

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To defeat this new generation of trade agreements we must act now. Below are five things each of us can do.

## 1. Demand binding protections

The debate is not over whether there is global trade, but under what rules such trade can occur. We are not allowed into the negotiations, but we can still make our voices heard and demand:

- a. A full moratorium on GATS talks until the implications of the agreements can be determined;
- b. Binding guarantees that GATS will not prevent governments from being able to regulate in the interest of their citizenry or their national interest;
- c. Binding guarantees that global trade rules guarantee certain basic worker and human rights (e.g. the Universal Declaration of Human Rights) and basic protections to the environment.

## 2. Build awareness

The new generation of global trade agreements attacks our democracy at its core -- many citizens will reject this if they know. We can build awareness on these threats (especially among the constituencies they will most affect -- construction workers, public employees, postal employees, and state and local elected officials) if we:

- a. Present on these issues at the meetings, conventions, adult church groups, etc. that you attend
- b. Write an opinion piece or letter to the editor for your local newspaper
- c. Write an article for your church, community, or local union newsletter

## 3. Keep Congress informed

Congress will likely be voting on the FTAA and GATS in 2005. We can make sure that our members of Congress know where we stand if we:

- a. Write our members of Congress a letter or e-mail speaking clearly about what specific issues important to you are at risk under the new trade deals;

- b. Encourage our various constituency groups, or local clergy, or local elected officials to meet with our members of Congress to keep them aware of the issues in these negotiations.

#### **4. Mobilize people to act locally**

The new generation of trade deals directly affects local political leaders and sharply curtails their ability to represent the wishes of their constituents and to govern. We can begin to mobilize people locally if we:

- a. Include a question on global trade in our group's local candidate screenings;
- b. Contact our city councilor or legislator and express our concern about the new global trade agreements threat to local government control
- c. Hold a community forum for local elected officials to ask how local government might be affected by the new trade agreements

#### **5. Mobilize people to act nationally**

The FTAA and GATS will be holding meetings throughout the next year. We can help highlight these meetings and make them more transparent if we:

- a. Encourage people to attend the upcoming FTAA protests in Miami in November 2003.

# Appendix 1

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## Glossary of Terms

**Commercial presence (mode).** One of the four modes of supply defined in GATS that applies to services provided by a foreign service provider who establishes a subsidiary in another member country to provide services. An example would be a foreign law firm that establishes a branch office in the capital of a foreign country to provide legal or lobbying services.

**Commitments.** Those specific services and modes of supply that are listed on a country's schedule. These commitments are then subject to the obligations of GATS such as National Treatment and Market Access.

**Consumption abroad (mode).** One of the four modes of supply defined in GATS that applies to services purchased by a foreigner in another member country. An example might be a person who goes to another country to receive specialized surgery or a tour guide business that provides services to foreign tourists.

**Country schedule.** Each member nation has a country schedule that lists all of the specific service sectors and modes of supply the country is willing to open up to the specific rules of GATS (such as market access and national treatment).

**Cross-border (mode).** One of the four modes of service supply that covers trade in services that cross the border without the movement of people or investment. Examples include buying information purchased from another country via the internet or advice provided via telephone.

**Dispute settlement.** The process outlined under the WTO's dispute settlement understanding that provides for dispute resolution through a three member dispute panel. If the dispute panel rules against a nation, that nation can either comply or face stiff penalties or retaliatory actions.

**Domestic regulation.** Although governments retain the ability to regulate under GATS, it is severely limited. Under GATS, a nation's laws, regulations, court actions, and other government measures must not create "unnecessarily burdensome" barriers to trade, even if such measures have no actual negative impact on trade and even if they were not intended to limit trade or discriminate against foreign competitors.

**Exceptions.** Any measure that is otherwise contrary to GATS can be argued as qualifying as an exception -- defined very narrowly as national security and the demonstrable protection of public health, morals and privacy. To be found an

exception a specific measure must be found to be "necessary" and the "least trade restrictive" measure available.

**Free Trade Area of the Americas (FTAA).** This new regional trade agreement is set to be finalized by 2005 and will cover trade in goods, service, investment in the 34 countries of the Western Hemisphere (all but Cuba). Like NAFTA, the FTAA is likely to contain Chapter 11 provisions that allow individual corporations to sue governments for loss of profits.

**General Agreement on Trade in Services (GATS).** First negotiated as part of the Uruguay Round of GATT negotiations, GATS is the first multilateral global trade agreement that covers trade in services.

**General Agreement on Tariffs and Trade (GATT).** First established in 1947 as the global agreement overseeing trade and tariff issues. It did not cover services, intellectual property, domestic regulation, etc. In the last round of negotiations over GATT (the Uruguay Round) GATT was replaced by the WTO as an organization and GATT became simply another trade agreement.

**General obligations.** GATS rules (such as Most Favored Nation Treatment) that apply to *all* measures of *all* member nations. These differ from the GATS rules that apply only to the specific service sectors and modes of supply listed on each country's schedule.

**International Trade Organization (ITO).** Originally conceived as the global organization deal with trade issues under the charter of the United Nations. As such, it would have been consistent with the UN's Universal Declaration of Human Rights. It was killed when the United States refused to ratify it in 1947.

**Limitations.** Those specific services, modes of supply, or existing inconsistent measures that are listed in each country's schedule. A limitation will exempt a particular service or service supply from GATS rules such as National Treatment and Market Access.

**Market access.** The GATS Market Access rule requires that a member cannot limit a foreign service provider competitive access to any service sector listed on the nation's schedule of commitments. Market access specifically prohibits any measure that limit the number of service suppliers; the value of service transactions; the number of service operations or number of employees; the type of legal entity delivering services; or the level of foreign capital participation in joint ventures.

**Measures.** A extraordinarily broad term that covers any government law, regulation, rule, court decision, administrative action that affects trade in services, which means any government action that modifies the competitive environment in any way. Government under GATS is understood to cover national, state, municipal and all sub-

units of government including boards and regulatory commissions that act in the government's behalf.

**Modes of supply.** There are four modes of supplying services defined in GATS: (1) cross border; (2) consumption abroad; (3) commercial presence; (4) natural persons.

**Most-favored nation treatment (MFN).** MFN requires that governments extend to all service providers in all member nations the most favorable treatment it extends to any service provider in any member nation.

**Natural persons (mode).** One of the four modes of supply of services defined by GATS that applies to foreign workers who cross borders to provide services. An example might be a foreign construction firm that brings workers into another member country to do construction work.

**North American Free Trade Agreement (NAFTA).** Came into effect in 1994, NAFTA is an agreement between Mexico, the United States and Canada that dramatically eliminates national barriers to trade in goods, services, and investment. The FTAA is being negotiated as the regional (and greatly expanded) version of FTAA.

**Necessity test.** GATS limits domestic regulation to only those regulations that protect health and safety, national security, morals or privacy. If challenged, a member nation must prove that the regulation is *both* necessary to ensure the quality of the service *and* the "least trade restrictive" option available. Failing either of these tests, the regulation will likely be found illegal.

**Schedule of commitments.** The same as a country schedule -- the list of specific commitments to the services and modes of supply a country is willing to open up to obligations under GATS.

**Service.** GATS does not specifically define "service," but the term is broadly understood to include any human commercial activity that meets a human need and is not a tangible good or commodity.

**Specific commitments.** Same as commitments -- those specific services and modes of supply that are listed on a country's schedule.

**Trade in services.** The backbone of GATS, trade in services refers broadly to every service provided through every mode of supply.

**World Trade Organization.** Created out of the Uruguay Round of GATT negotiations, the WTO is the global organization responsible for enforcing and overseeing global trade agreements.

## Appendix 2

Chart Comparing GATS, NAFTA and FTAA

	Existing GATS	New GATS	NAFTA	FTAA
<b>Status</b>	Came into effect January 1, 1995	Currently being negotiated. Planned timetable: <ul style="list-style-type: none"> <li>• Negotiations completed by December 31, 2004</li> <li>• Approval of national legislatures in 2005</li> <li>• Take effect January 1, 2006</li> </ul>	Came into effect January 1, 1994	Currently being negotiated. Planned timetable: <ul style="list-style-type: none"> <li>• Negotiations completed by December 31, 2004</li> <li>• Approval of national legislatures in 2005</li> <li>• Take effect January 1, 2006</li> </ul>
<b>Members/Signatories</b>	Includes all 146 WTO Member nations.	Includes all 146 WTO Member nations.	Includes Mexico, Canada, United States.	Will include 34 countries – all of the Western Hemisphere nations except Cuba
<b>Areas of Coverage</b>	Covers “measures by Members affecting trade in services” in four modes of supplying services: <ul style="list-style-type: none"> <li>• from the territory of one Member into the territory of any other Member</li> <li>• in the territory of one Member to the service consumer of any other Member</li> <li>• by a service supplier of one Member, through commercial presence in the territory of any other Member</li> <li>• by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member</li> </ul>	Expected to be same as existing GATS	Covers trade in: <ul style="list-style-type: none"> <li>• Goods</li> <li>• Limited specified services (trucking, legal, engineering, etc.); does not apply to commercial presence</li> <li>• Investment</li> <li>• Specified government procurement of goods and services</li> </ul>	Expected to cover same areas as NAFTA, but with <i>substantially</i> broader services coverage.

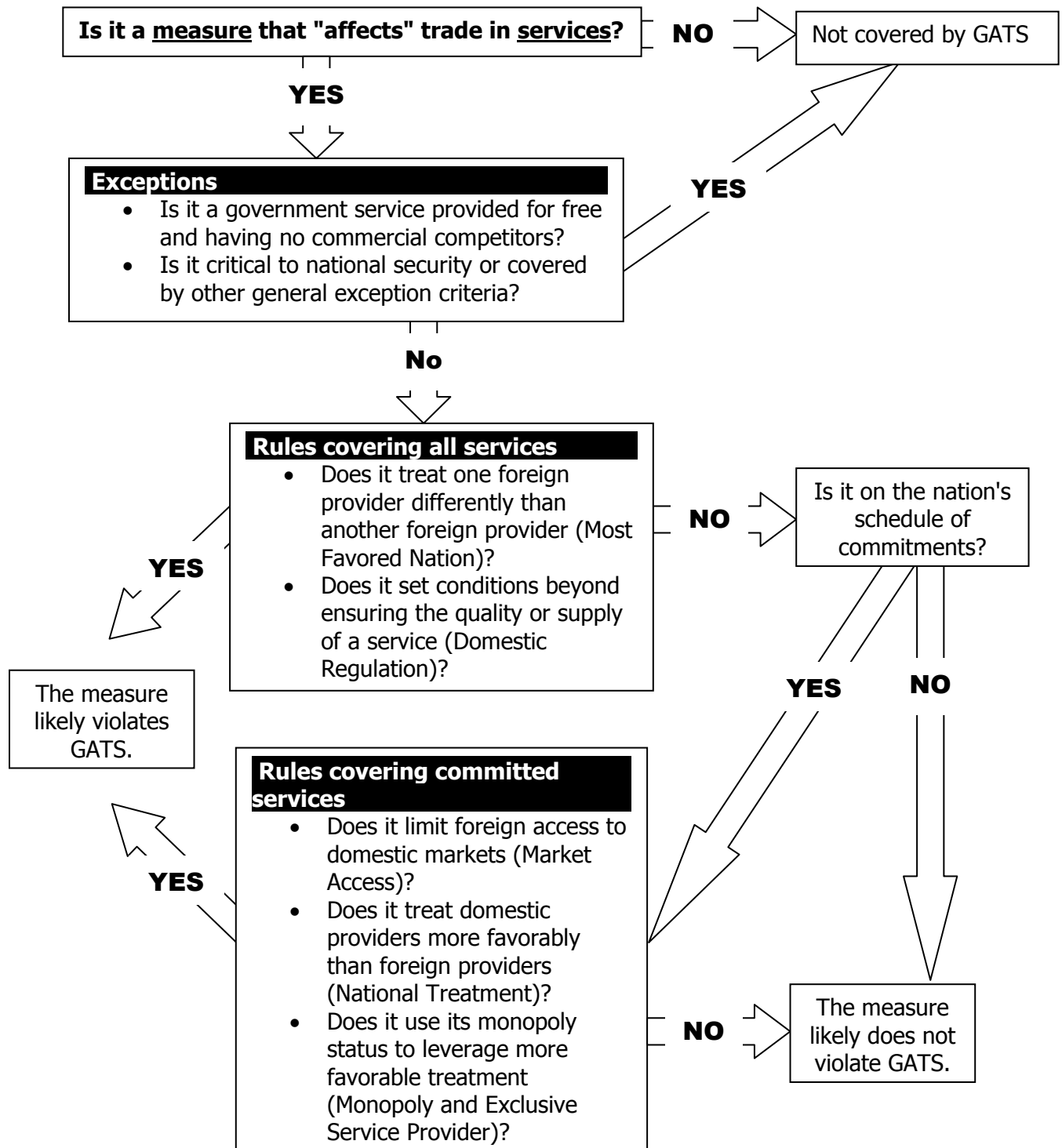
<b>Government Services</b>	Covers government services; exempts those not supplied on a commercial basis, or competing with private sector	Expected to be same as existing GATS	No	Expected to include government services with same logic as GATS
<b>Most Favored Nation</b>	A general obligation, covering all services	Expected to be same as existing GATS	A general obligation covering those goods, services, and investments included under NAFTA	Expected to be the same as NAFTA
<b>Domestic Regulation</b>	<ul style="list-style-type: none"> <li>Requires, in general, that measures "relating to [1] qualification requirements and procedures, [2] technical standards and [3] licensing requirements," be based on objective criteria and not be "more burdensome than necessary to ensure the quality of a service"; licensing cannot be a restriction on the supply of a service.</li> <li>Calls for member nations to develop more specific rules restricting domestic regulation</li> </ul>	Expected to include more specific disciplines on these issues (there is a Working Group on this issue in the current negotiations).	Includes far-ranging rules on "standards-related measures," requiring that: <ul style="list-style-type: none"> <li>they be based on risk-assessment (rather than the precautionary principle)</li> <li>Specific sets of standards (land transportation, telecommunications, automotive, textile and apparel labeling) be "harmonized" between the three countries</li> <li>The countries move to consider each other's technical regulations as equivalent to their own</li> </ul>	Expected to be broader than NAFTA
<b>Market Access</b>	Covers only those services, and the modes of supply of those services, specified in a country's Schedule of Commitments.	Expected to be same as existing GATS, except that it is expected that the Commitments negotiated for the new GATS will be substantially broader than those in the existing GATS.	Provides market access for goods and the covered services, but in services, commercial presence (mode 3 in GATS) is limited in certain specific sectors (banking, telecommunications)	Expected to be broader than NAFTA
<b>National Treatment</b>	Covers only those services, and the modes of supply of those services, specified in a country's Schedule of Commitments.	Expected to be same as existing GATS, except it is expected that substantially more Commitments will be negotiated for the new GATS.	Provides National Treatment for goods, investment, and services	Expected to be the same as NAFTA

<b>Investor Rights</b>	Includes the right for investors to provide services in committed sectors, including the right to establish commercial presence in the territory of another WTO Member. Does not include NAFTA's Chapter 11 rights.	Expected to be same as existing GATS, except that it is expected that the Commitments negotiated for the new GATS will be substantially broader than those in the existing GATS.	Includes far-ranging investor rights, including the right of investors from one country to sue the government of another country for a federal or state measure "tantamount to" expropriation (under Chapter 11), including loss of expected benefits	Expected to be the same as NAFTA
<b>Dispute Settlement</b>	Disputes are nation to nation. They are settled under the WTO's Dispute Settlement Understanding.	Same as existing GATS	NAFTA includes different types of dispute resolution for different issues. For most issues, it provides a panel system similar to the WTO's. For Investor's rights disputes, uses a separate system. For labor and environmental side deal disputes, yet a different panel system.	Expected to be the same as NAFTA
<b>Labor and Environmental Protections</b>	No	Expected to be same as existing GAT	Contains separate labor and environmental "side deals" that provide little or no real protections.	Expected to be no better – and possibly even worse – than NAFTA

# Appendix 3

## Flow chart to think through the GATS rules

Below is a simplified flow chart to help figure out how (or whether) a government measure could violate GATS.



# Appendix 4

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## Additional Web Resources

Below are some key websites for further information:

- **AFL-CIO:** [www.aflcio.org/issuespolitics/globaleconomy/ftaamain.cfm](http://www.aflcio.org/issuespolitics/globaleconomy/ftaamain.cfm)
- **Canadian Centre for Policy Alternatives:** [www.policyalternatives.ca](http://www.policyalternatives.ca)
- **Citizens Trade Campaign:** [www.citizenstrade.org](http://www.citizenstrade.org)
- **Communication Workers of America (CWA):** [www.cwa-union.org/international/ftaa](http://www.cwa-union.org/international/ftaa)
- **Friends of the Earth:** [www.foe.org/camps/intl/greentrade](http://www.foe.org/camps/intl/greentrade)
- **GATSwatch:** [www.gatswatch.org](http://www.gatswatch.org)
- **Public Citizen's Global Trade Watch:** [www.citizen.org/trade](http://www.citizen.org/trade)
- **Sierra Club:** [www.sierraclub.org/trade](http://www.sierraclub.org/trade)
- **Witness for Peace:** [www.witnessforpeace.org](http://www.witnessforpeace.org)
- **World Trade Organization (WTO):** [www.wto.org](http://www.wto.org)