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Crunch Time in Geneva

Benchmarks, plurilaterals, domestic regulation and other pressure tactics in the GATS negotiations

By Scott Sinclair

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Overview

"It ain't over till it's over."
— Yogi Berra

During this critical period in the WTO negotiations, global civil society should not be lulled into complacency by gloomy media reports about the deadlock in the Doha Round negotiations. While agricultural and other important issues remain serious obstacles to a deal, negotiators continue to work non-stop and the broad contours of a possible agreement can be discerned. The decision whether to close a deal is a political one that will be made, as in past rounds, by a small group of powerful governments.

At the December 2005 Hong Kong ministerial meeting, developed countries forced through a controversial set of services demands that tilts the playing field against developing countries and defensively-minded negotiators — preparing the ground for a strong final push to expand the GATS.

If there is a breakthrough on agriculture, the pressure will rapidly intensify for a large package of GATS commitments, including new rules restricting domestic regulation. Even if a deal is not concluded by year-end, by forcing issues now and goading others into concessions, the GATS demandeurs may still succeed in shaping an eventual outcome that will favour them and their global services corporations.

This paper analyzes GATS proponents' pressure tactics in order to empower non-governmental organizations, elected representatives, developing countries and citizens to counter them.[1]

1 Introduction

This is a decisive year for the Doha round negotiations. The expiry of U.S. fast-track negotiating authority in July 2007 sets an effective deadline of early 2007 for wrapping up the talks. If fast-track expires before a deal can be struck, the conclusion of the Doha round would probably be delayed until at least 2009, after the next U.S. presidential elections. Pressure is now being exerted to conclude a deal, including a substantial services package, before this window closes at the end of 2006.

Serious divisions remain on a range of issues, particularly agriculture. Despite these obstacles, however, it would be unwise, especially for those outside the talks, to prejudge the outcome. Some NGOs, unions, elected representatives and other observers appear to have been lulled by media reports that the talks are deadlocked and the view that the Doha round is destined to founder. While such perspectives are defensible, the outcome of the talks is not yet clear, and jumping to conclusions is ill-advised.

By this stage in the talks, negotiators understand very well the nature of the obstacles to a deal, and the outer limits of their negotiating partners' flexibility on the key issues. The broad contours of a potential deal are clear. Miscalculations and mistakes can still be made. But, to a large extent, the decision whether to close a deal is a political one. The key questions are: will the major players accept the particular deal that is taking shape and does that deal make political sense for them domestically?

The EU continues to push aggressively for an "ambitious result" in services and NAMA, but it is clear that India, Brazil and others will scale their NAMA and services offers to the EU's level of ambition in agriculture. Brazil has major agribusiness interests that dominate its negotiating strategy. Its government wants a deal, but it can not be bullied as in past rounds. India is currently a big question mark. The domestic costs and political repercussions of India agreeing to deeper market access in agriculture and NAMA may be too high and their offensive interests in services not enough to provide cover for the government.[2]

The biggest potential spoiler, however, is the United States. In April, the Bush administration decided to replace their USTR Rob Portman, an influential Washington powerbroker, with a senior bureaucrat with little political clout. Moreo-

ver, key Congressional Republicans have stated that they will fight a "minimalist deal". Charles Grassley, chair of the Senate Finance Committee, stated that he will not allow a minimalist deal to come before his committee and, if overruled, will fight it on the Senate floor. Bill Thomas, chair of the House Ways and Means committee, has publicly urged the administration to give up on the Doha round and pursue U.S. interests through bilateral trade deals. There is a degree of gamesmanship in this rhetoric. But the Bush administration is in disarray, trade is a controversial domestic issue, and Republicans fear Democratic inroads in upcoming elections. It is certainly possible that the administration could turn its back on a WTO deal that, while it would benefit their largest corporations over the long-term, is deemed not worth the domestic political aggravation.

Publicly, many WTO insiders express pessimism about the possibility of reaching a deal. Pessimism, however, even when well-grounded, can be part of a shrewd negotiating strategy. It diverts the attention of outsiders, giving negotiators a freer hand. It also ratchets up the pressure on defensively-minded governments, particularly when the U.S. and other demandeurs are threatening to exit and pursue their trade treaty objectives bilaterally.

While time is running out, it is still possible that a deal will be reached by the end of this year. There has been no breakthrough yet, but negotiators continue to work extremely hard in Geneva and in capitals, which they would not do if there was no possibility of meeting the end-of-year deadline. All that can be confidently predicted is that, by next January, the outcome will be much clearer. Until then, those concerned with the potential negative impacts of a WTO deal should avoid complacency and redouble their efforts as negotiations intensify.

2 The GATS negotiations

While the impasse over agriculture attracts the most media attention, services are also a major component of the Doha agenda. In the GATS negotiations, key demandeurs, urged on by global services corporations, are still pressing hard for ambitious results. Beyond agreeing to an end date for the elimination of agricultural export subsides, the WTO's sixth ministerial meeting in Hong Kong made minimal movement on agricultural and non-agricultural market access (NAMA) issues. By contrast, there were major developments in the mandate for the services negotiations.

At Hong Kong, GATS proponents were able, over the objections of a majority of developing countries, to ram through a controversial package of services demands. This package included a new negotiating model, various benchmarks and new timelines - setting the stage for an intensive new phase in the services negotiations.

Developed country negotiators, their allies, and global services corporations are striving to ensure that, if a breakthrough occurs in agriculture, part of the price for any such deal will be an ambitious package of GATS commitments, including new rules restricting domestic regulation. As a direct result of decisions taken at Hong Kong, those governments, especially developing country governments, wishing to limit new GATS commitments are now on the defensive on a playing field that has been tilted against them. The GATS demandeurs' agenda, however, continues to be hotly contested. In fact, their heavy-handed tactics at Hong Kong have provoked resistance and some unanticipated consequences that could frustrate their more excessive ambitions.

2.1 Annex C: the Hong Kong services package

The main proponents of GATS expansion (the Quad countries, global corporate lobby groups and their allies) undeniably won an important victory at Hong Kong. The demandeurs entered the meeting aiming to impose a highly controversial text, Annex C. While opponents succeeded in securing some specific changes that blunted the worst aspects of the services annex, the proponents generally carried the day. Annex C emerged from the meeting intact, providing

a new impetus and mandate for the final phase of the services negotiations. [3]

Prior to Hong Kong, the draft services annex was strongly criticised by Least Developed Countries, the Africa Group, Caribbean countries, as well as individual governments including Brazil, Argentina, Guatemala, Uruguay, Venezuela, Dominican Republic, Thailand, Malaysia, Indonesia, and South Africa.[4] At the insistence of many of these governments, the reference to Annex C in paragraph 21 of the draft declaration was bracketed, indicating disagreement, before the text was transmitted from Geneva to Hong Kong. As many developing country governments argued prior to and at Hong Kong, the text was highly prescriptive. It expanded, and arguably supplanted, GATS negotiating guidelines that had previously been agreed in 2001. By the end of the ministerial, the brackets had been removed, and the annex endorsed by ministers with only a few key changes.[5]

GATS proponents have successfully forced the pace of negotiations and are pushing for ambitious results within a very short time-frame. The new plurilateral request-offer negotiations were launched as planned at the end of February. The next round of revised offers are due on July 31, 2006. Final draft schedules of commitments must be submitted by October 31, 2006, so that the final, legally binding GATS schedules can be ready by year-end.

This paper discusses the key elements of the revamped, multi-pronged negotiating mandate emerging out of Hong Kong and the prospects for the final phase of services negotiations. The key elements of the ministerial declaration and Annex C that will shape the negotiations over the rest of the round are:

1. establishing various "benchmarks," including sectoral and modal objectives, designed to ensure high levels of increased GATS coverage;
2. mandating a new negotiating model, "plurilateral request-offer", that gives a more prominent role to the so-called Friends groups, sectoral alliances of the most aggressive GATS demandeurs;
3. providing a major impetus to the domestic regulation negotiations, which are now mandatory and have been de-linked from the other rule-making negotiations.

These tactics are meant to overwhelm defensively-minded negotiators with strong, multifaceted pressure. Such pressure may well succeed, as it did at Hong Kong — especially given the burden already being experienced by developing countries in other aspects of the talks.

In this push for ambitious GATS commitments, there has been almost no discussion of the negative impacts of GATS commitments on public services, public interest regulation, or the regulation of foreign investment for development purposes. The mandated assessment of the implications of existing GATS commitments has never occurred, despite long-standing developing country demands for a thorough evaluation before the treaty is expanded.

Nevertheless, the plurilateral methods and other devices may not work out as GATS proponents intend. While Hong Kong was clearly a win for the proponents of GATS expansion, it focused mainly on negotiating techniques, not substantive commitments. The outcome of the overall services negotiations, like that of the round itself, still remains open.

3 Benchmarks

The pressure to accelerate the pace of the current GATS talks began during 2004 when developed country negotiators deliberately orchestrated a sense of crisis in the services talks.[6] They asserted, however implausibly, that the services talks were "lagging behind" other parts of the negotiations.[7] The Quad explicitly linked concessions across the three pillars of the negotiations,[8] a position they had previously argued against. They also insisted, supported by India and a few other developing countries, on the completion of the negotiations on new rules restricting domestic regulation.[9] Most significantly, the demandeurs began to push for so-called "benchmarks" to ensure ambitious results in the GATS negotiations.

Benchmarks refer to various targets set to ensure that the GATS negotiations result in ambitious levels of increased coverage.[10] In plain language, benchmarks are negotiating techniques designed to coerce reluctant governments into making GATS commitments that they do not want to make.

Benchmarks, although they appeared to take some negotiators by surprise, are not a new idea. Previously known as "formula approaches," they have been advocated by the Organization for Economic Cooperation and Development (OECD) since the late 1990s. They were pushed by the Quad in the run-up to the 1999 Seattle ministerial, even before the current GATS negotiations began. A placeholder was later inserted in the negotiating modalities for the services negotiations agreed in 2001, which call for the bilateral request-offer approach "to be supplemented by plurilateral and multilateral approaches."

During the lead-up to Hong Kong, there were a flurry of benchmarking proposals tabled by the proponents of GATS expansion. These proposals all set targets that are meant to spur, and in certain cases compel, more far-reaching GATS commitments. These benchmark proposals have taken a variety of forms:

Numerical: for example, a country must commit a minimum number of sectors or sub-sectors;

Qualitative: governments must, for example, eliminate certain types of measures (such as foreign ownership limits or economics needs tests);

Horizontal: governments must bind existing levels of liberalization across sectors or in certain modes of delivery;

Sectoral: model schedules or checklists that define "high-quality" commitments by sector.

These various proposals are cumulative and can be pursued simultaneously, deliberately multiplying pressures on more defensively-minded or cautious governments.

3.1 Numerical targets

The European Commission (EC) has been the most aggressive champion of mandatory numerical targets. With brutal simplicity, it proposed that developed countries be required to make commitments in 139 of the 163 total sub-sectors and that developing countries must make commitments in 93 sub-sectors.[11]

The U.S. also supports numerical targets, although its position has been more nuanced than the European Commission's. Recognizing the depth of the opposition to mandatory numerical targets, the U.S. has instead proposed, and is independently developing, scoring methodologies to judge the quality to a country's GATS commitments.[12] It has left open the question as to whether these would be required or voluntary.

After coming under heavy fire from developing countries, a reference to numerical targets was dropped from Annex C of the ministerial declaration prior to the document being transmitted from Geneva to Hong Kong. This was an important tactical victory for developing countries, although mandatory numerical targets were simply sidelined in favour of other approaches.

Before the end of the negotiations, when they feel the timing is right, the demandeurs, led by the U.S. and the EC, may reach for a hammer to force others to make more sweeping GATS commitments. Numerical targets, even if they are not formally compulsory, are well-suited to that role. It is important to remain on guard against them.

3.2 Qualitative benchmarks

Qualitative benchmarks refer to non-numerical targets. Instead of simply counting commitments, a qualitative benchmark describes what is deemed to be a high-level commitment. This benchmark can then be used as a standard to judge the quality of offers or existing commitments.

For example, a commitment in financial services is not directly comparable to a commitment in transportation services, although in a simple numerical benchmarking exercise they would both carry the same weight. Similarly, other things being equal, a full commitment in mode 3 (commercial presence) would have far greater commercial and public policy impacts in a sector than full commitments in mode 2 (consumption abroad).

To address such concerns, and to ramp up the pressure for ambitious commitments, GATS demandeurs supplemented numerical targets with qualitative benchmarks — targets that aim to increase the quality, not just the number, of commitments.

A prominent example of qualitative benchmarking is the document "Sectoral and Modal Objectives As Identified by Members," referred to in Paragraph 2 of Annex C.[13] This document describes, by sector and mode, the most far-reaching proposals for GATS commitments. Audaciously, while it purports to represent "an aggregate account of the aspirations of and ambitions of participants in this round of negotiations," it records only offensive interests, that is, demands for further GATS commitments. The many concerns expressed by member governments about the adverse implications of agreeing to such demands are simply not reflected. Consequently, far from capturing the aspirations of all participants, the document gives a one-sided

and biased picture of the negotiations. It distorts the concept of "progressive liberalisation", discounting the diminishing flexibility afforded governments to proceed at the pace and with the precautions that they deem appropriate.

3.3 Horizontal benchmarks

Horizontal benchmarks are qualitative benchmarks that apply across modes or sectors. These include blanket proscriptions of certain type of regulatory measures — for example, prohibiting economic needs tests — by mode or by sector.

This top-down approach seriously compromises the already limited flexibility in the GATS. One of the main selling points of the GATS, and an essential condition for many developing countries originally signing on, was the ability to schedule limitations (or country-specific exceptions) for non-conforming measures, even in those sectors or sub-sectors where GATS commitments were made. Modal benchmarks, by aiming to eliminate broad classes of government measures, would curtail this flexibility.

Paragraph 1 of Annex C states "that Members should be guided, to the maximum extent possible, by the following objectives in making their new and improved commitments:

"Mode 1

(i) commitments at existing levels of market access on a non-discriminatory basis across sectors of interest to Members

(ii) removal of existing requirements of commercial presence

Mode 2

(i) commitments at existing levels of market access on a non-discriminatory basis across sectors of interest to Members

(ii) commitments on mode 2 where commitments on mode 1 exist

Mode 3

(i) commitments on enhanced levels of foreign equity participation

(ii) removal or substantial reduction of economic needs tests

(iii) commitments allowing greater flexibility on the types of legal entity permitted

Mode 4

(i) new or improved commitments on the categories of Contractual Services Suppliers, Independent Professionals and Others, de-linked from commercial presence, to reflect *inter alia*:
—removal or substantial reduction of economic needs tests
—indication of prescribed duration of stay and possibility of renewal, if any

(ii) new or improved commitments on the categories of Intra-corporate Transferees and Business Visitors, to reflect *inter alia*:
—removal or substantial reduction of economic needs tests
—indication of prescribed duration of stay and possibility of renewal, if any…"[14]

These benchmarks are most stringent for Modes 1 (cross-border trade) and 2 (consumption abroad). They aim to bind existing levels of market access across the board and to eliminate certain types of regulatory measures entirely. For example, the elimination of all commercial presence requirements for mode 1 would mean that service providers would be free to sell services in a given market entirely from outside the national territory, without having to establish any local presence.

This top-down injunction will likely prove controversial, and possibly untenable, even in developed countries. For example, U.S. regulations do not allow foreign institutions to sell securities on a cross-border basis. They require a commercial presence in the U.S., a requirement that many consumer groups support as an important safeguard for consumer rights. This feature of the U.S. regulatory system is unlikely to change as a result of the GATS, and will make it very difficult for the U.S. itself to fully imple-

ment the modal objectives articulated in the Hong Kong declaration.[15]

Nevertheless, at the Hong Kong ministerial the U.S., with support from the EC, pushed to toughen the mode 3 benchmarks by demanding language requiring "the removal or substantial reduction" of limitations on foreign equity. Developing countries successfully deflected this pressure by linking any toughening of the demands in mode 3 to stronger language on mode 4, a demand that the U.S., for domestic political reasons, was not able to accommodate.

3.4 Sectoral benchmarks

Sectoral benchmarks are techniques to define "high-quality" commitments by sector. These could include "model schedules" or "checklists" that specify the key elements of a sectoral commitment.

Sectoral commitments can also be designed to include customised deregulatory obligations that go beyond simply national treatment and market access commitments. The 1997 Telecommunications Reference Paper is the most frequently cited model for such initiatives. The 1997 Financial Services Understanding (FSU) also includes "GATS-plus" commitments that apply exclusively to the financial services sector (for example, while government procurement is generally excluded from the GATS, the FSU covers government procurement of financial services).

Sectoral approaches have been driven primarily by the so-called "Friends groups." The Friends are informal, ad hoc, industry–driven groupings of supporters of increased liberalisation in key sectors. The "friends" designation is specious. The Friends of Audio-visual services, for example, includes the U.S., Mexico, Hong Kong, China and Taiwan, a small group of countries that have been implacable foes of policies to protect and promote cultural diversity. As of December, 2005 there were at least fourteen Friends groups (chairs are indicated in brackets): Air Transport (New Zealand), Audiovisual (Chinese Taipei), Computer (Chile), Construction (Japan), Education (New Zealand), Energy (EC), Environment (EC), Financial (Canada), Legal (Australia), Logistic (Switzerland), Maritime (Japan), Mode 3 (Switzerland), Mode 4 (Canada), Express Delivery (U.S.) and Telecommunications (Singapore).

The plurilateral requests launched at Hong Kong are, in essence, a sophisticated effort to fully define sectoral benchmarks. With the new Hong Kong mandate for plurilateral requests, the Friends groups are now playing a central and formal role in the negotiations. It is to the plurilateral request-offer process that this paper now turns.

4 Plurilateral request-offer

The most significant outcome of the Hong Kong ministerial and the centrepiece of the push to expand GATS coverage was the mandate to proceed with plurilateral request-offer negotiations. Annex C of the Ministerial Declaration stated that "in addition to bilateral negotiations, we agree that the request-offer negotiations should also be pursued on a plurilateral basis."[16] This process makes it easier to force significant services concessions as part of an overall Doha Round package. Although mandatory numerical targets were beaten back in the lead-up to Hong Kong, the plurilateral requests will facilitate brokering and arm-twisting.

Plurilateral requests simply refer to group requests — requests made collectively by demandeur governments — to another target group of governments. This new negotiating tactic reflects the view of the GATS demandeurs that the traditional bilateral request-offer approach, where individual governments make requests individually of other governments and negotiate bilaterally, was not generating sufficient momentum towards an ambitious result.

Under the terms of the initial draft services annex, participation in these plurilateral negotiations would have been compulsory. Strong opposition from the G-90 and the African Caribbean Pacific (ACP) countries succeeded in modifying Annex C to read that member governments "shall consider" such requests. In practical terms, however, this wording change probably made little difference. GATS proponents secured their main objective of launching the plurilateral process.

The plurilateral request-offer negotiations are meant to supplement, not replace, the traditional bilateral request-offer methods. Instead of facing demandeur countries one-on-one as in the bilateral request-offer process, targeted countries now will also face groups of powerful countries, the most aggressive demandeurs in any particular sector. The plurilateral process will define a common set, or floor, of commitments that would apply to a critical mass of target countries. The key demandeurs can then pursue these commitments both plurilaterally and bilaterally.

The plurilateral request-offer process is now well underway. A total of 21 plurilateral requests were circulated on or shortly after the February 28, 2006 deadline stipulated in Annex C. During

the May 2006 services cluster, this list was pared down to 15 active plurilateral requests.

The new plurilateral approaches have resulted in the negotiations being re-organised mainly along sectoral lines. The requests target 13 key sectors: architectural and engineering services, and audiovisual, computer-related, construction, distribution, education, energy, environmental, express delivery and postal, financial, logistics, maritime transport, and telecommunications services. In addition, two cross-cutting modal requests pertaining to mode 4 and cross-border supply are under negotiation.

The primary targets of the group requests are the largest developing countries: Indonesia, Malaysia, the Philippines, Thailand, Argentina, Brazil, China, India, and South Africa. While the list of targeted countries has been kept secret, Geneva sources indicate that these are the countries named most frequently in the group requests.

On the other side of the ledger, as expected, the demandeurs are comprised mostly of a relatively small group of about a dozen OECD countries (counting the EU as one). The most active demandeur governments are: Australia, Canada, EC, Hong Kong, Japan, Korea, Mexico, New Zealand, Norway, Taiwan, Singapore, Switzerland and the United States. Chile participated in 2 of the first 8 requests, while 10 other governments joined in only 1 of the first 8 requests.[17]

The largest developing countries and the OECD bloc account for the vast bulk of global economic activity within the targeted sectors. For example, in telecommunications services, the largest 17 countries in the world (those with revenues over $5 U.S. billion annually) account for nearly 92% of global revenues in the sector. The next largest 20 countries (those with annual revenues of $1-5 billion U.S. annually) account for nearly 5% of global revenues. The remaining three-quarters of WTO members account for just 3% of global revenues. This concentration of services activity is typical of other sectors.

While the dynamics of the GATS talks are frequently cast in north-south terms, it is important to recognize that GATS demandeurs and their corporate sectors are also aiming to further open up markets within developed countries. To this end, all the interested parties making GATS collective requests are themselves deemed to be recipients of their own plurilateral requests.[18] Moreover, developed countries have targeted primarily other developed countries with a number of their plurilateral requests, notably audio-visual and maritime transport.

While the governments participating in collective requests are not, strictly speaking, legally bound to adhere to them themselves, there is a strong expectation that their own offers will at least match the level they are demanding of others. As a result, the pressure tactics employed against others may rebound on demandeurs' own sensitive sectors and policy measures.[19]

This is not an accident or an oversight. It ensures that multinational services corporations will be the clear winners, both in their home markets and abroad. The aim of the plurilateral requests is to force the governments of all countries, target and demandeur alike, to negotiate over exceptions for particular government measures within a dictated sectoral framework. This process curbs government regulatory authority, constricts public services, and shifts the balance of power away from democratically elected governments to multinational corporations.

Even though smaller developing and least developing countries have not been targeted directly in the plurilateral requests, they could still be profoundly affected by these negotiations. Many will be pressed to adopt the substance of the plurilateral requests through bilateral discussions. Even for those that manage to resist immediate pressures to make extensive GATS commitments, the template will be set. The sectoral outcomes in the GATS negotiations could become the de facto global standards for services regulation for the foreseeable future, just as the

Telecommunications Reference Paper, and the GATS Financial Services Annex and the Financial Services Understanding, already shape global regulation of these critical service sectors.

While far-reaching in intent, the plurilateral request-offer process has set off certain countervailing forces that may limit its ultimate effect.

The plurilateral requests are less extensive than some demandeurs would like because their formulation required pre-negotiation among the sponsors. The demandeurs had to scale back the ambition of the requests, because not all of them were willing to abide by full commitments. For example, as already noted, the U.S., a key demandeur on financial services, does not allow cross-border provision of financial services without a commercial presence within the U.S. This fact complicated the formulation of the financial services collective request. Other key participants also found themselves in the position of demanding of others what they were not prepared to commit themselves. For example, Canada — a sponsor of the telecommunications request — does not allow majority foreign control of telecoms companies, even though the collective request it helped formulate demands that foreign majority control be permitted. The hypocrisy of this stance was not lost on the recipients.

Another unintended consequence of the plurilateral process is that the key demands of GATS proponents are now more out in the open. With the exception of the EC requests, which were leaked in 2002, bilateral requests have mainly been kept secret. But the recent plurilateral requests were leaked almost immediately after being circulated in Geneva. Heightened public and NGO scrutiny may check the demandeurs. There are also indications that the group nature of requests has encouraged defensively-minded governments to work more closely together to respond to the requests more assertively than previously.

In general, the plurilateral requests, while far-reaching, are less ambitious than the previous bilateral requests. This is not surprising since the bilateral requests, taken cumulatively, aimed at virtually full GATS coverage of nearly every sector and the elimination of almost all existing limitations. There was an effort within the Friends groups to be realistic in their ambitions for the plurilateral process, that is, to formulate targets that could actually be attained in this round of negotiations.

What the plurilateral requests lost in scope, however, was made up for in the power and force of those behind the requests. The majority of plurilateral requests are sponsored by the biggest countries in the WTO and driven by the corporate interests of the demandeur countries. This puts target governments in a difficult, defensive position. The Friends groups, having brokered collective requests among themselves, will now try to put them forward to the broader WTO membership on a "take-it-or-leave it" basis. The European Commission, in particular, has made clear that an ambitious result in the services negotiations is a prerequisite for it to deliver on agricultural issues, and hence for the conclusion of the overall Doha Round.

The plurilateral process, when combined with the bilateral request-offer process, could whipsaw target countries. The Hong Kong declaration states that bilateral request-offers should remain the main method of negotiations. At the ministerial meeting, this was widely viewed as positive for developing countries. Demandeur countries, however, will attempt to use both processes in tandem to extract maximum concessions. For example, the U.S. and the EC have already begun to assert that the plurilateral request-offer process is not sufficient. They will doubtless use bilateral negotiations to ensure their key plurilateral demands are met. In practice, the group requests will serve as a new floor for expected GATS commitments in each sector.

In the high-level sessions where any final, overall WTO deal will be brokered, the U.S. and the EC can now more readily and precisely articu-

late their bottom-line for an acceptable outcome in services. They can now insist that ministers from key governments — such as Brazil, south east Asian countries, and South Africa — accept the plurilateral requests in a definite number of key sectors as a *sine qua non* for an overall deal. If a breakthrough on agricultural and NAMA modalities occurs, the GATS demandeurs hope that the momentum for an ambitious services package would be unstoppable.

The big powers can now also more easily define a critical mass of services commitments by toting up all countries' agreement to the plurilateral requests. They can now set their own informal numerical benchmarks for an acceptable services outcome, a calculation that was much more difficult to make and to communicate under the more decentralized bilateral request-offer approach. These informal quantitative benchmarks will also make it easier to go over the heads of services negotiators and diplomats to ministers who may be less aware of their countries' defensive concerns and far less knowledgeable about the risks inherent in GATS commitments.

In short, the plurilateral request-offer process has, as intended, simplified the linkage of services concessions to movement in the other pillars of a Doha package. It has also facilitated the arm-twisting by big powers which has been the staple of past trade rounds. While this procedural maneuver has not yet delivered substantive results, it has shifted the balance of forces further in favour of those seeking a substantial package of GATS concessions.

5 Domestic regulation

The Hong Kong ministerial jump-started another critical GATS issue: the negotiation of new rules restricting "domestic regulation." The proposed new rules would restrict laws and regulations, at all levels of government, even when they don't discriminate against or between foreign investors. Such restrictions would seriously curtail governments' right to regulate and weaken governments' ability to protect the public.

GATS Article VI:4 specifies that Members shall develop any "necessary disciplines" to ensure that "measures relating to qualification requirements and procedures, technical standards and licensing procedures do not constitute unnecessary barriers to trade in services."

Without WTO ministers debating whether or not such disciplines are in fact "necessary," the Hong Kong declaration mandated that these controversial negotiations be concluded and legal text developed by the end of 2006:

"Members shall develop disciplines on domestic regulation pursuant to the mandate under Article VI:4 of the GATS before the end of the current round of negotiations. We call upon Members to develop text for adoption."[20]

Significantly, the ministerial decree made the domestic regulation negotiations part of the Doha Development Agenda's "single undertaking", meaning that they must be concluded as part of the current round. Consequently, these new restrictions on domestic regulation would form part of any WTO deal this year. Even if no WTO deal can be concluded by the end of the year the decisions currently being made about the text of these restrictions could still shape global and local services regulation for decades to come.

The scope of the Article VI:4 restrictions — measures relating to qualification requirements and procedures, technical standards and licensing procedures — is extremely broad. Trade officials often try to convey the impression that the domestic regulation talks deal only with matters affecting professional licensing. But many other types of equally important governmental measures and regulatory authority would be covered by the planned restrictions. For example, *licensing requirements* includes not only professional licensing, but also broadcast licenses, university accreditation, licensing of facilities for clinics, hospitals and laboratories, waste

disposal permits, municipal zoning approvals, and many other matters. *Technical standards* would include standards related to water quality, sustainable forest management, toxic waste disposal, educational quality, and many other vital regulatory matters.

Negotiators and WTO officials also sometimes play down the significance of the proposed "disciplines", noting that the GATS recognizes the right to regulate and to introduce new regulations. But this is misleading, because the "right to regulate" can be exercised only in accordance with the GATS obligations, including the proposed disciplines on domestic regulation.[21] Even if governments remain free to determine the *ends* of regulatory action, the *means* would be subject to GATS challenge and WTO oversight. For example, alcohol companies will agree publicly with the objective of curtailing under-age drinking. But they often object to the means regulators have used to achieve this end — including strict standards on alcohol advertising.[22]

It also needs to be emphasized that the proposed restrictions explicitly target *non-discriminatory* domestic regulations, regulations that treat local and foreign services and service providers evenhandedly. They aim to expand GATS coverage directly into regulatory matters that are only peripherally trade-related.

Of particular concern are proposals to apply some form of "necessity test" to this wide range of non-discriminatory domestic regulations.[23] Necessity tests "establish the WTO consistency of a measure based on whether the measure is 'necessary' to achieve certain policy objectives."[24] Such a test is extremely difficult for governments to meet. In GATT and WTO dispute settlement, it has repeatedly failed to provide an adequate defence for challenged regulations.[25] Hence, regulations aimed at public health, municipal planning, or consumer, labour and environmental protection could all be deemed by WTO dispute panels to be "more burdensome than necessary." The very prospect of having to clear the hurdle of a GATS necessity test would have a chilling effect, discouraging governments from enacting new regulations.

Until recently, these proposed rules, and even the necessity test, were not a hot-button issue among trade negotiators. Trade officials, whether they are from commercial ministries in the north or the south tend to view regulations with suspicion as increasing costs to business, even if those regulations are meant to protect the public.

In an encouraging development, however, Brazil and the Philippines recently tabled a proposal that rejects the necessity test,[26] which they argued forcefully is "neither necessary nor convenient." At a meeting of the Working Party on Domestic Regulation in early May, a wide range of other developing countries, including the Africa Group, the African, Caribbean and Pacific Group of States (ACP), Small and Vulnerable Economies, Argentina and certain others supported the Brazilian/Philippine stance.

At the same meeting a smaller group of developing countries including India, Chile, and Mexico argued for the inclusion of a necessity test. India has concerns that licensing requirements and procedures can be used to nullify the benefit of certain GATS commitments, particularly in terms of what is required of Indian professionals working overseas. It should, however, be possible to address such concerns with additional commitments (under GATS Article XVIII) that are tied directly to any specific mode 4 commitments and that ensure that any negotiated commitments are actually meaningful and effective.[27] This more specific, limited approach could provide certainty for commercial service suppliers, while lessening the risks inherent in general restrictions on the right to regulate. The proposed restrictions on domestic regulation are a very blunt instrument and dangerous for a wide range of legitimate regulations that are only secondarily related to trade in services.

Developed countries led by Switzerland, Australia and New Zealand have mounted a strong counterattack against the Brazil-Philippines position at subsequent negotiating sessions. These governments charge that the Brazilian-Philippines proposal "lacks ambition" and insist on strong restrictions, including a necessity test. To this end, Chile, Taiwan, and Hong Kong, China recently tabled text that includes the full application of a necessity test, stipulating that regulatory measures should be "not more burdensome than necessary to meet specific national policy objectives including to ensure the quality of the service."[28]

Certain elements in other country proposals, even where they do not include a formal necessity test, are rash and worrisome. A joint China-Pakistan proposal, for example, states crudely that "Members shall ensure that licensing requirements do not act as barriers to trade in services and are not more trade restrictive than required to fulfil national policy objectives."[29] Almost all regulations can be interpreted as being in some way a barrier to trade because they deliberately seek to curb or influence commercial activity in order to promote other objectives. This is especially so under the GATS which defines trade to include investment. It is thus difficult to identify a licensing requirement that would not conflict with this perplexing proposal.

The China-Pakistan wording could be even more harmful than applying a necessity test, under which countries would at least have the possibility, however remote, of defending a regulation that affects trade as necessary to meet national policy objectives. Such egregious proposals underscore the folly of letting trade negotiators, who often do not understand the purpose of the regulatory process, or are hostile to it, write rules governing regulation.

Worryingly, some major developed countries, such as the European Union and Canada, have so far remained silent or non-committal on the issue of the necessity test. Pressure needs to be brought to bear on these governments to clearly oppose necessity tests and other regulatory restrictions. For its part, the U.S. formally opposes a necessity test, and has spoken out on the issue. But the current U.S. position is driven mainly by the concerns of its regulatory departments, and it is not clear that USTR negotiators can be relied on to maintain this opposition under corporate pressure as negotiations intensify.[30] The U.S. proposal on transparency requirements also gives cause for concern as it would require governments to give foreign interests new trade law rights to intervene in the internal regulatory processes of WTO members.

The application of a necessity test, or other constraints on legitimate regulation, are thus a very real threat. The chair of the working party is expected to table a draft consolidated text of the proposed regulatory restrictions early this summer. This draft text would then be the basis of negotiations to finalize new disciplines by the end of the year. If, despite the opposition of the majority of developing countries, a necessity test or other substantive restrictions are included in the chair's draft text, it will be an uphill fight to remove them.

Even proposals that do not contain an explicit necessity test could cause significant problems. For example,

- a requirement that licensing decisions be made "within a reasonable period of time"[31] would be a victory for transnational corporations. A government could be challenged if it did not promptly respond to corporate proposals for oil drilling, pipeline development, shopping mall construction or other controversial projects.
- A seemingly innocuous rule that licensing requirements be "relevant to the activities to which the licensing requirements apply"[32] could call into question the consistency of requirements that investors

follow through on commitments related to project approvals. These requirements could include commitments:

- by an energy company to fund renewable energy to offset greenhouse gases from a conventional energy project,
- by a property developer to fund low-income housing in return for permission to proceed with a commercial development, or
- by financial service providers to increase services to low-income neighborhoods or target loans to disadvantaged groups as a condition for approval of a merger or acquisition.

It is critical that the public, non-governmental organizations, regulators, and elected representatives intervene as soon as possible to oppose necessity tests, or other restrictions, that could lead to WTO dispute panel interference with such non-discriminatory regulations affecting services.

Overseeing non-discriminatory domestic regulations affecting trade in services (those that do not discriminate in standards and qualifications based on nationality) is not an appropriate role for the WTO. Because the WTO has an institutional focus of enhancing trade, it puts commercial interests ahead of regulatory measures to protect public health and safety. Furthermore, national regulations are drafted within the political realities and context of each country; it is inappropriate for domestic political compromises — generally arrived at through democratic processes — to be second-guessed by WTO panels, far-removed from local political realties, constraints and accountability.[33]

Another example illustrates the problematic nature of the proposed restrictions on domestic regulation. The plurilateral request-offer process targets distribution services as a priority sector. The plurilateral request demands full coverage even for sensitive products such as alcohol, tobacco or pharmaceuticals. If the proposed rules on domestic regulation, including a necessity test, were to apply to distribution services, then non-discriminatory regulatory policies — for example, to curb tobacco advertising, reduce harmful alcohol consumption, or control drug prices to make them affordable — would suddenly be subject to GATS authority and challenge. The generic demand to cover distribution services, in combination with the new rules on domestic regulation, would give highly aggressive and litigious multinational companies another trade treaty club to attack beneficial public policies in both northern and southern countries.

This is just one example of the threats posed by these proposed new restrictions. If they are agreed to, literally thousands of non-discriminatory public interest regulations affecting services (for example, water quality standards, municipal zoning, permits for toxic waste disposal services, accreditation of educational institutions and degree-granting authority) would be exposed to WTO oversight and potential challenge.

If agreed to, the proposed restrictions would affect not just new commitments, but the commitments that WTO member governments have already made. At the stroke of a negotiator's pen, every WTO member governments' existing GATS commitments would be deepened. Prudent governments would recognize the immediate need to review existing non-discriminatory regulations affecting trade in services in all of the subsectors already covered by their GATS commitments. Many of these regulations would instantly become vulnerable to WTO challenge.

The impact of domestic regulation restrictions would be particularly troublesome for developing countries, where regulatory frameworks need to be flexible in order to allow new regulations to be developed in response to development needs. The persistent demand from the south for "policy space" underlies much of the growing oppo-

sition from Brazil, the Philippines and others to the inclusion of a necessity test.

But there is also considerable concern about these negotiations in developed countries, particularly among state and local governments. Twenty-nine U.S. state Attorneys General recently wrote to the USTR warning that "any new GATS provisions that would confer on WTO panels the right to judge whether regulations made by elected representatives, within their constitutional mandates, are 'necessary' or 'proportionate' would unacceptably encroach upon our states' regulatory authority." Similar concerns have been expressed by hundreds of local governments in Australia, Canada, France, New Zealand and the UK on the impact of GATS commitments on their local regulatory and legislative powers.

The domestic regulation negotiations should not proceed further without a full, public review of the regulatory framework at all levels of government, in each WTO member country. Such reviews would doubtless provide a broad range of examples where the proposed restrictions would jeopardize legitimate domestic regulations and undermine established regulatory frameworks. If any new rules are to be developed, they should aim solely at ensuring the transparency of domestic regulations. There are risks even to this approach, however, since some governments advocate a stringent definition of "transparency." As mentioned above, for example, the U.S. has proposed a requirement to give prior notice of new regulations, and an opportunity to comment, to foreign governments and service providers. Prior notice would be an administrative burden on governments, particularly local and developing country governments. It would also give powerful foreign corporations greater opportunity to frustrate and even block regulations that they oppose.

Without forceful and immediate intervention from elected representatives, NGOs, national regulators, and concerned citizens, the draft disciplines are almost certain to contain the option of a necessity test or other similar negative elements. These obscure negotiations could curtail and complicate the future of democratic regulation at a moment when the need for public interest regulation — from addressing climate change to protecting public health — has never been greater. Timely intervention is essential to put an end to this threat.

6 Conclusion

Despite the "development" rhetoric that surrounded its launch, the Doha round of WTO negotiations has been reduced to a traditional high-pressure, high-stakes market access negotiation. In the aftermath of the Uruguay round, developing countries raised scores of "implementation issues"—unanticipated costs and problems posed by the new WTO treaties. For some in the south, a development round held the potential to restore balance and regain policy flexibility by ending harmful developed country practices, particularly agricultural dumping and export subsides, while respecting developing countries' need for "policy space" to shape their own development. That potential has not been realized. Instead, the big trading powers are cynically turning the original "development" rhetoric against the development concerns of the south. They have made it clear that any change in their harmful agricultural policies will be conditional on deep cuts in agricultural and industrial tariffs and substantial GATS commitments that would significantly further erode policy flexibility.

Benchmarks, plurilateral negotiations and the other pressure tactics discussed in this paper are deliberately designed to reduce the already-limited flexibility in the GATS. Since the December 2005 meeting of trade ministers in Hong Kong, the proponents of GATS expansion have successfully defined a core set of commitments that cover a critical mass of member governments and a broad range key sectors. Their ultimate goal is to ensure that as much of this services package as possible will be part of the price of any overall Doha round agreement. It is conspicuously hypocritical of GATS proponents to deflect outside criticism of the GATS by pointing to the treaty's flexibility, while working to undermine this already limited room for maneuver. At a very basic level, it is also offensive to try to coerce developing country governments into taking commitments they do not want, and the full implications of which they may not understand.

GATS negotiations may soon intensify. If a breakthrough occurs on the agricultural and NAMA modality issues, the services negotiations, which are currently stalled, could begin to move quickly. As the Deputy Director of the WTO, U.S. representative Rufus Yerxa, recently remarked, "I think that process will only accelerate after we get over this hurdle of setting the level of ambition in agriculture and indus-

try. Only then will we see what's really going to come out on the table in services."[34]

Even if a deal is not closed by year-end, by forcing issues now and bullying others into concessions, GATS proponents could still succeed in shaping an eventual outcome that would favour them and their global services corporations. The proposed restrictions on domestic regulation, for example, are one of the most threatening aspects of the GATS negotiations. A draft consolidated text is to be tabled imminently. If the champions of a necessity test, or comparable restrictions, achieve their aims, existing services regulations will be undermined and new pubic interest regulations deterred, especially in the south where regulatory structures are generally weaker.

Substantial new GATS commitments raise serious issues for citizens and policy-makers in both the north and the south. These issues include the appropriate scope of international trade treaties, and their increasing intrusion into matters best democratically decided, such as the public provision of basic services and non-discriminatory public interest regulation. Despite their profound policy and developmental impacts, the proposed new GATS commitments and rules have hardly been debated, and the disturbing implications of recent GATS dispute settlement rulings in the U.S. gambling and Mexico telecommunications cases are still not widely known or understood.[35]

The current talks evoke some of the worst aspects of the Uruguay Round, which gave rise to the demands around "implementation issues" and the initial calls for a development round. Developing countries are now being pressured to make the greatest GATS concessions, while developed countries are insisting, in effect, that they get credit for the commitments they made during the Uruguay round. For developing countries, trading more "policy space" in services in exchange for export market access that could prove ephemeral — or for reductions in agricultural subsidies that will be limited and that may occur anyway because of domestic pressures in the U.S. and Europe — is a bad bargain.

Citizens in developed countries should also be very concerned about GATS impacts in their own countries. Their negotiators' aggressive tactics could unleash reciprocal demands to more fully cover sensitive sectors (such as health, water, audio-visual, environmental, energy and social services) and to eliminate exceptions for non-conforming measures in already committed sectors. As already discussed, the planned new restrictions on domestic regulation would interfere with non-discriminatory regulation not just in newly covered sectors, but in all previously committed sectors as well.

It is critical that in all the power bargaining, the public does not lose sight of the concrete policy implications of the GATS. Reducing the services negotiations to a struggle over the quantity and extent of commitments will result in the meaning and impacts of GATS commitments being ignored until it is too late. Corporate interest groups and developed country negotiators currently have the upper hand. They are striving, with notable success, to ensure that an ambitious package of services commitments is well-defined and on the table by the time of the final ministerial meetings where the decisive trade-offs on agriculture and NAMA are to be made.

In the face of a threatening new wave of GATS encroachment into domestic policymaking, it is vital for NGOs, regulators, elected representatives at all levels of government and others outside the Geneva process to speak out on services issues, especially on the use of heavy-handed pressure tactics and the threat of proposed restrictions on domestic regulation.

As negotiations enter the end game, GATS critics cannot afford to slacken their efforts. They must now re-focus on stiffening the resolve of their national governments to protect the public interest and safeguard democratic decision making around the world by countering the unrelenting pressure to expand this deeply flawed treaty.

Notes

1 I am very grateful for the collegial advice and assistance of Jim Grieshaber-Otto, whose suggestions improved many parts of the paper. Ellen Gould provided many valuable suggestions and insights on the domestic regulation section. Ruth Caplan and Mary Bottari also provided helpful comments on the domestic regulation section. Bruce Campbell, Tony Clarke, Alexandra Strickner, Michelle Swenarchuk, and Ken Traynor, provided support and encouragement. Tim Scarth formatted the paper and Kerri-Anne Finn readied it for publication. Finally, I wish to acknowledge the ongoing support and financial assistance of the members of the Canadian Centre for Policy Alternatives' Trade and Investment Research Project who made this work possible. The views expressed and any errors in the paper are my responsibility alone.

2 Indian opposition, on its own, however, is probably not enough to derail a deal. Recall that India unsuccessfully tried to block the launch of the Doha round in 2001 in Qatar.

3 It is important to recall that, prior to Hong Kong, Annex C was not a negotiated text. It was drafted and transmitted to Hong Kong solely on the authority of the Mexican chair of the services working group. While the chairs of other negotiating groups also drafted reports that were appended to the ministerial declaration, the declaration gave Annex C a higher status than these other annexes, which were simply "taken note of" in the declaration.

4 "Benchmarking proposals come under heavy fire at formal WTO Services Meeting," Third World Network, TWN Info Service on WTO and Trade Issues, 4 October, 2005.

5 Two governments, Venezuela and Cuba, refused to consent to the annex, lodging reservations against Annex C in the final session adopting the ministerial declaration.

6 The crisis rhetoric first emerged in the run-up to the so-called July 2004 framework agreement which put the Doha negotiations back on track after the collapse of the Cancun ministerial.

7 Despite the fact, for example, that negotiating modalities in services were agreed in 2001, while there is still no agreement on modalities in agriculture and services. There have also already been two rounds of formal offers in the

services talks in stark contrast to agriculture and NAMA where negotiating issues have moved more slowly.

8 The three main pillars of the Doha negotiations are agriculture, non-agricultural market access (NAMA) and services.

9 The domestic regulation negotiations under Article VI.4 have been effectively de-linked from the other GATS rules negotiations on safeguards, government procurement and subsidies. Because of developed country opposition there is little prospect of substantive agreement on a services safeguard mechanism, even though it continues to be a high-profile demand of ASEAN governments.

10 Benchmarks are also referred to as "complementary approaches" because they reinforce — others would argue replace — the traditional "request-offer" approach that GATS demandeurs have attacked for not delivering the "desired results."

11 European Communities, Elements for Complementary Approaches in Services, 27 October, 2005. TN/S/W/55.

12 See United States Trade Representative, "U.S. seeks to expand trade in services," Doha Development Agenda Policy Brief, December 2005. available at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file556_8537.pdf.

13 World Trade Organization, Doha Work Programme, Ministerial Declaration, adopted on 18 December 2005, Ministerial Conference, Sixth Session, 13–18 December 2005, WT/MIN(05)/DEC, 22 December 2005. (Available at http://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm#annexc; accessed May 27, 2006.) After objections from some member governments, a footnote was added that explains that "This attachment has no legal standing." The usefulness of this qualification is questionable as the document itself states that "it has no legal standing and is without prejudice to the position of Members." Para. 2.

14 Ibid.

15 "Doha plurilateral initiatives run into difficulty," Inside U.S. Trade, February 24, 2006.

16 World Trade Organization, Ministerial conference, Sixth Session, Hong Kong, 13–18 December, 2005, "Doha Work Programme, Ministerial Declaration," para. 7, p. C-3.

17 These are Iceland, Panama, Peru, Djibouti, Ecuador, India, Jamaica, Malaysia, Pakistan, Paraguay, Saudi Arabia, and Turkey.

18 The plurilateral requests follow a standard format which states, in each case, that the sponsors "are also deemed to be recipients of this request."

19 See, for example, Scott Sinclair, "The GATS Negotiations and Canadian Telecommunications Foreign Ownership Limits," Canadian Centre for Policy Alternatives, Trade Policy Briefing Paper, Volume 7, Number 1, March 27, 2006.

20 World Trade Organization, Ministerial conference, Sixth Session, Hong Kong, 13–18 December, 2005, "Doha Work Programme, Ministerial Declaration," Annex C, para. 5.

21 In the words of the U.S.-Gambling panel report: "Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired." World Trade Organization, "United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services," Report Of The Panel, WTO document symbol WT/D285/R, 10 November 2004.

22 See Ellen Gould, "Trade Treaties and Alcohol Advertising Policy," Journal of Public Health Policy (2005) 26, 359–376.

23 GATS Article VI:4 states that the "disciplines shall aim to ensure that such requirements are, inter alia...not more burdensome than necessary to ensure the quality of the service." As one legal analyst asserts, however, "The negotiating mandate of Article VI:4 is not a strict one as suggested inter alia by the wording 'such disciplines shall aim to ensure'. [Governments] are free to determine the scope of their negotiations and of possible future disciplines." This clearly includes the option that there be no new disciplines at all, in other words, that no new disciplines are necessary. See Markus Krajewski, "Asserting the Right to Regulate: Domestic Regulation," South Centre Workshop on Trade in Services, Geneva. March 24 2006.

24 The WTO Secretariat describes the two aspects of a potential GATS necessity test as: "the first aspect is the general requirement that regulations not be more trade restrictive than necessary; the second aspect is to examine whether an individual measure is actually necessary to achieve the specified legitimate objective." WTO Secretariat, "Necessity Tests in the WTO," Working Party on Domestic Regulation, S/WPDR/W/27, 2 December 2003, p. 1.

25 For example, GATT Article XX permits governments to adopt measures "necessary to protect public morals…(and) human…life or health" provided they are not applied in a discriminatory way or constitute a "disguised restriction" on trade. However, in 12 of 14 trade disputes concerning regulation for protections of public morals, health or the environment, where the necessity defence was invoked, only two domestic protective regulations were upheld. These involve the banning of asbestos use by France and a US gambling regulation, which was upheld because the complaining country (Antigua) did not suggest an alternative regulatory approach. See Michelle Swenarchuk, "Trade Rules And Alcohol: An Unhealthy Mix," Pan American Conference On Alcohol Policies, Brasilia 28–30 November, 2005. available at www.cela.ca.

26 Working Party on Domestic Regulation, Communication from Brazil and the Philippines, JOB(06)/133, 2 May 2006.

27 For example, if the EU or Canada agree that they will admit a certain number of professionals, on a temporary basis in a certain sector, then this commitment should include any additional regulatory commitments (inscribed in the 3rd column of the schedule in the committed sector) that are needed to ensure that these professionals are licensed and their qualifications recognised so that they can perform the work in the EU and Canada.

28 Working Party on Domestic Regulation, Communication From Chile; Hong Kong, China; and the Separate Customs Territory Of Taiwan, "Article VI:4 Disciplines—Proposal for Draft Text," Room Document, 9 June 2006.

29 Communication from China And Pakistan, "Proposed Disciplines on Domestic regulation under Article VI:4 of the GATS," Working Party on Domestic Regulation, JOB(06)/158 May 2006.

30 The USTR might, for example, be tempted to accept a necessity test, or similar substantive restrictions, applying to regulatory procedures, especially it if they can rationalize this as meeting a demand stemming mainly from developing countries.

31 Working Party on Domestic Regulation, Communication From The United States, "Horizontal Transparency Disciplines in Domestic Regulation," JOB(06)/182, 9 June 2006.

32 "Each Member shall ensure that licensing requirements are based on objective and transparent criteria and are relevant to the activities to which the licensing requirements apply." Working Party on Domestic Regulation, Communi-

cation From Chile; Hong Kong, China; and the Separate Customs Territory Of Taiwan, "Article VI:4 Disciplines—Proposal for Draft Text," Room Document, 9 June 2006.

33 Problems with existing GATS provisions should be fixed before new restrictions are contemplated. As the U.S.-Gambling case has demonstrated, GATS rules already interfere with domestic regulatory authority. GATS market access rules, as interpreted by the Appellate Body, interfere with non-discriminatory regulations that prohibit undesirable activities in covered services sectors. These existing problems need to be addressed, rather than developing new GATS restrictions that would interfere even more with important public protection regulations.

34 "Yerxa Warns About Consequences From Loss of Momentum if Doha Stalls," BNA WTO Reporter, May 26, 2006.

35 See Ellen Gould, "How the GATS Undermines the Right to Regulate: Lessons from the U.S. Gambling Case," Canadian Centre for Policy Alternatives November 28, 2005 and the analysis of the Telmex case in Scott Sinclair and Ken Traynor, "Divide and Conquer: The FTAA, U.S. Trade Strategy and Public Services in the Americas," Public Services International and Canadian Centre for Policy Alternatives, January 13, 2005, pp. 19–24, both publications available at http://www.policyalternatives.ca/index.cfm?act=main&call=6104ea04.

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