Divide and Conquer

The FTAA, U.S. trade strategies and public services in the Americas

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The FTAA, U.S. trade strategy and public services in the Americas

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Public Services International
November, 2004

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Acknowledgements

The authors wish to thank Jim Grieshaber-Otto and Gary Schneider who assisted us greatly with the writing and editing of this report. John Dillon provided expert advice on the section on Argentine investment disputes. We also benefited from the comments of a number of readers including: Beatrice Edwards, Cam Duncan, Diana Bronson, Alejandro Alvarez, Ellen Gould, Matthew Sanger, Sandra Sorenson, Jane Stinson, Mike Waghorne and members of the Inter-Americas Executive Committee of Public Services International. The authors are responsible for any remaining errors.

This report was commissioned by the Public Services International (PSI) Americas, but the views expressed are not necessarily those of PSI. The authors also wish to acknowledge the ongoing support of colleagues in the Trade and Investment Research Project (TIRP) of the Canadian Centre for Policy Alternatives, as well as the financial support of TIRP member organizations and the C. S. Mott Foundation. Cam Duncan from PSI Americas was a constant source of support and advice throughout the project.

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Divide and Conquer

The FTAA, U.S. trade strategy and public services in the Americas

Introduction

The services and investment rules of the proposed Free Trade Area of the Americas treaty (FTAA) are a grave threat to public services and public interest regulation throughout the Americas. Based on the neo-liberal philosophy that the best government is the smallest government, this treaty would create intense pressure to privatize, deregulate and erode existing public services. It is designed to 'lock-in' neo-liberal policies that have already been adopted and to prevent future governments from reversing privatization or creating new public services. Fortunately, citizens in the hemisphere are quickly becoming aware of how the FTAA and similar treaties subvert efforts to meet their needs.

The services trade agenda

Negotiations for an all-encompassing agreement have run into stiff opposition. Since the FTAA talks began in 1994, a new political landscape has emerged, featuring:

- left-leaning governments in Brazil, Venezuela and, most recently, Uruguay that oppose a very broad treaty;
- economic crises in Argentina and Bolivia that eroded the credibility of governing elites and thrust new, more populist governments into office;
- tenuous Congressional support for free trade policies in the U.S., the agreement's main proponent; and
- throughout the region, a deep public discontent with the philosophies and policies embodied in the proposed treaty.

At their Miami meeting in November 2003, the region's trade ministers avoided a public collapse of the negotiations, but only by papering over their underlying differences. They decided to pursue a so-called "two-tier" agreement to be comprised of a common set of mandatory obligations to cover all negotiating areas and another set of stronger obligations that governments could individually agree to adopt. Negotiators have so far failed to make this complicated formula work and have not met the January 1, 2005 deadline for a final agreement.

Facing persistent resistance to a sweeping hemispheric treaty, the U.S. administration has devised new strategies to further its aims. Its emphasis has shifted to bilateral negotiations, such as the recently concluded Central American Free Trade Agreement (CAFTA), which has yet to be approved in either the U.S. or Central American nations. The U.S. now has free trade deals in place with Mexico, Canada, and Chile; signed (but not ratified) treaties with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic; and negotiations underway with Colombia, Ecuador, Peru, and Panama. The U.S. is using these bilateral negotiations to isolate and build pressure on the FTAA holdout countries – clearly a "divide-and-conquer" strategy.

At the same time, the U.S. is using global negotiations at the World Trade Organization (WTO) to apply pressure to broaden and deepen coverage of the General Agreement on Trade in Services (GATS). These talks, which began in 2000, are the first in a series of mandated rounds of GATS negotiations. In 2001, the GATS talks were rolled into the current WTO negotiations, known as the Doha round.

In the ongoing global GATS negotiations, there have been sweeping demands made to expand GATS coverage. Current GATS requests add up to a set of demands that would see most WTO members making full commitments in nearly every service sector. This high-pressure dynamic is unfolding more or less as the original GATS architects planned. What remains to be seen is how far individual governments will go to meet these sweeping requests. Since it is not unusual for the most significant concessions to occur in the final days, even hours, of intense negotiations, the limited time remaining before this fateful endgame is critical. Union activists, public interest groups, elected representatives and ordinary citizens must make every effort to ensure that their national governments do not agree to make commitments that further undermine public services or public interest regulation.

Key elements of the FTAA services rules and related treaties

Whether bilateral, regional or global, the core features of this new generation of services and investment treaties are similar and each treaty is built on preceding ones. The FTAA is intended to combine the most restrictive rules of both the North American Free Trade Agreement (NAFTA) and the GATS. Likewise, the recent bilateral free trade treaties being negotiated by the U.S. also contain the worst features of both the NAFTA and the GATS.

The scope of recent services trade treaties is immense. Services include a wide range of human activities and the treaties cover all government actions affecting the different ways that a service can be delivered internationally. The basic purpose of the treaties is to restrict governments from interfering with the ability of foreign companies and investors to profit by supplying services. Much of the flexibility the treaties supposedly provide to governments is a myth. The exceptions, or "reservations," that are said to exclude public services from challenge provide only limited protection. One of their main functions is political, allowing proponents to deflect public opposition just enough to get the treaty approved.

The latest services and investment treaties include the following key provisions:

- **Rules on "non-discrimination"** ensure that governments treat foreign services and suppliers no less favourably than local ones. The National Treatment rule is tougher than generally realized, requiring governments to ensure that foreigners have "equality of competitive opportunity" with domestic services and suppliers.
- **Restrictions on performance requirements** —attempt to eradicate conditions set by governments that oblige foreign investors to purchase locally, transfer technology, take local partners or train local workers. Such requirements were used historically by the now-industrialized countries to promote economic development. Though such government policies remain effective economic development tools, the treaties aim to prohibit their use in both developing and developed countries.
- **Rules on "expropriation" and compensation** protect foreign service companies and other investors against alleged "expropriation" without compensation. The meaning of expropriation in these treaties, however, is extremely broad, contrasting sharply with national laws in most of the hemisphere (including the U.S.). For example, under NAFTA, investors have successfully argued that land rezoning and environmental protection regulations are compensable expropriation. This opens the door to investor-state claims that government actions to expand public services or to restrict private for-profit provision of health care, education or other social services amount to expropriation and that governments must compensate foreign investors that are negatively affected.
- **Market access rules** prohibit governments from restricting corporations' access to domestic markets through the use of "quantitative restrictions." Examples of beneficial public policies that could conflict with these market access rules include measures limiting the growth of medical services or clinics in rich regions until poorer regions are better served; conservation measures limiting the

number of tourist operators in environmentally-sensitive areas; and policies which allow only non-profit organizations or co-operatives to provide a specific service, such as child care or other social services.

- **Public monopolies and state enterprises** are prohibited in covered service sectors. A future government that wants to create or expand a public monopoly (such as public health insurance) in a previously-covered sector must provide compensation to affected foreign service providers and investors. Requiring that foreign commercial service exporters and investors should be compensated when public services are created or expanded creates serious limitations on sovereignty and democratic decision-making.
- **Restrictions on "domestic regulation"** are now under negotiation in the GATS. At issue is the development of "disciplines" on member countries' non-discriminatory regulations - those that treat local and foreign services and service providers even-handedly. The broad subject matter of these proposed restrictions covers a wide range of government regulatory measures. The proposed restrictions aim to apply some form of "necessity test" – requiring governments to demonstrate that their regulations are not more trade-restrictive than necessary and that the measures are needed to achieve a legitimate objective. If agreed to, these controversial new rules could affect the licensing of toxic waste sites, water quality standards, accreditation of schools, hospitals and universities, and many other regulations vital to the public interest.
- **Investor-to-State Dispute Settlement Procedures** allow for foreign investors to bypass domestic legal systems. Most modern treaties include government-to-government (also known as state-to-state) enforcement procedures. When governments cannot resolve a trade dispute through diplomacy, the case is heard by an appointed trade panel. These panels meet in private and issue rulings that can include a requirement to reverse a non-conforming public policy measure or face trade sanctions.

  In addition to state-to-state dispute settlement, the NAFTA investment chapter, most bilateral investment treaties, and bilateral free trade deals include a highly controversial investor-to-state dispute settlement procedure. Under this process, investors can bypass established domestic legal systems, using separate treaty rules to challenge government actions directly, without the approval of their home government. While these arbitral tribunals cannot directly overturn domestic laws, they can and have imposed substantial fines for breaches of treaty investment rules

Trade treaties and public services

Recent trade treaties, including the proposed FTAA, are at odds with the underlying principles of public services. These services are built upon non-market values of equity, fairness and solidarity and are rooted in concepts of citizenship, democratic control and accountability. They are intended to be available universally on the basis of need, rather than the ability to pay, and considered as a fundamental human right. In contrast, trade treaties embody commercial imperatives and treat vital basic services such as education, drinking water distribution or health care as ordinary commodities to be bought and sold for profit.

International trade treaties such as the NAFTA, the WTO Uruguay Round agreements, bilateral investment treaties and the FTAA are a key aspect of neo-liberalism. In candid moments, proponents' statements reveal how trade treaties promote this philosophy. For example, U.S. Trade Representative Robert Zoellick has accurately noted that these treaties:

- support privatization,
- attack public service monopolies, and
- drive deregulatory market reform.

Case studies from Argentina, Costa Rica and Mexico graphically illustrate the problems associated with these aims.

Supporting privatization in Argentina

The FTAA and other current free trade treaties are clearly intended to pry open public services that have not yet been privatized and to consolidate privatization whenever it occurs. Argentina's recent experience demonstrates both the problems with privatization itself and the risks to society when investment treaties attempt to lock in radical free-market social experiments.

During the 1990s, policies enforced and funded by the International Monetary Fund (IMF), World Bank and Inter-American Development Bank (IDB), turned Argentina into a laboratory for private-market experiments in basic services. Privatizations were commonplace in water distribution, health insurance, social security, postal, energy distribution, and other service sectors. These privatizations led to significant job losses, failed to improve services and were costly for consumers. Understandably, they became intensely unpopular with the public.

In the aftermath of the country's 2001 financial crisis, many private investors in basic services found themselves in financial difficulty and blamed local and national government policies for their problems. Unfortunately, while in the grip of neo-liberal orthodoxy, Argentina's government had signed 38 bilateral investment treaties with, among others, the United States, Canada, France, Germany, Spain and the United Kingdom.

Many foreign companies involved in failed privatizations, including high-profile corporate racketeers such as Enron, are now using the investment provisions of these treaties to try to recoup losses. Foreign investors have now launched over 30 investor-to-state challenges against the government of Argentina. Most of these cases involve contracts or concessions from the public authorities to provide what were formerly public services.

Incredibly, after suffering through the failings of privatized services, Argentina's citizens are now threatened with having to compensate foreign investors for their losses. This double jeopardy should serve as a warning to other countries in the hemisphere not to become entangled in bilateral investment treaties or the even stronger provisions of the proposed FTAA, where legal and financial vulnerability would be even greater.

Attacking government monopolies in Costa Rica

The fate of Costa Rica's highly successful public insurance programs in the recently negotiated U.S.-CAFTA is a poignant example of how strong-arm tactics and high- pressure treaty bargaining have been used to attack public services.

In December 2003, just 48 hours before the CAFTA talks' final deadline, U.S. negotiators stunned their Costa Rican counterparts. They tabled, for the first time, a proposal that Costa Rica eliminate its public insurance monopoly and open the sector to U.S. insurance companies. Faced with this eleventh-hour demand, Costa Rican negotiators walked out of the talks. Within two weeks, however, they returned to the bargaining table. On January 25, 2004 the U.S. and Costa Rica announced a deal that included the phased-in, full opening of Costa Rica's insurance system to U.S. private insurers. In return, the U.S. provided Costa Rica with minimal, face-saving improvements in agricultural market access.

Furthermore, despite official assurances to the contrary, Costa Rica's highly-regarded public health insurance system is only partially excluded from the treaty. If the CAFTA is implemented as planned, the system will deteriorate, becoming more like the dysfunctional and inegalitarian American health insurance model and reversing decades of hard-won social progress.

Imposing deregulation in Mexico's telecommunications sector

The recent GATS case involving Mexico's telecommunications sector illustrates the power of trade treaties to drive deregulatory market reforms even after privatization. It also underlines how powerful countries can use obscure treaty rules to force developing country governments to deregulate, enriching foreign corporations at the expense of local citizens.

In mid-2004, a WTO panel issued its decision on a challenge brought by the U.S. against Mexico's telecommunications regulations. The panel ruled that Mexico was violating its GATS commitments by not providing "cost-oriented and reasonable rates, terms and conditions" to U.S. telecom companies for connecting their long-distance calls to Mexico. The panel also ruled that, contrary to GATS rules, Mexico was not taking appropriate measures to prevent "anti-competitive practices" by Telmex, Mexico's privatized national telephone company.

As a result, U.S.-based long-distance firms can no longer be required to contribute to the development of Mexico's telecommunications infrastructure as a condition for gaining access to the Mexican market. The ruling denies Mexico an important source of revenue that should be used to expand basic telephone service to poor customers and into rural areas, many of which do not have any access to phone services.

All governments that have made or will make GATS Telecommunications Reference Paper commitments are thus forbidden to include the costs of expanding telecommunications infrastructure or improving universal access when setting rates for interconnection. This prohibition - which will hit developing countries the hardest - deprives governments of a proven regulatory method and source of revenues for improving their citizens' access to basic telecommunications services.

Conclusion: Growing resistance, emerging alternatives

Immediate prospects for concluding the FTAA are slim. The U.S. administration and its corporate allies have not, however, given up on their substantive goal of expanding NAFTA-plus treaty provisions throughout the hemisphere. U.S. priorities have merely shifted from the stalled FTAA to wrapping up bilateral free trade agreements, while pushing their interests through global WTO talks.

This strategy, called "competitive liberalization," is a crude, but worryingly effective, means for advancing neo-liberal aims in the hemisphere and globally. Bilateral free trade treaties enable the U.S. to strong-arm smaller countries into acceding to its ideological and commercial agenda. Bilateral FTAs also target sympathetic foreign governments that are eager to lock in controversial, domestic free-market reforms.

If uncontested, competitive liberalization might even succeed in unblocking the FTAA and global negotiations by overcoming opposition to U.S. objectives. The U.S. administration employs bilaterals to set legal precedents that it can then replicate and expand in succeeding negotiations. Moreover, once a government has signed a bilateral deal based with the U.S., there is little point in it opposing similar provisions and commitments in the FTAA talks or in multilateral negotiations, including the WTO Doha round.

The flip side of the intensified U.S. trade policy agenda, however, is a growing awareness and assertiveness by many citizens and some governments, reflecting deep discontent with the policy prescriptions embodied in the FTAA model. There is a strong interest among emerging industrial and developing countries in preserving policy space for alternative economic development policies. The trade agreements threats have, ironically, contributed to a new appreciation of public services and a mixed economy and a better understanding of how they contribute to economic development, increased social justice and environmental sustainability.

Citizens and progressive governments are already resisting the divide-and-conquer strategies at work in trade treaty negotiations. The need to forge international alliances against the corrosive incursions of trade treaties and to unite in strengthening public services, democratic institutions and governments' ability to regulate in the public interest is increasingly being recognized across the region.

1. The services trade agenda after Miami

1.1 Miami: resistance and reaction

When trade ministers for the Americas gathered in Miami in November 2003, the atmosphere was very different from the FTAA launch in the same city nine years earlier. The 1994 Miami Declaration set a target of no later than 2005 for completion.[1] It was to be a sweeping accord, building upon the most expansive features of the North American Free Trade Agreement (NAFTA).

> "We will strive to maximize market openness through high levels of discipline as we build upon existing agreements in the Hemisphere. We also will strive for balanced and comprehensive agreements, including among others: tariffs and non-tariff barriers affecting trade in goods and services; agriculture; subsidies; investment; intellectual property rights; government procurement; technical barriers to trade; safeguards; rules of origin; antidumping and countervailing duties; sanitary and phytosanitary standards and procedures; dispute resolution; and competition policy."[2]

By November 2003, after years of intensive negotiations involving nine separate negotiating groups,[3] governments had moved little towards that ambitious goal. The political landscape in the Americas had changed in ways that made concluding a sweeping FTAA far more difficult than its proponents had imagined in 1994. With just a year left before the final deadline, talks appeared to be at an impasse.

The political landscape in the Americas had changed in ways that made concluding a sweeping FTAA far more difficult than its proponents had imagined in 1994.

In Brazil and Venezuela new governments of the left, which had been openly sceptical of the FTAA in opposition, were elected to office. Profound economic crises in Argentina and Bolivia had thrust new populist governments into power. These governments reflected the deep public discontent with the neo-liberal policy prescriptions embodied in the FTAA. Caribbean governments had their own distinctive concerns. While anxious about their access to U.S. markets and struggling to cope with the implementation of the WTO Uruguay round agreements, they were generally unenthusiastic about taking on new FTAA obligations. All these governments, rallying behind the leadership of Brazil, were proving to be tough negotiators resisting the U.S. push for a comprehensive FTAA.

By the Miami summit, the U.S. administration itself was increasingly frustrated with the lack of progress towards its vision of a far-reaching FTAA. But notwithstanding the usual approach of the U.S. administration to dictate terms rather than negotiate, the United States Trade Representative (USTR) was genuinely hampered by political constraints, not the least of which was the razor-thin Congressional majority supporting free trade policies. The tenuousness of this support was underlined when, in the summer of 2002, the fast-track bill authorizing the administration to negotiate deals like the FTAA passed the Congress by just one vote.[4] This close vote gave protectionist U.S. business interests such as the sugar, citrus and cotton industries a stronger position to obstruct trade deals they didn't like. The USTR had little flexibility to respond to market-opening demands from other countries. In the U.S. population at large, support for free trade deals was also waning. The country was running an enormous trade deficit,[5] and many workers and communities hit hard by job losses blamed unfair trade deals.

Furthermore, the WTO ministerial meeting held in Cancun, Mexico had collapsed in disarray just two months earlier. A large bloc of developing countries had refused to be browbeaten into accepting new issues on the WTO agenda, and strong differences over agriculture, galvanized by Brazilian leadership and the emergence of the G-20, stymied the adoption of a negotiating text.[6]

The two main protagonists, Brazil and the U.S., co-chaired the Miami ministerial meeting.[7] Both governments were anxious to avoid a public collapse of the FTAA negotiations so soon after the Cancun debacle. But the compromise they arrived at did little to resolve underlying differences. It simply papered them over.

1.2 A two-tier FTAA: core and plurilateral agreements

The Miami declaration was a hollow victory for FTAA supporters, reaffirming the commitment to conclude an agreement by the January 1, 2005 deadline. The declaration sought to get around the increasingly serious

obstacles to meeting that goal by stating that "governments might assume different levels of commitment."[8] It proposed a "two-tier FTAA," with a common set of obligations covering *all negotiating areas* (including investment, services, intellectual property, government procurement, etc.) and a further set of additional, stronger obligations that countries could sign on to or not. Negotiators were to work out the specifics of this unusual and complicated treaty structure at later meetings.

At the subsequent meeting of the FTAA Trade Negotiating Committee (TNC) in Puebla, Mexico, senior negotiators failed to come up with a workable approach that was acceptable to all parties. Basic differences glossed over in Miami quickly re-emerged. Mercosur (comprised of regional trade partners Brazil, Argentina, Uruguay and Paraguay) continued to press the United States to include meaningful agricultural and industrial market access commitments in the common, first tier of obligations. The U.S. was resisting these demands as part of an overall, ambitious agreement and was strongly against making such concessions as part of the more limited, first-tier agreement.

U.S. negotiators insisted that Brazil and other FTAA-sceptical governments must be prepared to participate fully in the second-tier of obligations if they expected market access commitments from the U.S. At Miami, the U.S. and other supporters of a far-reaching FTAA, including Canada and Chile, had insisted that the declaration state explicitly that the level of benefits must be commensurate with the level of obligations. Or, in the words of a senior U.S. trade official, "you get what you pay for."[9] Without significant movement from others on U.S. priorities – a state-of-the-art investment chapter, GATS-plus services commitments, market access in government procurement, and TRIPS-plus intellectual property rules – the U.S. would give little.

By the autumn of 2004, negotiators have still not been able to make the complicated Miami formula work. The Puebla TNC session was "recessed" to allow for further instructions from capitals and, although sporadic informal consultations continue, there have been no further meetings of the TNC in 2004. Despite the supposedly positive chemistry on display in Miami, negotiations quickly became bogged down again.[10]

1.3 Bilaterals: the U.S. back-up strategy

Faced with persistent resistance to an ambitious hemispheric agreement, the U.S. administration neither recanted nor gave up. The U.S. administration reacted to the obstacles by devising new strategies to achieve the objectives of its corporate sponsors. Its focus shifted to locking up bilateral agreements wherever possible.

After the collapse of the WTO Cancun meeting, USTR Robert Zoellick testily divided the trade policy world in two, asserting that: "... the key division at Cancun was between the can-do and the won't-do. For over two years, the U.S. has pushed to open markets globally, in our hemisphere, and with sub-regions or individual countries. As WTO members ponder the future, the U.S. will not wait: we will move towards free trade with can-do countries."[11]

The U.S. administration reacted to the obstacles by devising new strategies to achieve the objectives of its corporate sponsors.

By the end of 2003, the U.S. already had bilateral or regional free trade deals with Canada, Mexico, and Chile. An agreement with five Central American countries (Nicaragua, El Salvador, Honduras, Guatemala, and Costa Rica) was near completion. At Miami, Zoellick pointedly announced that the U.S. was entering into new bilateral free trade negotiations with Panama and four Andean countries (Colombia, Peru, Ecuador, and Bolivia).

Since Miami, the Central America Free Trade Agreement (CAFTA) was concluded, although it has yet to be approved in either the U.S. or Central American nations. Talks to "dock" the Dominican Republic into the already completed Central American trade deal were completed in record time. Negotiations to include Panama in the CAFTA and on an Andean FTA with Colombia, Ecuador and Peru are underway, although strong popular unrest with neo-liberal policies in Bolivia makes it unlikely that its government will join the U.S.-Andean free trade talks anytime soon.[12]

Zoellick calls this strategy "competitive liberalization." Bilateral negotiations are used deliberately to advance U.S. goals in multilateral and regional negotiations. The bilateral agreements are all based on a NAFTA-plus template (see section 2) and in each negotiation the U.S. pushes hard to move the goalposts. The commitments in each new agreement become the new floor for all future ones – advancing U.S. aims step-by-step.

The strategy has some drawbacks for U.S. commercial interests. Brazil, for example, is, by far, the largest market in South America.[13] Strong-arming smaller, more compliant economies will not directly win concessions from more strong-willed governments. Some members of Congress and certain U.S. business interests have criticized the USTR for focussing too much energy on commercially insignificant markets.[14]

Competitive liberalization, though, is a patient strategy. In time, governments or attitudes in the larger countries may change. Until then, the U.S. strategy is intended to build pressure on the holdout countries by encircling them, bringing more and more countries into the U.S.-dominated trade treaty bloc.

This strategy has had some success. Once countries accept sweeping commitments in a bilateral deal with the U.S., they have little incentive to resist similar provisions in a hemispheric deal. In fact, governments such as Canada or Chile, having already paid the price of free trade adjustment and surrendered much of their policy space, feel it costs them nothing to impose similar restrictions on others They pursue aggressive free trade deals with an uncritical, missionary zeal. These dynamics were evident in Puebla where the U.S. and its main free trade partners – Canada, Chile, Mexico and Costa Rica – worked hand in hand at the talks.[15]

Crucially, as will be discussed, the domestic impacts, particularly on public services, are wrenching in those countries that become the targets of the U.S. bilateral strategy.

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1.4 GATS: a policy straitjacket

The Bush administration has pledged to pursue its strategy of competitive liberalization "globally, regionally and bilaterally." Ongoing negotiations to broaden and deepen the WTO's GATS are a crucial *global* leg of that strategy.

Since the failed Seattle ministerial meeting in 1999, U.S. negotiators and the corporate community doubted they could achieve further significant gains in the WTO arena on the contentious issues of intellectual property and investment. The 2001 Doha meeting – the first ministerial after the failure in Seattle and held shortly after the 9/11 attacks in the U.S. – demonstrated that a large bloc of developing countries opposed strengthening the WTO Trade-related Aspects of Intellectual Property Rights Agreement (TRIPS). These countries were particularly mobilized around the contentious issues of the relationship between the intellectually property rights and public health. Similarly, the last ministerial meeting in Cancun, Mexico in 2003 had underlined the depth of opposition from developing countries to negotiating new rules on investment at the WTO. On both these issues the U.S. and its allies recognise that they face an uphill battle at the WTO and consequently favour regional and bilateral negotiations to advance their agendas.

The situation with respect to services is different. The U.S., its Quad partners – Japan, Canada and the European Union – and their corporate lobby groups still retain high hopes of more substantial services liberalization through the WTO. In fact, the GATS was created in 1994 as a direct result of U.S. and business pressure.

The Caribbean island-state of Antigua and Barbuda recently outlined the pressures experienced by smaller

countries during the Uruguay Round negotiations that led to the GATS:

> "As of the mid-1970s United States services industries (such as insurance, financial services, travel and tourism) began to press their government for negotiations aimed at removing restrictions to international trade in services. The United States government responded positively to this request and proposed negotiations on trade in services in the context of the General Agreement on Tariffs and Trade 1947 (the "GATT 1947"). Many developing countries opposed this but the United States threatened to abandon the GATT and pursue its own trade programme through regional and bilateral agreements if trade in services was not placed on the negotiating table."[17]

The resulting services agreement was part of the WTO "single undertaking," meaning that governments had no choice but to be part of the GATS if they wanted to be members of the newly created WTO.

The extent of commitments made by countries when the GATS was signed in 1994 varies greatly.[18] Developed countries, along with a few developing countries, made extensive commitments, but many other developing countries took a more cautious approach. Tourism, distribution, banking, insurance, telecommunications and professional services are areas where most countries have made commitments. In certain other sectors, such as health, education and postal services, commitments are relatively uncommon.

Nevertheless, GATS proponents viewed these initial commitments as simply a down-payment that would be increased through future negotiations. Indeed, the GATS treaty contains a so-called "built-in" agenda that requires "successive rounds of negotiation" to broaden and deepen coverage under the agreement.[19] All service sectors are "on the table" in these ongoing rounds of negotiations.

The current round of services talks began in early 2000 and was later rolled into the broader Doha round negotiations that began in 2001. Even in the immediate aftermath of Cancun, when all other negotiating group meetings were suspended, the GATS negotiating sessions went ahead as scheduled, leading one developing country diplomat to remark that "after a nuclear war one thing survives: cockroaches, now it's the GATS."[20]

At the November 2001 launch of the Doha round, members agreed to specific deadlines for the services negotiations. Participants were to submit initial requests for specific commitments by June 30, 2002 and initial offers by March 31, 2003.

By early 2004, over 60 of the148 WTO members had made requests of *other* countries to make specific commitments in *their* services sector. These requests add up to a set of demands that most WTO members *make full commitments* in *nearly every sector*. The requests also target *all* limitations (or country-specific exceptions) protecting otherwise GATS-illegal government measures from challenge [see chart, *Examples of GATS-illegal measures*]. This high-pressured dynamic is unfolding more or less as the original GATS architects planned.

Examples of GATS-illegal measures

Examples of GATS-illegal measures
Worker adjustment programs that provide government assistance to companies set up by laid off timber workers
Government assistance targeted to economic development corporations controlled by directors chosen from and accountable to the local community
Government programs that favour enterprises owned or controlled by indigenous peoples
Restrictions on non-resident ownership of farm land
Government programs that direct research and development subsidies to locals or nationals
Technology transfer requirements for foreign investment
Requiring that skilled foreign employees provide training to locals
Requiring that publicly-funded research and development grants to foreign companies produce benefits in the local or national economy

Sources: All these examples are drawn from non-conforming measures listed as limitations to national treatment in the Canadian and US GATS schedules or from illustrations of inconsistent measures in the GATS scheduling guidelines available at "http://www.wto.org" www.wto.org (S/CSC/W/19).

What is still unknown is how far individual governments are willing to go to meet these sweeping requests. By the fall of 2004, forty-eight WTO members had tabled initial offers for the increased application of certain GATS rules to aspects of *their own* domestic service sectors.[21] The majority of these offers are from developed countries.[22] Recently, a senior U.S. trade official expressed disappointment with this situation and announced that the U.S. would aim to ensure that at least half of all WTO members – 74 – would table offers by the end of 2004.[23]

Most of the initial offers tabled to date are light on new or substantial commitments.[24] This is to be expected at this stage in the negotiation. The process of request- offer, revised request and counter-offer will continue until the very end of the Doha negotiations. At that point, the WTO plans to combine the services package with the results of the other negotiations in a final agreement to be adopted by all members.

Many developing countries have deliberately linked the pace of the services negotiations to match that of other parts of the WTO talks, in particular, agriculture. The U.S., European Union and Japan, and their corporate sectors, clearly expect substantial new GATS commitments and movement on new rules controlling services regulation as payment for any concessions on agricultural subsidies. If there is a breakthrough in agriculture, the stage is set for GATS negotiations to move rapidly.

A significant unblocking of the agricultural talks, and the overall Doha round, occurred in July, 2004. Spurred by a deal hammered out by just five governments – the United States, the European Union, Australia, Brazil and India – WTO members approved a so-called "framework agreement" that is expected to put the Doha negotiations back on track. Governments declined to set a new formal deadline to replace the unrealistic milestone of January 1, 2005. But a realistic decision point is prior to the expiry of U.S. fast-track negotiating authority in the middle of 2007.[25]

Although little-debated because of the intense spotlight on agriculture and industrial market access, the services provisions of the July 2004 framework agreement are significant. Those countries that have not yet submitted offers "must do so as soon as possible." All governments are now expected to submit revised offers by May 2005. These offers are to be "high quality... particularly in areas of export interest to developing countries." The framework agreement also requires members to "intensify the negotiations on rule-making under the GATS" which call for new GATS restrictions on subsidies (GATS Article XV), government procurement (GATS Article XIII), and domestic regulation of services (GATS Article VI.4), as well as the development of safeguards provisions (GATS Article X).[27]

Both the U.S. and the European Commission have emphasized that they put the highest priority on services. Outgoing EU trade commissioner stated that: "Services negotiations need to move from second into third gear," adding that "It will be inconceivable to conclude the [Doha Round] without a significant level of new and substantial commitments on services."[28] In the run-up to the July framework deal, global corporate groups from the United States, Europe, Australia, Canada, Chile, Hong Kong, India, Japan, and Singapore lobbied intensively in Geneva while decrying the fact that "services negotiations continue to be hostage to agriculture, though the service sector dwarfs the agriculture sector in volumes of global trade, worldwide GDP, and employment."[29]

...government negotiators must be under specific, crystal-clear and non-negotiable instructions to never agree to a services package that further undermines public services or public interest regulation.

The GATS negotiations are now set to intensify. If an overall agreement on agriculture and industrial market access can be reached, services will certainly be swept along. It is not unusual for the biggest concessions to occur in the final days, even hours, of a long negotiation.

This negotiating dynamic poses a difficult challenge for unions, NGOs, public interest groups and all but the world's largest governments, who will not even be in the room when the final deal is brokered. Once such a deal is struck it is almost impossible to change its specifics without the whole package unravelling. To avoid destructive new concessions in services, union activists, public interest groups, elected representatives and ordinary citizens must work now well before the final, fateful end game of negotiations. To withstand such intense pressure, government negotiators must be under specific, crystal-clear and non-negotiable instructions to never agree to a services package that further undermines public services or public interest regulation.

2. Key elements of the FTAA services rules and related treaties

2.1 NAFTA and GATS: models for the FTAA

When the U.S. government, its allies and corporate backers speak about the need for an "ambitious" FTAA, they have a very clear idea about what they want. The GATS and the NAFTA services and investment chapters are the "twin beacons guiding the FTAA negotiators"[30] and its proponents.

When it was signed in 1994, supporters considered the NAFTA an innovative, "state-of-the-art" services and investment agreement. The GATS, which was signed a year later, is sometimes portrayed as a weaker, even "development-friendly," treaty. But this impression is mistaken. While less intrusive in some ways, in other ways the GATS is actually more restrictive than the NAFTA. The FTAA, as first conceived, aimed to combine the most restrictive features of both treaties, leading some to describe it as "NAFTA on steroids." Though this goal has not been reached yet through the FTAA process, it persists. And the same potent NAFTA/GATS hybrid of services and investment provisions is found in the bilateral free trade agreements recently negotiated by the U.S.

It is valuable for trade union and other public interest advocates to understand that the essence of this new generation of treaties—whether bilateral, regional, or global—does not vary. If a particular negotiation or treaty falls short of the ambitions of its most avid supporters, the agenda is picked up in the next treaty or round of negotiations. The venue and the vehicle may change, but the ultimate aim of ever broader and deeper treaties remains the same.

The basic purpose of services trade treaties is to restrict government "measures" so that they do not interfere with the ability of foreign companies and individuals to profit by supplying services.

Recent international treaties—including the NAFTA, GATS and numerous bilateral investment treaties—share many features in common. It is also important to understand these common elements and how they affect public services and public interest regulation. It is to these common features that we now turn.

2.2 Scope: everything is on the table

The scope of modern services trade treaties is immense. This is because, firstly, the subject-matter of the treaties—services—includes such a wide and varied range of human activities. Secondly, the treaties do not exclude, in principle, any services or service sectors. At the outset of negotiations everything is on the table, and it is up to individual governments that want to exclude sectors or measures to win desired protection. Thirdly, the treaties cover any and all government measures affecting "trade in services", which is defined to include all the different ways (or "modes") that a service can be delivered internationally. These include: "cross-border" (e.g. international consulting services); "consumption abroad" (e.g. tourism); "commercial presence" (i.e. foreign direct investment) and "natural persons" (e.g. engineers working abroad).

Services affect virtually all aspects of our lives from birth to death.[31] Countless people deliver services that are vital to our daily lives. In turn, many of our jobs are directly tied to the provision of services to others. More broadly, how societies choose to organize the delivery of vital services, for example, to make them affordable and universally accessible, is a fundamental aspect of how they govern themselves.

Since the mid-1990s, services have been subject to international trade treaty rules. This was a direct result of global business pressure for binding rules on traded services. It should come as no surprise that multinational corporations, as they expand and extend their global reach, have a strong interest in reducing the cost of complying with the regulations they face in different countries. They also benefit from reducing competition from domestic, sometimes publicly-owned, firms and from the privatization of public enterprise that allows them to increase their market share. Achieving global rules to reduce or eliminate government policies that constrain their international commercial activities is a key priority of many global services corporations.

The basic purpose of services trade treaties is to restrict government "measures" so that they do not interfere with the ability of foreign companies and individuals to profit by supplying services. Basically, a "measure" is *any* action taken by government, including laws, regulations, procedures, requirements, policies, administrative

decisions, administrative actions, and even unwritten practices.[32] The treaties apply to measures taken by all levels of government, including central, regional, and local governments. They also cover measures taken by any non-governmental bodies exercising authority delegated to them by government.[33]

These trade treaty rules only restrict governmental actions. With few exceptions, actions taken by companies or private individuals are not restricted. In other words, the treaties create legally enforceable commercial *rights* for foreign companies, without creating any corresponding social *responsibilities*.

2.3 The myth of flexibility

While, in principle, "no service sector is excluded *a priori*,"[34] governments usually have an opportunity to negotiate exclusions for sensitive sectors or important policy measures when the treaty is signed. Depending on the treaty model, there are different ways that this can be done.

In a "top-down" treaty (such as the NAFTA), all sectors and measures are assumed to be covered and governments must negotiate "reservations" (country-specific exceptions) to shield important measures from aspects of the treaty. In a "bottom-up" treaty (the GATS is partly bottom-up), only those service sectors (or sub-sectors) that governments explicitly agree to include are covered.

The difference between a bottom-up and top-down treaties is significant, but its importance can be exaggerated. Even in a bottom-up treaty, once a government agrees to cover a sector or sub-sector, then all inconsistent measures must be individually protected or eliminated. In trade policy jargon, they must be "listed or lost."

While a strongly worded reservation can help protect an important policy or sector from challenge, from a democratic perspective this process is deeply flawed.

- Governments have only one chance, when the treaty is first negotiated, to make reservations. None can be added later.
- All reservations must be negotiated with other governments. In an unequal power relationship, this can be difficult for the weaker party.
- The listing of reservations focuses attention on non-conforming measures, which targets them for elimination in future negotiations.
- Protective country-specific reservations can be eliminated unilaterally by a single national government. Future governments cannot later reinstate them. Once a reservation is eliminated, it is gone forever.

Indeed, one of the main uses of reservations is political: to deflect political opposition just enough to get the treaty approved. Once the treaty is ratified, the pressure to then eliminate these protections begins.

The defects of reservations and the disturbing results of unequal power bargaining can easily be seen by reviewing Guatemala's draft list of services and investment reservations in the just-completed CAFTA. Guatemala is currently governed by a very right-wing government hostile to public services and state intervention. As a result, its reservations are few and protect little (see sidebar, *Guatemala's CAFTA reservations*). Either the Guatemalan government didn't care about preserving democratic policy flexibility, the country's negotiators were taken advantage of by hard-nosed U.S. negotiators – or, quite likely, both.

2.4 Rules on "non-discrimination"

All trade treaties include *non-discrimination* rules to ensure that governments treat foreign services and suppliers no less favourably than local ones. There are two main types of non-discrimination rules.

The *most-favoured-nation (MFN) treatment rule* requires that governments "immediately and unconditionally" extend the best treatment given to *any* foreign services or services suppliers to all like foreign services and service suppliers. In other words, if government actions favour services or companies from one foreign country, then they must extend that favourable treatment to services or companies from all foreign countries. In both the NAFTA and GATS, MFN is a top-down rule that applies 'across the board'.[35]

The *national treatment rule* requires that governments provide *foreign* services and service providers the best treatment given to like *domestic* services and service suppliers. National treatment is a tougher rule than generally realized. It means more than just that foreign suppliers must be treated the same as domestic ones. It requires that governments ensure that foreigners have "equality of competitive opportunity" with domestic suppliers.[36] In the NAFTA model, national treatment is a top-down rule (it applies to all sectors except those governments negotiate exclusions for), while in the GATS it is bottom-up (applying only to those service sectors that governments agree to include).

2.5 Restrictions on performance requirements

The treaties ban certain *performance requirements*, for example, conditions set by governments that oblige foreign investors to purchase locally, transfer technology, take local partners or train local workers.

Guatemala's CAFTA reservations

Two different types of country-specific exceptions, called Annex I and II reservations, are allowed under the CAFTA. Annex I reservations exempt specific, existing measures. They are bound, meaning that the measures can only be amended to make them more CAFTA-consistent. If an exempted measure is amended or eliminated it cannot later be restored. This means that if a Guatemalan government opened the country's forestry sector to non-Guatemalans, this policy change would then be permanent despite the reservation for forestry (see below). In other words, the protection afforded by Annex I reservations is designed to disappear over time.

Annex II reservations are unbound. This means that they protect not only existing non-conforming measures, but allow governments to take new measures that would otherwise be CAFTA-inconsistent. An Annex II reservation therefore provides stronger protection because it allows for future policy changes in an exempted sector. A measure, however, must conform strictly to the terms of the reservation, which insulate it from challenge under only certain specific rules of the CAFTA. For example, no reservations are possible against the expropriation and compensation provisions of the investment chapter. Annex II reservations are also sometimes vaguely worded, making it difficult to know in advance whether policy measures are genuinely safe from challenge.

The first thing that strikes one about Guatemala's reservations is how few there are and, more importantly, how little they protect.

Guatemala has listed thirteen Annex I reservations and three Annex II reservations.

Under Annex I:

- There are four reservations pertaining to various laws that restrict non-resident ownership of land and real estate. A single, broadly worded, preferably unbound, reservation pertaining to non-resident ownership of all land and estate would have provided far more certainty and flexibility.
- Another reservation allows the Guatemalan authorities to require that a foreign enterprise "allocate an assigned amount of capital for its operations in Guatemala." This "shall not be used to prevent a foreign enterprise from establishing in the country."
- In the area of forestry, the reservation states that "only Guatemalan nationals and enterprises organized under Guatemalan law may exploit and renew forestry resources." Because this reservation only protects against national treatment provisions, performance requirements are prohibited in the forestry sector despite this reservation.
- Foreigners wanting to provide professional services that require a university degree must do so through a contract or other relationship with a Guatemalan enterprise. Similar reservations pertain to notaries public and tour guides.
- Foreign performing artists require prior consent from the Guatemalan authorities before they can perform in the country. In all other respects, the cultural sector (films, publishing, magazines, newspapers, etc.) is subject to the full force of the agreement.
- Three other reservations reserve aspects of specialty air services and air transportation to Guatemalan nationals and enterprises.

Under Annex II:

- There are two reservations that simply mirror identical US reservations. The first pertains strictly to the most-favoured-nation rule, in aviation, fisheries, and maritime matters. The second reserves the right to adopt or maintain any measure related to maritime transportation.
- A more significant reservation gives Guatemala the right to adopt or maintain any measure that grants rights or preferences to socially- or economically-disadvantaged minorities and indigenous peoples. This more strongly-worded reservation, though, has a serious flaw. Since it applies only to measures taken by the central government, it isn't clear whether aboriginal self-governments would benefit from the protection of the reservation.
- Remarkably, there are no reservations for health, education, pubic utilities, child care, law enforcement or other social services. All other parties to the CAFTA have some such unbound reservation, and even though these have serious shortcomings, it is astonishing that Guatemala did not include one.
- Guatemala is currently governed by a very right-wing government hostile to public services and state intervention. Either the Guatemalan government didn't care about preserving democratic policy flexibility or the country's negotiators were taken advantage of by the hard-nosed U.S. team. As a result, its reservations are paltry and offer very little protection.

Government policies requiring foreign investors to transfer state-of-the art technology, or train locals to use it, can accelerate the uptake of such technology in developing countries. Despite these benefits, the latest generation of trade treaties now prohibits their use, in both developing and developed countries.

Historically, various kinds of performance requirements were used by the now industrialised countries to promote their economic development. Government policies requiring foreign investors to transfer state-of-the art technology, or train locals to use it, can accelerate the uptake of such technology in developing countries. Despite these benefits, the latest generation of trade treaties now prohibits their use, in both developing and developed countries.

Both the GATS and the NAFTA prohibit performance requirements. While the GATS does not explicitly outlaw them, its national treatment principle implicitly prevents governments from applying local content, sourcing and other performance requirements to foreign service investors in covered sectors. The NAFTA model goes considerably further.[37] It prohibits performance requirements on investments of any nationality, including those from non-NAFTA countries and even on domestic investors. These tough NAFTA rules on performance requirements are the ones used in recent U.S. bilateral free trade deals.

2.6 Rules on "expropriation" and compensation

Modern investment agreements include controversial rules protecting foreign investors and investments, including services companies, against "expropriation." The NAFTA (Article 1110), for example, provides that governments can expropriate foreign-owned investments only for a public purpose and only if they provide compensation according to NAFTA rules. The NAFTA's investment protection provisions can be invoked directly by investors through investor-to-state dispute settlement, and reservations cannot protect against such expropriation claims.

Whether a particular measure is an expropriation, and the amount of compensation due to investors, are matters of interpretation to be determined by a NAFTA arbitral panel. Investors have successfully argued that non-discriminatory regulations that significantly diminish the value of their investments amount to expropriation under the treaty.[38] This sharply contrasts with national laws in most of the hemisphere (including the United States), which generally would not view non-discriminatory regulatory measures—for example, legitimate land rezoning or environmental protection regulations—to be compensable expropriation.[39]

This expropriation provision (which is contained in the NAFTA but not the GATS) seriously threatens efforts to reform or renew public services. The "extremely broad definition of expropriation"[40] opens the door to investor claims that measures to expand public services or to restrict private for-profit provision of health care, education or other social services amount to expropriation and that compensation must be paid to foreign investors that are negatively affected. Once these rules are in place, expanding public services into areas where substantial foreign investment interests are already established will almost certainly trigger investor-state challenges and compensation claims.

2.7 Market access rules

Another highly intrusive feature of the new services treaties is their so-called *market access* rules. These rules, drawn from the GATS Article XVI, prohibit governments from restricting: the number of service suppliers or operations; the value of service transactions; the number of persons that may be employed in a sector; and, significantly, the types of legal entities through which suppliers may supply a service. Governments "shall not maintain or adopt" any of these quantitative restrictions "either on the basis of a regional subdivision or on the basis of its entire territory."[41]

This article is particularly troubling because it deliberately prohibits such measures, even if they are non-discriminatory, applying to foreign and domestic services and suppliers equally.[42] Examples of beneficial public policy measures that could run afoul of these rules include:

- Environmental protections restricting the number of tourist operators active in environmentally sensitive areas, limiting the number of resource extraction licenses, or even anti-pollution provisions restricting new sources of pollution in degraded air- or water-sheds are all "limitations on the number of service suppliers."[43]
- Regulations which require courier or transportation companies to provide a minimum level of service in rural areas as a condition of access to lucrative urban markets.

- Measures limiting the growth of medical services or clinics in rich regions until poorer regions are better served;
- Policies which allow only non-profit organizations or co-operatives to provide a specific service, such as child care or other social services.

Such public policies certainly restrict the market access of commercial providers, whether domestic or foreign. But they are completely unrelated to trade policy. They have never before been subject to trade treaty restrictions, nor should they be.

2.8 Monopolies and state enterprises

Importantly, these same market access rules also prohibit monopolies and "exclusive service suppliers." While the treaties usually also recognise governments' right to designate new monopolies, this right is hollow. Any government wishing to designate a new monopoly in a previously covered sector must provide compensation to affected foreign service providers and investors. In the NAFTA model this must be monetary compensation (the amount will be determined by an investor-state tribunal, not domestic courts or legislatures). Under the GATS, a government must provide trade-related compensation (new trade treaty commitments) to other governments whose suppliers are affected, or face retaliatory trade sanctions.

While many public monopolies and regulated private monopolies in the Americas have been privatized over the past two decades, in many countries such monopolies remain the chosen provider for basic services. Postal services, the distribution and sale of alcoholic beverages, electrical generation and transmission, rail transportation, health insurance, water distribution, and waste disposal are just some of the more widespread examples. Exclusive supplier arrangements are commonplace in post-secondary education, health care and other social services. The trade treaty rules prohibiting them heavily infringe upon sovereignty and democratic choice.

2.9 Restrictions on "domestic regulation"

Significant negotiations are underway in the GATS to establish new restrictions on *non-discriminatory domestic regulation*. At issue is the development of "disciplines" on member country's domestic regulation – explicitly non-discriminatory regulations that treat local and foreign services and service providers even-handedly. The subject matter of these proposed restrictions is very broad, covering measures relating to qualification requirements and procedures, technical standards and licensing procedures— a wide swath of vital government regulatory measures.[44]

The proposed restrictions are being designed to include transparency requirements and some form of "*necessity test*," that is, that regulations must not be more trade restrictive than necessary and that they must be necessary to achieve a treaty-sanctioned legitimate objective. These rules, if agreed to, could affect important environmental measures such as licensing (e.g. waste disposal permits) and standards (in everything from water quality and education to pipeline safety standards). Other measures, in many other services sectors, could also be affected.

The proposed GATS restrictions on domestic regulation that are now being negotiated in Geneva are deservedly controversial. The application of trade treaty restrictions to services regulation has also provoked controversy within the United States government from domestic regulators such as the Environmental Protection Agency, as well as from consumer, environmental and other public interest groups. The U.S. administration appears to be awaiting the outcome of the Geneva negotiations before deciding whether to embrace them in the FTAA and bilateral accords. In all the recent U.S. bilateral FTAs, there is non-binding, "best endeavours" language on domestic regulation. But, more ominously, there is also a place-holder commitment that the results of the WTO negotiations on domestic regulation, once agreed to, will automatically be incorporated into the FTAs.

2.10 Dispute settlement: government-to-government and investor-to-state

NAFTA and the GATS both include procedures for enforcing their rules through government-to-government (which is also referred to as state-to-state) dispute settlement procedures. When governments are not able to resolve trade disputes through consultations, they are heard by an appointed trade panel. Trade panels, which meet in private, issue legally-enforceable rulings which can include a requirement to withdraw a non-conforming public policy measure or face trade penalties. Governments which refuse to conform to a trade panel ruling can try to negotiate compensation in the form of trade concessions to the complainant government. If they are unable or refuse to do this, the complainant government can retaliate with trade sanctions against exports of the other country, which are usually chosen to have as much economic and political impact as possible.

In addition to state-to-state dispute settlement, the NAFTA investment chapter, most bilateral investment

treaties, and bilateral free trade deals include a highly controversial investor-to-state dispute settlement procedure. Under this process, investors, including service investors, can bring a challenge directly, even without the approval of their home government. While these arbitral tribunals cannot directly overturn domestic laws they can – and have – awarded substantial compensation for breaches of NAFTA's investment rules (see *Trade vs. public interest: NAFTA investor-state Disputes*).

Trade vs. the public interest: NAFTA investor-state disputes

Ethyl: In settlement of a NAFTA challenge by Ethyl corporation, the Canadian government repealed a ban on the gasoline additive MMT. It also paid the company US $13 million, and issued a statement saying that MMT has no known health effects even though manganese – a major ingredient of the additive – is a known carcinogen.

S.D. Meyers: Canada lost a dispute initiated by a hazardous waste disposal company, which claimed US $30 million for loses it allegedly incurred as a result of a Canadian ban on exports of PCBs in the mid 1990s – even though allowing PCB exports would have brought Canada into conflict with its commitments in the Basel Convention on the Transboundry Movement of Hazardous Waste and with U.S. legislation banning PCB imports.

Metaclad: Mexico was ordered to pay US $16 million in damages to a US-based hazardous waste disposal company because Guadalcazar, a small municipality in the state of San Luis Potosi, denied the company a permit to establish a hazardous waste site on land already seriously contaminated by toxic wastes. The Mexican government has resorted to Canadian courts in an effort to have this decision set aside.

Methanex: A Canadian-based company is suing the US government for US $970 million in losses due to a California state order to phase out the use of MTBE, a methanol-based gasoline additive which has contaminated groundwater from leaks in underground storage tanks.

UPS: The US-based courier is seeking $230 million in damages from the Canadian government, claiming that Canada's national postal system is being used to support its courier business and is preventing UPS from competing for more of Canada's courier business.

3. The FTAA and public services

3.1 Introduction: public service principles are at odds with neo-liberal treaties

Public services are built upon the non-market values of equity, fairness and solidarity. They are rooted in concepts of citizenship, democratic control and accountability. Public services aim to be universally available, on the basis of need, rather than the ability to pay. Essential public services are recognized as fundamental human rights.

While public services may never fully achieve the lofty ideals citizens set for them, their guiding principles set them apart from commercial services. Indeed, the values underlying public services are at odds with commercial imperatives that treat basic services such as education, water or health care as commodities to be bought and sold.

Modern, successful public services were built up in most countries over many decades of political struggle and social change.[45] They commonly include: social services, such as health care, education and social security; utility and infrastructure services, such as water, roads and energy; and security services such as policing, the justice system, and the military. But public services are not fixed or static; they "vary between countries and over time."[46] Furthermore, societal decisions about the nature and extent of public services are inherently political and a vital expression of democratic decision-making.[47]

By the middle of the twentieth century, the idea that governments must play a central role in providing basic and social services was widely accepted as a hallmark of a civilised society. But beginning in the early 1980s, this consensus about public services, and the role of government generally, came under sustained attack.

Neo-liberalism – the revival of the nineteenth-century idea that the best government is the smallest government – took hold among corporate and governing elites. This began in the English-speaking developed countries and soon spread to the rest of the world.[48] The neo-liberal policy prescriptions of deregulation, tax reduction, privatization and free trade put strong pressures on public services and began to erode the gains made over many decades. This was especially true in the developing world, where the International Monetary Fund (IMF), World Bank and regional banks such as the Inter American Development Bank (IADB) imposed these policies on governments as conditions for debt refinancing and financial support.

International trade treaties such as the NAFTA, the WTO Uruguay Round agreements, bilateral investment treaties and the FTAA are a key part of this neo-liberal offensive. As discussed in Section Two, the rules of the latest generation of these treaties no longer deal primarily with trade or just with ensuring that governments treat foreigners fairly. Rather, they contain many more intrusive obligations. These are intended to shrink the role of government, to restructure or bypass countries' legal and regulatory systems and to privilege commercial interests – particularly foreign corporate interests. Through the use of case studies, this section of the paper discusses the impacts of these intrusive features on public services and public interest regulation in the Americas.

...the rules of the latest generation of these treaties no longer deal primarily with trade or just with ensuring that governments treat foreigners fairly. Rather, they contain many more intrusive obligations.

3.2 The flawed governmental services exemption—no protection for most public services

The U.S. Trade Representative's summary of its FTAA services negotiating position insists that "in areas related to social services – including education and health-care services – the United States is not seeking nor would we agree to use the FTAA negotiations to promote privatization."[49] It is useful to begin the discussion of FTAA impacts on public services by scrutinizing this misleading statement.

The fig leaf that the USTR hides behind when it makes this claim is the so-called "governmental authority" exclusion: "The U.S. excludes services supplied in the exercise of governmental authority – which we define as any service which is supplied neither on a commercial basis, nor in competition with one or more services suppliers – from the services chapter of the FTAA Agreement."

The reason this "exclusion" is of little or no practical value is straightforward. Public services systems are mixed systems, and so invariably have some commercial or competitive elements. Pure public services – those that are completely publicly-financed and delivered free-of-charge by governments exclusively through public institutions – are very rare. Even the most highly-developed public service systems are routinely financed through a continually shifting mix of private and public funding and delivered through a combination of public, private not-for-profit and private for-profit delivery.

In most real-world cases, the governmental authority exclusion would not protect public services from FTAA obligations. As the USTR document correctly states — if *either* a commercial *or* competitive element is present, then the exclusion does not apply. The main role of this fudged exemption is to provide political cover so that trade officials and politicians can deny that the FTAA will harm public services.

In fact, FTAA services and investment rules are designed to restrict the role of public services.

In fact, FTAA services and investment rules are designed to restrict the role of public services.

3.3 The FTAA: supporting privatization, attacking state monopolies and driving market reforms

In March 2003, appearing before a Congressional trade committee, USTR Zoellick more candidly explained how trade treaties advance neo-liberal ideology and U.S commercial interests,

> "Trade agreements bolster property rights by... supporting privatization.... Free trade agreements attack ... state monopolies and oligarchies.... Trade agreements drive market reforms in sectors ranging from e-commerce to farming."[50]

These three assertions need to be explored further in order to understand the neo-liberal vision and corporate interests driving U.S. trade strategy, and the FTAA specifically. The next three sub-sections will explore these themes – "supporting privatization," "attacking state monopolies," and "driving market reforms" – in relation to three Latin American case studies: Argentina's failed privatizations and ensuing investor-state disputes, the attack on Costa Rica's public insurance programs though the CAFTA negotiations, and the deregulation of Mexico's telecommunications sector through the GATS.

3.3.1 "Supporting privatization" in Argentina

Privatization occurs when public assets or enterprises are sold to private interests or when services that were once publicly-delivered are provided instead by commercial interests. Regrettably, Zoellick's assertion that trade treaties support privatization is correct. The clear intent

of the FTAA and other neo-liberal treaties is to pry open public services that have not yet been privatized and to consolidate privatization whenever it occurs.

Recent events in Argentina graphically reveal how this dynamic can work in practice. Globally, many privatization initiatives have failed.[51] But in few countries has privatization gone further or failed more spectacularly than in Argentina. The country's experience demonstrates serious problems with privatization, including the risks to society when intrusive investment treaty obligations attempt to lock in radical free-market social experiments.

The IMF, the World Bank and the IADB have, as noted earlier, aggressively enforced privatization policies within Latin America since the mid-1980s. Between 1986 and 1999 in this region "there were 396 sales and transfers of public assets to the private sector, representing more than half the value of all privatizations in the developing world."[52] This restructuring turned the region into a laboratory for private-market experiments in basic services.

In Argentina, public sector workers were the first casualties of this privatization wave. In 1989 the number of employees in the public telephone, postal, airline, sanitation, electricity, railway and gas distribution services was just under 250,000. After a decade of privatization, just 75,000 persons worked in those enterprises.[53]

The pain soon spread to the general population. Privatizations failed to improve basic services and these services became more costly for consumers. As one analysis of the situation noted: "After privatization, the new foreign owners of utilities were allowed to charge tariffs that rose in line with the rate of inflation in the United States even though Argentina was actually experiencing disinflation.[54] As a result, the report continues, Argentines face the "second highest telephone rates in the world for international calls" and "after the French company Vivendi bought up a large part of the water distribution system, it promptly raised prices in some provinces by 400%." Meanwhile, "privatized bus companies raised their fares by 40% to 100%, penalizing the poor."[55]

In the aftermath of Argentina's 2001 financial crisis, a new government tabled legislation in 2002 calling for foreign-owned telephone, gas and electricity utilities to accept a freeze on their tariffs. Foreign owners fought back by postponing promised services improvements and lobbying their home governments to put pressure on Argentina to reverse the measure.[56] Privatized firms played hardball. Aguas Argentinas, the consortium that runs the privatized water system of Buenos Aires, stopped the expansion of water services and only made emergency repairs. An electric utility warned of blackouts if it didn't get its tariff increase. Transport companies cut suburban train service.[57] As usual, it was the public that bore the brunt of these threatening corporate tactics.

Despite the supposed potential for corporate profits, many privatized service providers found themselves facing serious financial problems. In early 2002, after several years of troubled operations plagued by financial and water-quality problems, Aguas Argentinas defaulted on its debt (see sidebar on page 16, *Aquas Argentinas*). Another conglomerate, Exxel Group, used aggressive business strategies involving junk bonds, offshore tax havens and leveraged buyouts to acquire interests in Argentina's public and private services. These included health insurance plans, medical social security groups, private mail services, energy distribution and other services traditionally provided by governments or the non-profit sector. By 1998, it had quickly grown to become one of Argentina's top ten companies; but by 2003 the value of its assets had shrunk nine-fold and most of its constituent companies were bankrupt.[58] Similarly, when the Enron bubble burst and the U.S. parent company imploded amid revelations of fraud and scandal, the energy concessions run by its Argentine subsidiary were left in limbo.

Globally, many privatization initiatives have failed. But in few countries has privatization gone further or failed more spectacularly than in Argentina.

Because of such experiences and widespread corruption, privatization has become deeply unpopular throughout Latin America. The Latinobarometro poll, published annually by the conservative Economist magazine, shows that Latin American public opinion has swung strongly against the policy of privatization. Not surprisingly, this shift has been strongest in Argentina where, by 2002, over 70 percent of the population disagreed or strongly disagreed with the statement that "The privatization of state companies has been beneficial."[59]

It is at this time, when disillusionment with neo-liberal reform sets in and the desire for change is greatest, that some of the most potent trade treaty provisions are designed to kick in. As discussed earlier in this paper, investment and services treaties contain clauses that protect foreign investors against alleged expropriation and ensure so-called "minimum standards of treatment" under international law. When privatization deals go

sour, foreign investors can take such claims directly to binding international arbitration, through the notoriously undemocratic investor-to-state dispute settlement process.

These cases are decided by commercial arbitration panels that are empowered to punish national governments for breaches of the relevant treaty by imposing fines. Unfortunately, decisions are based on investment treaty rules, not domestic law. The arbitral panels meet in secret, usually keeping both evidence and arguments confidential. Even the final decision can be released only if both parties agree.

These tribunals, which operate entirely outside the public interest protections of domestic law, courts and constitution, are now swinging into action against Argentina. During its embrace of neo-liberal orthodoxy, Argentina signed 38 bilateral investment treaties (BITs), giving it more BITs than any other Latin American country. Its BIT partners include most of the world's largest economies: the United States, Canada, France, Germany, Spain and the United Kingdom. In the aftermath of Argentina's economic crisis, investors turned to the investor-state dispute settlement mechanism in these treaties with vengeance.

Aguas Argentinas

In May 1993, Aguas Argentinas was formed when the Suez group from France and Aguas de Barcelona of Spain took over responsibility for water and sewage for 10 million people in metropolitan Buenos Aires. Aguas Argentinas purchased the water concession for a modest price, investing only $30 million U.S. of its own money. This occurred shortly after local governments had sunk $650 million U.S., borrowed from the World Bank and the IADB, to fix up the city's water system. This loan was used to upgrade infrastructure and install computer systems so that prospective buyers could more easily track costs and bill their customers.

Aguas immediately fired about half the company's employees and began agitating for higher water rates. Over the next decade the company hiked rates twice but did not deliver long promised major improvements to the system. In 2003, the Argentine regulatory authority slapped Aguas Argentinas with a 55 million peso fine for unfulfilled commitments. In a separate action, the municipalities of Berazategui, Quilmes and Berisso initiated court action seeking compensation of $300 million U.S. from Aguas Argentinas because only a small fraction of sewage collected by the company is treated and the rest is discharged untreated, polluting the river shared by the communities. In the suburb of Quilmes, water was available for only a few hours a day and even this water is often contaminated.

In April 2002, the company defaulted on its corporate debt. In late 2003, the company was hit with further fines for water failures and non-fulfillment of contract obligations. Fed up with this abysmal performance, the Argentine government met with the company in February 2004 to press for either new commitments to fulfil outstanding obligations or face cancellation of the contract.

Adding insult to injury, on July 17, 2003 the foreign investors in Aguas Argentinas filed an investor-state case against Argentina for alleged breaches of its bilateral investment treaties.

This example of the failure of privatization to deliver as promised is an instructive, if expensive, lesson. By the end of the 1990s, 460 million people around the world were dependent on private water corporations for their daily water needs—up from 51 million in 1990. The privatization policies pushed by the World Bank, the Inter-American Development Bank and the International Monetary Fund were designed to benefit major international water companies such as Suez and Vivendi. Yet they have not been able to consistently deliver clean water at affordable prices to meet peoples' needs in Latin America or elsewhere.

Despite this track record of failure, a key sectoral demand by the Coalition of Services Industries (CSI) under Environmental Services in the FTAA negotiations is still to "broaden and deepen the commitments in sewage services, refuse disposal services, sanitation and similar services."

Sources*:* Special to CorpWatch by Sebastien Hacher, February 26, 2004; "IDB Plan to Sell the Public Sector: Cure or the Ill?" Beatrice Edwards, NACLA Report on the Americas, January-February 2003; Coalition of Services Industries, submission to the Services and Investment Workshops, VIII Business Forum, Miami, Florida, November 17-21, 2003.

Foreign investors have now launched over thirty investor-state cases against the Argentine national government (see table on page 18: *Pending Bilateral Investment Treaty cases against Argentina*). Many of these cases relate to contracts and concessions for privatized services. Among the foreign investors suing Argentina are Enron and the foreign partners in Aguas Argentinas. Despite their corporate shenanigans, these companies now blame the Argentine government for their problems and expect Argentina's already hard-pressed taxpayers to provide compensation. If the panels rule in their favour, investors can enforce the fine in almost any developed country where there are Argentine government assets available for seizure.[60]

Argentina's citizens suffered – and continue to suffer – through the failings of privatized services. Yet under the bizarre and biased logic of investment treaties, the Argentine public is now expected to compensate foreign investors for their losses. This double jeopardy should serve as a warning to other countries in the hemisphere: do not become entangled in investment treaty rules or the even stronger provisions of the proposed FTAA.

In fact, if Argentina were part of an FTAA instead of just under the BITs, the country's legal and economic position would be even more precarious. In addition to aggrieved foreign investors and their lawyers, it would directly face the wrath of the United States, which could target sanctions against Argentina's key exports until it complied with the FTAA investment rulings. Such retaliatory sanctions could be aimed, to exert maximum pressure, at any sector, threatening export earnings that are desperately needed if the country is to work its way out of a deep economic crisis.

3.3.2 "Attacking state monopolies" in Costa Rica

USTR Zoellick's candour on the role of trade treaties such as the FTAA in attacking state monopolies is blunt. Less frank advocates of services and investment agreements frequently stress the flexibility these agreements supposedly give to governments to choose which sectors to commit and which sensitive policies to protect. They deflect charges that the agreements are undemocratic as baseless by asserting that governments voluntarily agree to the deals. This self-serving rationale ignores power politics and bargaining pressure – an arena in which Ambassador Zoellick is obviously very comfortable.

Unequal power bargaining

The fate of Costa Rica's highly successful public insurance programs in the recently negotiated U.S.-CAFTA is a disturbing example of how strong-arm tactics and high- pressure bargaining have been used to attack very successful public monopolies.

Throughout the CAFTA negotiations, the Costa Rican government, up to the President himself, repeatedly promised to exclude Costa Rica's public services, including its public insurance monopoly, the National Insurance Institute (Instituto Nacional de Seguros) from the treaty.[61]

Late on December 15, 2003, just 48 hours before the CAFTA talks' final deadline, U.S. negotiators tabled, for the first time, a proposal that Costa Rica eliminate its public insurance monopoly and open the sector to U.S. insurance companies. Stunned by this eleventh-hour demand, Costa Rican negotiators walked out of the talks.[62] Later that week, the U.S. and the other four Central American countries involved in the talks announced that the CAFTA would proceed without Costa Rica. USTR Zoellick told reporters he believed that Costa Rica would eventually join the pact, but that it had to decide quickly because the U.S. "won't wait."

Within two weeks, chastened Costa Rican negotiators returned to the bargaining table. On January 25, 2004 the U.S. and Costa Rica announced a deal that included the full opening of Costa Rica's insurance sector to U.S. private insurers. In return, the U.S. provided Costa Rica with minimal, face-saving improvements in agricultural market access.

Dismantling Costa Rica's public insurance system

Costa Rica's National Insurance Institute provides the full range of insurance needs: including auto, home, workplace, crop, life, property, occupational risk, travel, and natural disasters. This public monopoly enables the system to pool risk and cross-subsidise between different sectors, providing Costa Ricans with some of the most affordable insurance rates in the region. But, as a direct result of U.S. arm-twisting, this system will now be dismantled.

Under the terms of the CAFTA financial services deal, Costa Rica is obliged to phase out its public insurance monopoly within seven years:

- U.S. insurance companies will be allowed to sell "any and all lines of insurance" to Costa Ricans on a cross-border basis as soon as the treaty comes into force, although Costa Rica will not have to let U.S. companies do business or solicit within its territory until July 1, 2007.
- By no later than January 1, 2008, U.S. companies will be able to sell all insurance except compulsory auto insurance and occupational risk insurance through offices established within Costa Rica.
- By no later than January 1, 2011, Costa Rica must fully open its insurance market, including compulsory auto and occupational risk insurance, to U.S. firms.

Pending Bilateral Investment Treaty cases against Argentina — November 2004

Case Subject Matter	Company Bringing Case against Argentina Republic	Date Registered	Status
Water & sewer services concession agreement	Compañía de Aguas del Aconquija S.A. & Vivendi Universal	Feb. 19, 1997	Decision Oct 5/01– Request for resubmission to new panel Oct/03
Water & sewer services concession agreement	Azurix Corp.	Oct. 23, 2001	Tribunal appointed, case pending
Water & sewer services concession agreement	Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. & Interagua Servicios Integrales de Agua, S.A.	July 17, 2003	Tribunal appointed, case pending
Water & sewer services concession agreement	Aguas Cordobesas, S.A., Suez, & Sociedad General de Aguas de Barcelona, S.A.	July 17, 2003	Tribunal appointed, case pending
Water & sewer services concession agreement	Aguas Argentinas, S.A., Suez, Sociedad General de Aguas, de Barcelona S.A. & Vivendi Universal, S.A.	July 17, 2003	Tribunal appointed, case pending
Water & sewer services concession agreement	Azurix Corp	Dec. 8, 2003	Pending
Water & sewer services concession agreement	SAUR International	Jan. 27, 2004	Pending
Natural gas transportation	Enron Corporation & Ponderosa Assets, L.P.	April 11, 2001	Tribunal appointed, case pending
Gas transmission enterprise	CMS Gas Transmission Company	Aug. 24, 2001	Tribunal appointed, case pending
Gas distribution enterprise	LG&E Energy Corp., LG&E Capital Corp. & LG&E International Inc.	Jan. 31, 2002	Tribunal appointed, case pending
Gas supply & distribution enterprise	Sempra Energy International	Dec. 6, 2002	Tribunal appointed, case pending
Gas supply & distribution enterprise	Camuzzi International S.A.	Feb. 27, 2003	Tribunal appointed, case pending
Gas supply & distribution enterprise	Gas Natural SDG, S.A.	May 29, 2003	Tribunal appointed, case pending
Gas production & distribution / power generation project	Total S.A.	Jan. 22, 2004	Pending
Electricity generation & distribution	AES Corporation	Dec. 19, 2002	Tribunal appointed, case pending
Electricity distribution & transportation enterprise	Camuzzi International S.A.	April 23, 2003	Tribunal appointed, case pending
Hydrocarbon & electricity concessions	Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) S.A. & Pioneer Natural Resources (Tierra del Fuego) S.A.	June 5, 2003	Pending
Hydrocarbon & electricity concessions	Pan American Energy LLC & BP Argentina Exploration Company	June 6, 2003	Tribunal appointed, case pending
Hydrocarbon & electricity concessions	El Paso Energy International Company	June 12, 2003	Tribunal appointed, case pending
Electricity distribution enterprise	Enersis, S.A. & others	July 22, 2003	Tribunal appointed, case pending
Electricity distribution enterprise	Electricidad Argentina S.A. & EDF International S.A.	Aug. 12, 2003	Pending
Electricity distribution enterprise	EDF International S.A., SAUR International S.A. . & Léon Participaciones Argentinas S.A	Aug. 12, 2003	Pending
Hydrocarbon concession & electricity generation project	BP America Production Company & others	Feb. 27, 2004	Pending
Informatic services contract	Siemens A.G.	July 17, 2002	Tribunal appointed, case pending
Motor vehicle enterprise	Metalpar S.A. & Buen Aire S.A.	April 7, 2003	Tribunal appointed, case pending
Insurance company	Continental Casualty Company	May 22, 2003	Tribunal appointed, case pending
Information storage & management project	Unisys Corporation	Oct. 15, 2003	Pending
Leasing enterprise	CIT Group Inc.	Feb. 27, 2004	Pending
Gas and oil production	Wintershall Aktiengesellschaft	July 15, 2004	Pending
Gas and oil production	Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A	Aug. 5, 2004	Pending
Telecommunications concession	France Telecom SA	Aug. 26,2004	Pending
Financial reinsurance services	RGA Reinsurance Company	Nov. 11, 2004	Pending

Notes:

1. Between 1972 and 2003, 84 cases were concluded through the International Centre for Settlement of Investment Disputes (ICSID) Tribunal of the World Bank. Not all cases went to a final panel decision, a number of cases were withdrawn or settled before a decision by a panel was rendered.
2. As of August 2004, 78 cases have been filed and are pending decisions by Tribunals.
3. Cases against Argentina represent 37% of all cases pending.
4. Year of filing for pending cases 1997-2, 1998-2, 1999-0, 2000-3, 2001-7, 2002-16, 2003-31, 2004 to August 5-23.

Undermining public health insurance

Public health insurance is provided to Costa Ricans through the Costa Rican Social Security Administration (Caja Costrricense de Seguro Social). This public system, built up over many decades of social struggle, provides nearly all Costa Ricans with affordable health care, while the country spends only one-tenth per capita of what the U.S. spends on health care.

The CAFTA's financial services provisions partially exclude Costa Rica's statutory system of social insurance, which is enshrined in Article 73 of the Costa Rican constitution. But, contrary to official assurances that it is fully excluded from the treaty, opening the insurance market to U.S. companies will seriously harm Costa Rica's remarkable public heath insurance program.

Occupational risk insurance, for health care costs incurred from injuries at work, is currently an integral part of the Costa Rica's health insurance system provided solely by the National Insurance Institute. Under CAFTA it will be stripped from the public system by 2011.

Moreover, wealthy Costa Ricans will be free to purchase supplementary private health insurance from firms located in the United States, a practice that is currently illegal. By 2007, U.S. companies will be able to sell health insurance to wealthy individuals from offices within Costa Rica itself. This will result in "cherry picking" where U.S. insurance companies will target well-off individuals, leaving the public system to cover those that cannot afford private insurance. Undermining universality in this way lessens the fairness and the efficiency of the public system, and, over time, will erode public support for it.

The growth of private insurance markets will also harm the ability of the public authorities to allocate health resources where they are needed most (such as preventative care and basic public health). Experience in other countries shows that doctors and other health professionals will be attracted to privately financed facilities, which are more likely to provide high-cost, high-tech treatments, including elective cosmetic surgery, than are public facilities.[63]

This public system, built up over many decades of social struggle, provides nearly all Costa Ricans with affordable health care, while the country spends only one-tenth per capita of what the U.S. spends on health care.

...if the CAFTA is implemented as planned, the highly regarded Costa Rican health insurance system, which is the envy of many Latin American countries, will gradually become more like the highly dysfunctional and inegalitarian American health insurance system—reversing decades of hard-won social progress.

As the U.S. experience dramatically shows, replacing a single-payer system with private markets will also greatly escalate administrative costs. For example, under Canada's single-payer public health insurance system, administrative costs account for just 1 percent of total outlays on hospital and physician services, while in the highly fragmented U.S. insurance system, administrative costs account for nearly 20 percent of total outlays by private insurers.[64]

Finally, once U.S. insurance firms are established within Costa Rica, they can use the CAFTA's investor-state dispute mechanism to challenge future attempts to restore or expand the public health insurance system. They will argue that this is "expropriating" their business and seek compensation.

In short, if the CAFTA is implemented as planned, the highly regarded Costa Rican health insurance system, which is the envy of many Latin American countries, will gradually become more like the highly dysfunctional and inegalitarian American health insurance system – reversing decades of hard-won social progress.

This deal, as noted previously, has not yet been ratified and will face a tough fight in the Costa Rican society and Congress.[65] For a variety of reasons, CAFTA approval will also face some opposition in the U.S. Congress. Its ratification is not a foregone conclusion.

3.3.3 Imposing "market reforms": the GATS Telmex case

In the summer of 2000, the United States used the threat of WTO litigation to pressure Mexico into changing its telecommunications regulations to benefit U.S. long-distance companies. The concessions made by Mexico during eighteen months of bilateral consultations were not enough to satisfy the U.S. negotiators, who proceeded to launch a full WTO challenge. A dispute settlement panel was established in April 2002.[66]

Two years later, the WTO panel issued its decision – the first ruling to deal exclusively with the GATS.[67] In a complex 250-page report, the panel sided with the U.S.

on the key aspects of its complaint against Mexico. The panel upheld the U.S. charge that Mexico was violating its commitments under the GATS and the subsidiary GATS Telecommunications Reference Paper by not providing "cost-oriented and reasonable rates, terms and conditions" to U.S. telecom companies for connecting their long-distance calls to Mexico. It also ruled that Mexico violated the GATS by not taking appropriate measures to prevent "anti-competitive practices" by Telmex, Mexico's privatized national telephone company.[68]

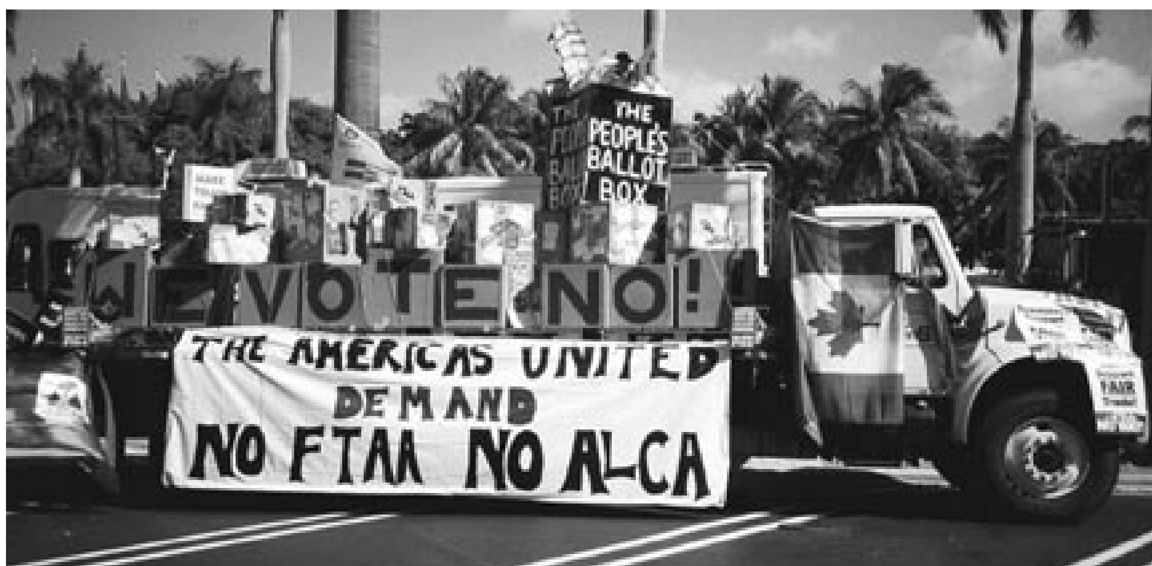
In June 2004, the two governments struck a deal by which Mexico complied with the WTO ruling. The dispute had centered on so-called "settlement rates," which are the fees that telephone carriers charge each other for completing calls routed through phone networks to each other's markets. In the June deal, Mexico agreed to revise its international long-distance rules, to allow for the supposedly "competitive commercial negotiation of international settlement rates."[69]

Under previous long-distance regulations, Telmex – the dominant domestic carrier – negotiated uniform "settlement rates" that all Mexican carriers used when charging U.S. companies to complete long-distance calls from the U.S. The new Mexican rules announced in August, 2004, allow U.S. telecom firms to bypass Telmex and negotiate rates directly with any Mexican telephone carrier.

In practical terms, this means that AT&T, for example, can now dictate interconnection rates directly to its Mexican affiliate, Alestra. AT&T can set those rates to suit their overall continental and global operations. Despite the free-market rhetoric, it is hard to see how such convenient, intra-firm price-setting qualifies as "competitive commercial negotiation".[70] Rates to AT&T's parent company are expected to fall under the new regime, but it is not clear that the company will pass these savings on to its U.S.-based customers or how Mexican consumers might benefit.

What is clear is that under the new rules, Mexico will lose a huge source of revenue that could be used to expand basic telephone service to poor customers and rural areas.

What is clear is that under the new rules, Mexico will lose a huge source of revenue that could be used to expand basic telephone service to poor customers and rural areas. Since most developing countries such as Mexico receive more incoming calls than they originate, settlement rate payments are usually a net source of revenue. According to the London-based Panos Institute: "Money from these international revenues has traditionally been used by developing country operators to subsidise cheaper local calls and expansion of the network to poorer customers or to rural areas."[71] As Mexican government representatives argued fruitlessly to the WTO panel, and as developing countries have traditionally asserted, such revenues are "essential if the benefits of telecommunications are not to be confined to a few urban elites."[72]



Public interest dimensions of the Telmex case

At one level, the Telmex dispute can be seen as simply a clash between commercial behemoths over a lucrative revenue stream. The U.S. brought the case on behalf of the two largest long-distance companies in the world: AT&T, and the now disgraced WorldCom Inc.. Their target was Telmex, the Mexican national phone company sold by the Mexican government in a controversial 1990 privatization. Its majority owner, Carlos Slim, is Mexico's richest man. Telmex, the world's 19th largest phone company, is today expanding throughout Latin America.[73] But there are important public interest dimensions to the case.

Revenues and effective policies to achieve universal telephone access in Mexico are urgently needed. Mexico has just 147 telephone mainlines per 1000 people (ranking 53rd in the world),[74] compared to 646 per 1000 people in the U.S. (which ranks 8th in the world). Sadly, over three-quarters of rural *localities*, containing six per cent of the Mexican population, do not have *any* access to phone services.[75]

Because of its proximity to the U.S., which contributes to a much greater number of incoming than outgoing calls, Mexico has garnered substantial revenues from settlement payments.[76] Indeed, when the U.S. started WTO proceedings in 2000, net settlement payments from the U.S. to Mexico were $U.S. 763 million, the highest U.S. payments to any country.[77] These settlement payments have declined steadily since the mid-1990s, but can now be expected to fall drastically as a result of the WTO-driven changes.

Mexico tried to convince the WTO panel of the importance of these revenues: "Accounting rate revenues remain an important potential source of funds for infrastructure development. However, Mexico's net revenue from settlement rates (from all countries) has already been declining. Thus, in light of the important need of Mexico for investment in the telecommunications sector, further and immediate drastic cuts in settlement revenue are not economically feasible."[78] The panel rebuffed this and related Mexican arguments, instead adopting a draconian interpretation of the GATS Reference Paper language on "cost-oriented" interconnection rates. The panel ruled that "contrary to Mexico's position, the general state of the telecommunications industry, the coverage and quality of the network, and whether rates are established under an accounting rate regime, are not relevant to determining a proper cost-oriented rate."[79]

The privatization of Telmex has already made it more difficult for the Mexican government to ensure that the company invests in expanding telecommunications infrastructure to unserved regions and groups. Telmex has come under pressure from Mexican regulators to add more lines to connect rural areas, but these connections are relatively unprofitable and need to be subsidised.[80] The huge loss of long-distance revenues to U.S.-based companies reduces the prospects for meaningful investment in achieving universal service.

The privatization of Telmex has already made it more difficult for the Mexican government to ensure that the company invests in expanding telecommunications infrastructure to unserved regions and groups.

As GATS analyst Ellen Gould observes in a trenchant analysis of the Telmex ruling: "The panel dismissed Mexico's arguments that in order to be granted access to the Mexican market, American firms should contribute to the development of the country's telecommunications infrastructure."[81] The WTO panel's harsh interpretation means that those governments that have made, or will make, GATS Telecomms Reference Paper commitments are *forbidde*n from including the costs of expanding infrastructure or improving universal access when they set interconnection rates, including long-distance settlement rates. This prohibition will deprive many countries of an important source of revenue and a proven social policy tool for expanding universal service. Developing countries will be hardest hit.

Debunking the myth of GATS flexibility

There is a disturbing twist to this case. When Mexico originally made its GATS telecom commitments in 1997, it apparently genuinely believed that that the accounting rate system, of which settlement rates are a part, was excluded from the GATS telecommunications rules. This impression, shared by some other developing countries and telecommunications experts,[82] arose primarily from a negotiated "understanding" reached at the close of the GATS basic telecommunications negotiations, which reassured governments that they need not lodge GATS exemptions to protect differences in accounting rates from potential GATS challenge.[83]

The panel proved indifferent to what Mexico or others might have believed when they made their GATS commitments. It brushed aside Mexico's arguments that negotiators meant to exclude accounting rates from the scope of the GATS Reference Paper. The panel asserted

This prohibition will deprive many countries of an important source of revenue and a proven social policy tool for expanding universal service. Developing countries will be hardest hit.

instead that: "the Understanding seeks to exempt a very limited category of measures, temporarily, and on a non-binding basis, from the scope of WTO dispute settlement. Simply because Members wished to shield a certain type of cross-border interconnection from dispute settlement, because of possible MFN [most-favoured-nation treatment] inconsistencies , it does not follow that they wished to shield all forms of cross-border interconnection from dispute settlement. The clear intention to do so is not expressed in the Understanding."[84]

Mexico's misunderstanding of the meaning of its GATS commitments is part of a troubling pattern in GATS and GATS-related disputes. In the European Communities bananas case, the Canada auto pact case, the Canada split-run magazine case, and, most recently, the U.S. gambling case, it turns out that governments did not fully understand the legal implications of their GATS commitments.[85]

In every GATS-related case to date, defendant governments have lost and, in each instance, have either erred in their GATS scheduling or misunderstood their GATS obligations. WTO panels have demonstrated little sympathy or deference towards what governments understood or intended at the time they made their GATS commitments. Instead, the WTO dispute settlement bodies have simply examined the letter of the treaty and the commitments, and consistently given a very liberalizing interpretation.

GATS proponents commonly point to the supposed flexibility of the agreement to counter opponents' criticisms. They argue that the treaty gives governments the opportunity to safeguard their vital interests by qualifying any commitments they make. This argument, of course, assumes that governments (not to mention their citizens) understand the full legal implications of GATS commitments. Experience shows, however, that the GATS is an unusually complicated treaty. The "overwhelming uncertainty about the meaning of the provisions of the GATS" has been candidly acknowledged by key GATS insiders.[86] This extraordinary level of uncertainty, the power it gives WTO panels to second-guess public policies, and defendant governments' dismal record in GATS cases, are fast eroding the myth of GATS flexibility.

Will its hard-line GATS position haunt the U.S.?

As complainant in the Telmex case, the U.S. pressed for a hard-nosed interpretation of the GATS provisions on interconnection rates. It argued that the Reference Paper required that interconnection rates be based exclusively on the costs incurred in providing interconnection. In the U.S. view, accepted by the panel, public policies that set interconnection rates to recover costs for social purposes, such as expanding infrastructure or improving universal access, were strictly prohibited.

This hard-line legal interpretation may yet come back to haunt the U.S. authorities. As Mexico pointed out during the panel proceedings, the U.S. has its own provisions for above-cost interconnection rates to finance expanding telecommunications infrastructure in U.S. rural areas. The U.S. asserted that it had protected these universal service provisions by expressly limiting its Reference Paper obligations with an exception for rural carriers.[87] Perhaps, but in a future dispute, a WTO panel could well give as little weight to the U.S. intentions to preserve its rural universal service requirements as it did to Mexico's intentions to protect its own.[88]

Moreover, the U.S. telecommunications regulatory structure has recently shifted away from enforcing cost-oriented interconnection rates. The 1996 Telecommunications Act, from which the GATS Reference Paper is largely derived, was designed to compel the former monopoly phone companies (the so-called "Baby Bells") to open their networks at a discount to their competitors. These competitors include long-distance carriers AT&T and MCI, the same companies that were behind the challenge to Mexico's regulations. A recent court ruling, that the Bush administration has decided not to appeal, has ended the U.S. federal government's support for that policy. The ruling allows the Baby Bells "to stop the practice of providing long-distance companies and other competitors deeply discounted access to local networks for resale."[89]

This shift in U.S. policy could run afoul of the U.S.'s own Reference Paper obligations. At the time of the Telmex ruling, a major U.S trade publication reported a private-sector source critical of the WTO ruling as saying said that the broad reading of the Reference Paper, "while welcomed by the U.S. now could backfire. It covers a 'lot of conduct' required by governments that could fall under this definition of anti-competitive."[90] As official enthusiasm for the 1996 telecommunications reforms wanes, awareness of the hazards of locking an inflexible, highly prescriptive regulatory structure into a binding international treaty may grow – even within the U.S.

Reverberating consequences

As discussed, there are critical public interest dimensions to this landmark WTO case. In particular, the decision gives short shrift to public policies designed to achieve universal access to telecommunications, and facilitates the predatory grab by foreign commercial interests of revenues that are urgently needed to finance expanded access to Mexico's poor and rural inhabitants. These consequences will reverberate beyond Mexico, especially in other developing countries but, perhaps, even to telecom regulation within the United States itself.

Furthermore, the tough interpretation of the GATS telecommunications provisions championed by the U.S. and affirmed by the WTO panel should further shake the persistent myth of GATS flexibility. The panel's lack of deference – even disdain – for how the defendant government understood its GATS commitments is especially chilling. As Gould argues, the case "provides a cautionary tale for governments who believe they can preserve their policy space while taking on more WTO obligations."[91] This lesson should be taken to heart by governments and their citizens in the current round of negotiations to broaden and deepen GATS coverage.

4. Conclusion: Growing resistance, emerging alternatives

As the unachievable January 1, 2005 deadline slips away, the divisions papered over at the November 2003 Miami summit continue to bedevil the FTAA process. Negotiators have so far failed to agree on instructions to implement the complicated "two-tier" negotiating structure formulated in Miami, missed key interim deadlines, and left an intended ministerial meeting unscheduled.[92] In other words, the FTAA talks have effectively ground to a halt.

It is not unusual for major trade treaty negotiations to falter or to take far longer than anticipated to finish. It is very unlikely that the FTAA project will be officially abandoned. And it is definitely possible that the now-moribund talks will eventually regain momentum. But in the near-term, prospects for concluding a hemispheric treaty are slight.

Yet, paradoxically, even as prospects for an ambitious FTAA dim, USTR's negotiating efforts have intensified. The U.S. administration and its corporate allies have not given up on their substantive goal of expanding NAFTA-plus treaty provisions throughout the hemisphere. The locus of intense activity has simply changed.

Under its "competitive liberalization" strategy, U.S. priorities have shifted from the stalled FTAA to wrapping up bilateral free trade agreements wherever possible. The U.S. now has free trade deals in place with Mexico, Canada, and Chile; signed (but not ratified) treaties with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic; and negotiations underway with Colombia, Ecuador, Peru, and Panama. The U.S. is using these bilateral negotiations to isolate and build pressure on the FTAA holdout countries – clearly a "divide-and-conquer" strategy.

There is a whiff of desperation surrounding "competitive liberalization." As its aggressive trade agenda meets stronger resistance, the U.S. response has become more fragmented and complex. This has led some mainstream commentators (such as the Economist magazine)

The U.S. is using these bilateral negotiations to isolate and build pressure on the FTAA holdout countries— clearly a "divide-and-conquer" strategy.

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to deride the new U.S. trade initiatives as "trolling for little fish" while the commercially-significant "big fish" such as Brazil elude its net. Still, there are good reasons for progressives to be concerned that competitive liberalization, while crude, is an effective strategy for advancing U.S. and neo-liberal aims in the hemisphere and globally.

The most important reason for vigorously opposing the U.S. bilateral free trade push is the great harm that it will do in the target countries. Bilateral free trade treaties are a way for the U.S. to strong-arm smaller countries into acceding to its ideological and commercial agenda.[93] As explored earlier in the Costa Rican case study in this paper, the dangers to public services are real. If the CAFTA proceeds as intended, successful public insurance and telecommunications services will be lost. For over a decade, those very services have been staunchly defended by the Costa Rican populace against neo-liberal pressures to privatize. Despite misleading official assertions that public health insurance is protected from the treaty, the CAFTA will immediately damage Costa Rica's remarkable public health insurance system and further erode it over time. A central, but unspoken, feature of competitive liberalization is to undermine such exemplary public service systems and so prevent them from being emulated by others.

The bilateral free trade strategy is also, as U.S. trade officials openly admit, a way to target governments that are "most committed" to neo-liberal reforms and work with them to "lock in" such reforms. The scandalous decision of Guatemala's right-wing regime not to shield even the most basic social services from the full force of the CAFTA, as discussed in this paper, is simply an extreme example of this problem. By tying the hands of future governments and attempting to foreclose progressive alternatives, the U.S. administration is in effect conspiring with right-wing governments to limit future generations' democratic choices.

Competitive liberalization might even succeed in another of its stated aims: unblocking regional and global negotiations by overcoming opposition to U.S. objectives. First, the U.S. employs bilaterals to establish legal precedents that it can then replicate and expand in succeeding negotiations. The U.S. push for "TRIPS-plus" intellectual property protection in all its bilateral treaties has attracted the most criticism, but similar leveraging occurs across all negotiating areas.[94] A demonstrated willingness to support "key U.S. positions in FTAA and WTO negotiations" is one of the U.S. government's criteria for selecting candidates for bilateral free trade agreements.[95]

More decisively, once a government has signed a "high-standards" bilateral deal with the U.S., there is little point in opposing similar provisions and commitments in an eventual FTAA or in WTO negotiations. Prior to the CAFTA, for example, the five Central American countries had "in general made only about 5% of all possible GATS commitments."[96] By contrast, the CAFTA "will accord substantial market access across the Central American countries entire services regime, subject to very few reservations."[97] Given the extent of these commitments, if the CAFTA is approved it is unlikely that Central American governments will ally with other developing countries that continue to resist sweeping U.S. services demands under the FTAA or through the GATS. U.S. strategy will have shifted them from Zoellick's "won't do" to the "can do" bloc.

This under-the-radar realignment was probably a factor, along with cruder forms of pressure, in reaching the July framework agreement that has revived the Doha Round of WTO negotiations in Geneva. In the wake of that agreement, the global GATS negotiations, arguably the U.S. government's highest Doha round priority, are now back on track. As a result, those who are concerned about the implications of GATS expansion can no longer count on differences over agriculture to sink a services deal. Unions, NGOs, public interest groups and concerned elected representatives must now re-engage and organise to defend their public policy interests from GATS threats.

Up until the mid-1990s, corporate lobbyists proposed trade treaty text and the Quad (U.S. EU, Canada and Japan) trade officials, after resolving their own differences, dictated terms to everyone else.[98] Over the past 10 years, global trade politics have become far more fractious and complex, but the old ways die hard. "Competitive liberalization" is, in some respects, simply a more sophisticated variation of the former strategies.

The flip side of the intensified U.S. trade policy agenda, however, is a growing awareness and assertiveness by many citizens and some governments, reflecting deep discontent with the policy prescriptions embodied in the FTAA model.

The public and political reaction to the threats discussed in the case studies earlier in this paper illustrates this resistance. Argentina's new government has engineered an economic recovery by rejecting some of the standard IMF shock therapy prescriptions and by pumping back into the economy the savings generated by its non-payment of some of its US$100 billion debt to private bondholders. These unconventional - by IMF-World Bank standards - financial policies, together with measures such as price freezes on utility rates to provide relief to hard-pressed consumers, have provoked a blitz of investment treaty challenges by international corporate interests. By demonstrating a new toughness in international negotiations with debtors and investors, Argentina is sending a strong signal that its citizens will not shoulder the entire burden of failed and largely externally-driven, economic policies.[99]

In Mexico, as even proponents have been forced to admit, the privatizations of the 1990s (including that of Telmex) remain deeply unpopular. Mexico's defeat in the WTO Telmex case resulted directly in a surrender to U.S. commercial interests and the loss of a lucrative source of revenues that could have been used to meet pressing social needs. This episode underlines how, even in a post-privatization environment, more intrusive trade treaty rules deprive governments of tools and resources to achieve universal service and other social policy goals. Such experiences have deepened popular discontent and created a growing demand for alternatives. Most notably, efforts to privatize and deregulate the energy sector, which Mexico largely shielded from NAFTA restrictions, are meeting fierce political and public resistance.

...even in a post-privatization environment, more intrusive trade treaty rules deprive governments of tools and resources to achieve universal service and other social policy goals.

Finally, the Costa Rican government's cave-in to U.S. demands to dismantle that country's public telecommunications and insurance monopolies has fuelled a political crisis worsened by government corruption scandals. A recent nation-wide strike against neo-liberal

Part of this paradigm shift is a new appreciation of public services and a mixed economy and a better understanding of how they contribute to economic development, increased social justice and environmental sustainability.

policies in general and the CAFTA in particular ended with the resignation of the government's entire economic team, including Costa Rica's trade minister and the lead CAFTA negotiator. Given the political turmoil in Costa Rica and uncertain prospects in the U.S. Congress, the ultimate ratification of the U.S.-CAFTA is not a foregone conclusion.

These examples illustrate a rising scepticism towards the simplistic notion that more treaty-driven liberalization, deregulation and privatization will lead to economic development, increased social justice and environmental sustainability. This has sparked a growing interest among emerging industrial and developing countries in preserving policy space for alternative economic development policies. Part of this paradigm shift is a new appreciation of public services and a mixed economy and a better understanding of how they contribute to economic development, increased social justice and environmental sustainability.

Citizens and progressive governments are already resisting the divide-and-conquer strategies at work in trade treaty negotiations. The need to forge international alliances against the corrosive incursions of trade treaties and to unite in strengthening public services, democratic institutions and governments' ability to regulate in the public interest is increasingly being recognized across the region.

Endnotes

1. First Summit of the Americas, Dec. 9-11, 1994, "Declaration of Principles."
2. First Summit of the Americas, Dec. 9-11, 1994, "Plan of Action."
3. The nine FTAA Negotiating Groups are: Market Access; Agriculture; Government Procurement; Investment; Competition Policy; Intellectual Property Rights; Services; Dispute Settlement; and Subsidies, Antidumping and Countervailing Duties.
4. President Bush signed the Trade Act 2002 into law on August 6, 2002. The legislation gives "fast-track" authority to the U.S. president to negotiate trade deals that the Congress must then either accept or reject without amendment. This authority will continue until June 1, 2005 with an automatic two-year extension to 2007, unless Congress adopts a majority resolution of disapproval.
5. U.S. Commerce Department data showed the June 2004 trade deficit at $55.8 billion U.S., a record monthly high. The U.S. trade gap is now running at more than $600 billion annually (5.5% of GDP). See Dean Baker, Economic Reporting Review, August 23, 2004. Center for Economic Policy and Research (http://www.cepr.net/pages/Economic_Reporting_Review_Page.htm).
6. The G-20 is a group of developing countries working together to develop a common position in the WTO agriculture negotiations. The group formed in August 2003 in response to a joint U.S.-E.U. proposal on agriculture in the Doha negoations that did not give enough weight to developing country interests. As of early 2004, the members of the G-20 are: Brazil, China, India, Chile, Argentina, Bolivia, Cuba, Egypt, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, the Philippines, South Africa, Thailand, Venezuela, and Zimbabwe.
7. Brazil and the U.S. will now chair the FTAA process until negotiations conclude.
8. Ministerial Declaration, Free Trade Area Of The Americas, Eighth Ministerial Meeting, Miami, U.S., November 20, 2003, available at http://www.alca-ftaa.org/Ministerials/Miami/Miami_e.asp.
9. Assistant USTR Christopher A. Padilla, "Remarks to Forum Brasil," U.S. Chamber of Commerce, January 20, 2004. reprinted in World Trade Online, March 5, 2004.
10. "Zoellick silent on rescuing stalled FTAA talks as deadline nears," Inside U.S. Trade, September 10, 2004.
11. Robert B Zoellick, "America will not wait for the won't-do countries," Office of the United States Trade Representative, September 22, 2003.
12. In September 2004, as the U.S.-Andean negotiations entered their fourth negotiating session, "Zoellick cautioned that the chances that Bolivia could at some point fully join the negoations are slipping." Bolivia currently participates in the talks as an observer. ("Zoellick silent on rescuing stalled FTAA talks as deadline nears," Inside U.S. Trade, September 10, 2004.)
13. In 2003, Brazil was the largest trader in South America with exports of $73 billion U.S. and imports of $51 billion U.S.. Argentina was the next largest with exports of $29 billion U.S. and imports of $14 billion U.S.. Brazil alone accounts for about 40% of total South American trade. Source: World Trade Organisation, available at http://www.wto.org/english/res_e/statis_e/its2003_e/its03_byregion_e.htm.
14. U.S. General Accounting Office, "Intensifying Free Trade Negotiating Agenda Calls for Better Allocation of Staff and Resources," January 2004, passim.
15. "And in preparing for Puebla, the United States consulted with many countries. And we worked with a group of, initially, of four other countries - Canada, Chile, Costa Rica, and Mexico." Transcript Background Teleconference Call by a "U.S. Trade Official" regarding the Free Trade Area of the Americas (FTAA), Trade Negotiations Committee Meeting (TNC) in Puebla, Mexico February 7, 2004. World Trade Online, accessed March 6, 2004.
16. Robert Zoellick, Letter to David M. Walker, Comptroller of the United States, General Accounting Office, December 3, 2003.
17. First submission of Antigua and Barbuda before the panel of the World Trade Organisation: United States - measures affecting the cross-border supply of gambling and betting services, WT/DS285, 1 October 2003.
18. As will be further discussed in the next section, the two most restrictive provisions of the GATS are that foreign service suppliers must be treated "no less favourably" than domestic suppliers, and governments can not restrict "market access" by controlling the number of companies providing a service. These provisions apply only to sectors or sub-sectors that governments have listed in their GATS schedule, that is, where they have made "specific commitments."
19. GATS Article XIX.
20. Quoted in "GATS: Business as usual despite Cancun failure," Bridges Weekly Trade News Digest, October 8, 2003, vol. 7, no. 33.
21. "WTO receives new services offers in ongoing Doha negotiations," BNA WTO Reporter, October 4, 2004.
22. "Initial services offers show low level of commitment," Bridges Weekly Trade News Digest, March 4, 2004.
23. In a March 1, 2004 speech at the HYPERLINK "http://www.iib.org/2-17-04AConference.pdf" Annual Conference of the Institute for International Bankers in Washington, assistant USTR James Mendenhall "acknowledged that progress in the GATS negotiations is slow, due in part to opposition from developing countries, which have largely refrained from making offers to open their service sectors." Furthermore, "Mendenhall said that the United States hopes to see at least 74 countries, or half the WTO membership, make offers by the end of 2004, although he acknowledged that reaching that goal would be 'a fairly difficult task.'" "U.S. Official Laments Slowness of WTO Negotiations on Services," BNA WTO Reporter, March 2, 2004.
24. A list of countries who have submitted initial offers is available on the WTO website at: HYPERLINK "http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm" http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm.

    The following countries have made their offers publicly available on the WTO web site, and there is a link to these offers from the web site listed above: Australia; Canada; Chile; EC; Iceland; Japan; Liechtenstein; New Zealand; Norway; Slovenia; Turkey; and the United States.
25. See supra, note 4.
26. World Trade Organization, "Doha Work Programme," Decision adopted by the General Council on August 1, 2004, W/T/L/579. The services provisions occur mainly in Annex C.
27. For an overview of some of the public policy issues at stake in the GATS rule-making talks, see Scott Sinclair, GATS: how the World Trade Organization's new 'services' negotiations threaten democracy, (Canadian Centre for Policy Alternatives, 2000), chapter 4.
28. "EU Commissioners Decry Lack of Movement In Non-Agricultural, Services Negotiations," BNA WTO Reporter, May 11, 2004.
29. "Services Groups Cite Need For July WTO Framework Deal," BNA WTO Reporter, June 30, 2004.

30. Public Services International, "Democracy or Dominance in the Americas? The FTAA vs. Public Services," p. 8.
31. Services, commonly defined as "anything you can't drop on your foot," includes a vast range of human activities: from birth (midwifery) to death (burial); the trivial (shoe-shining) to the critical (heart surgery); the personal (haircutting) to the social (primary education); low-tech (household help) to high-tech (satellite communications); and from our wants (retail sales of toys) to our needs (water distribution).
32. For example, NAFTA Article 201(1) defines "measure" as including "any law, regulation, procedure, requirement or practice."
33. GATS Article I:3(a) states that for the purposes of that treaty, "'measures by Members' means measures taken by...central, regional or local governments and authorities; and...non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities...."
34. For example, the guidelines for the current phase of GATS negotiations stipulate, "There shall be no a priori exclusion of any service sector or mode of supply." Section II.5, "Guidelines and procedures for the negotiations on trade in services," Adopted by the Special Session of the Council for Trade in Services on March 28, 2001, S/L/93.
35. Countries can negotiate limited, temporary MFN exceptions when the treaty is signed.
36. For example, a procurement tender that was given on very short notice could be considered discriminatory because it gives an advantage to local suppliers who are better situated than foreign suppliers to respond quickly.
37. The NAFTA investment chapter explicitly prohibits governments from imposing or enforcing certain types of requirements "in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment" (NAFTA Article 1106).
38. For example, in one NAFTA investor-state arbitration the tribunal ruled that a Mexican state government had expropriated a U.S. company's investment by creating an ecological preserve that prevented use of the site for hazardous waste management purposes, even though the hazardous waste operation had never been granted the required local government approval. In the words of the Metalclad panel, "expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property...but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state." The United Mexican States vs. Metalclad Corporation, para. 103.
39. For a review of Canadian legal principles regarding land use and expropriation see: Richard D. Lindgren and Karen Clark, Property Rights vs. Land Use Regulation, Canadian Environmental Law Association, mimeo.
40. Supreme Court of British Columbia, The United Mexican States and Metalclad Corporation, Reasons for Judgement of the Honourable Mr. Justice Tysoe, May 2, 2001.
41. GATS Article XVI.
42. In principle, national treatment is a relative restriction that allows each member government to adopt the policy it chooses (even if those differ from other members) so long as the measure is not discriminatory in law or in effect. By contrast, these market access provisions are framed in absolute terms. They preclude certain types of policies, whether they are discriminatory or not.
43. For a fuller discussion of the problems posed by Article XVI for such measures see Scott Sinclair and Jim Grieshaber-Otto, Facing the Facts: A Guide to the GATS Debate, (Ottawa, Canadian Centre for Policy Alternatives, 2002), pp. 52 ff.
44. GATS Article VI.4.
45. Public Services International, "Public Services Work! Information, insights and ideas for our future." (available at www.world-psi.org).
46. "Public Services Work! Information, insights and ideas for our future," supra, p. 14.
47. "Public Services Work! Information, insights and ideas for our future," supra, p. 21.
48. Canadian Labour Congress, Policy statement, "Trade and the Economy," June 2002.
49. "FTAA Negotiating Group on Services: Public Summary of U.S. Position," p. 1, available at www.ustr.gov. accessed March 1, 2004.
50. Zoellick, Robert B., Statement of the U.S. Trade Representative before the Committee on Finance of the United States Senate, March 5, 2003. (available at http://www.insidetrade.com; accessed Mar. 6, 2003.)
51. Public Services International, "Public Services Work!", supra note 44, p. 6.
52. Beatrice Edwards, "IADB plan to sell the public sector: the cure or the ill?", NACLA Report on the Americas, January–February 2003.
53. Source: John Dillon, KAIROS, personal correspondence, October 21, 2004; data cited in Buenos Aires newspaper, Pagina 12, Horacio Vertibsky "El Clon (The Clone)," February 17, 2002.
54. In other words, while aggregate prices for goods and services sold in Argentina actually fell by an average of 1.3% over the years 1999-2001, utility rates continued to go up. "Crisis & Resistance in Argentina," KAIROS Global Economic Justice Report Vol. 1 No. 1 March 2002.
55. KAIROS Global Economic Justice Report Vol. 1 No. 1 March 2002.
56. KAIROS Global Economic Justice Report Vol. 1 No. 1 March 2002 and Financial Times of London, July 1, 2002.
57. Source: John Dillon, KAIROS, personal correspondence, October 21, 2004; Buenos Aires newspaper, Clarin, April 12, 2002.
58. Celia Iriart, "Managed Care and Globalization: The Argentinean Case," Presentation to the Globalization, Justice, Health conference, November 2003, mimeo.
59. This was up from less than 10 per cent in response to the same question in 1998. (available at www.economist.com, accessed March 18, 2003)
60. As John Dillon notes, although creditors often launch court cases as a pressure tactic, it may be difficult for them to actually seize assets to collect their claims. Referring to bondholders, the Financial Times of London reports that: "It is not clear which assets investors can seize. The government sold off all the state-owned companies in the privatisation process of the 1990s. Assets abroad such as embassy buildings and vehicles are protected. Even an attempt to seize cash in a US bank account belonging to Argentina's privatized postal company...failed." FTL, Sept. 20, 2004. Personal correspondence with John Dillon, October 21, 2004.
61. Fabian Borges, "CAFTA: Country Will Negotiate Insurance;" Tico Times, HYPERLINK "http://www.ticotimes.net/archive/12%5F19%5F03%5Fb.htm" http://www.ticotimes.net/archive/12%5F19%5F03%5Fb.htm, accessed March 22, 2004.
62. Inside U.S. Trade, December 19, 2003
63. Cf. "(E)vidence from countries where private insurers compete indicates that, even with strong regulatory systems, greater

competition among health insurers segments and destabilizes the market and undermines the ability to build larger, more equitable risk pools that spread costs between rich and poor, healthy and sick." Debra J. Lipson, "GATS and Trade in Health Insurance Services," Background Note for WHO Commission on Macroeconomics and Health, Working Group 4, available at HYPERLINK "http://www.cmhealth.org/docs/wg4_paper7.pdf" http://www.cmhealth.org/docs/wg4_paper7.pdf.

64. "In Canada, the estimated cost of prepayment and administration amounted in 1999 to 13.6% of total payments to private insurers. By contrast, the total reported outlays for prepayment and administration in the public sector were only 1% of outlays for hospitals and physicians' services. U.S. data show a similar pattern: out of $80.9 billion for prepayment and administration in 2000, $53.1 billion was spent by private insurers, and $21.5 billion by the public Medicare and Medicaid programs. These sums represented 19.6% and 6.3%, respectively, of total outlays through these channels. For the federal Medicare program alone, which more closely parallels Canada's Medicare, the percentage of overhead was 3.3%. The complexities of financing in the much more fragmented U.S. health care environment add significantly to both public and private administrative costs, but the differential remains very large."

    Robert Evans, "Raising the Money: Options, Consequences and Objectives for Financing Health Care in Canada," Commission on the Future of Health Care in Canada, October 2002. p. 31. (available at HYPERLINK "http://www.hc-sc.gc.ca/english/care/romanow" http://www.hc-sc.gc.ca/english/care/romanow.)

65. The Inter-American Development Bank has stepped in with a proposed $400 million "competitiveness loan," to Costa Rica. The loan is closely tied to approval of the CAFTA treaty, illustrating how international financial institutions work hand in hand with trade negotiations to lock neo-liberal policies permanently in place. The proposed Costa Rica loan is CR-0140, Reforms to Facilitate Investment for Growth and Competitiveness (available at HYPERLINK "http://www.iadb.org/exr/doc98/pro/ucr0140.pdf" \o "http://www.iadb.org/exr/doc98/pro/ucr0140.pdf" http://www.iadb.org/exr/doc98/pro/ucr0140.pdf).

66. On August 17, 2000 the U.S. requested formal consultations with Mexico pursuant to the WTO and GATS dispute settlement procedures. These consultations occurred in October, 2000. On November 10, 2000 the U.S. first requested the establishment of a WTO dispute settlement panel. This led to a second set of consultations that occurred in January 2001. Afterwards, the dispute process lay dormant until February 2002 when the U.S. again requested that the WTO Dispute Settlement Body establish a panel. The WTO panel was established on April 17, 2002.

67. World Trade Organization, Mexico – Measures Affecting Telecommunications Services, Report of the Panel, April 2, 2004. (Hereafter "Telmex panel")

68. Telmex panel, supra note 63.

69. Letter from U.S. Ambassador Linnet F. Deily to Mexican Ambassador Eduardo Perez Motta, June 1, 2004, reprinted in World Trade Online, www.insidetrade.org, June 4, 2004. The WTO panel had rejected the U.S. argument that Mexico was obligated to allow U.S. telecoms to bypass Mexico's domestic phone networks completely by operating or leasing their own private lines. The June deal confirms that Mexico will continue to prohibit this practice, known as International Simple Resale.

70. As the Telmex panel report notes: "According to Mexico, the United States fails to mention that the two other major Mexican long distance carriers [besides Telmex] are affiliates of carriers from the United States and also fails to explain how allowing those carriers to dictate rates to their Mexican affiliates would serve any anti-competitive purpose." World Trade Organization, Mexico – Measures Affecting Telecommunications Services, Report of the Panel, April 2, 2004, para. 4.274. For the panel's account of the U.S. reply, see para. 4.279.

71. "For richer or poorer, the impact of telecomms accounting rate reform on developing countries," Panos, Special Briefing, March, 1998.

72. Ibid., p. 3.

73. John Authers, "Rich pickings send Slim into LatAm telecoms," Financial Times of London, September 6, 2004. In 1999, Telmex ranked 19th (by revenues) of the world's largest 20 telecommunications operators. (International Telecommunications Union, HYPERLINK "http://www.itu.int/ITU-D/ict/statistics" www.itu.int/ITU-D/ict/statistics.)

74. United Nations Development Program, Human Development Indicators, available at HYPERLINK "http://hdr.undp.org/statistics/data/indic/indic_111_1_1.html" http://hdr.undp.org/statistics/data/indic/indic_111_1_1.html .

75. Six per cent of Mexicans live in localities without any access to telephone service. International Telecommunications Union, World Telecommunications Development Report, 2003, p. 88.

76. While Mexico's revenues from settlement rates are substantial due to heavy traffic with the U.S., the rates themselves are low by developing country standards. At the time of the dispute, the rates were 5.5 U.S. cents/min for the largest cities, 8.5 cents for medium-sized cities, and 11.8 cents for other localities (see Telmex, para. 7.215, Table 1). These rates have fallen sharply since 1997 and are below the benchmarks that the U.S. Federal Communications set for Mexico.

77. According to U.S. FCC figures, net settlement payments to Mexico were $763 millions U.S. in 2000, down from a high of $878 million U.S. in 1996. U.S. Federal Communications Commission, "Net settlement payments, 1985-2000," available at http://www.fcc.gov/ib/pd/pf/account.html.

78. Telmex panel, para 4.181.

79. Telmex panel, para 7.183, quoted in Ellen Gould, "Telmex Panel Strips WTO of Another Fig Leaf," Canadian Centre for Policy Alternatives, July 2004, p. 2.

80. See John Authers, "Rich pickings send Slim into LatAm telecoms," Financial Times of London, September 6, 2004.

81. Ellen Gould, "Telmex Panel Strips WTO of Another Fig Leaf," Canadian Centre for Policy Alternatives, July 2004, p. 1.

82. For example, a 1998 briefing states that: "While accounting rate reform was specifically excluded from the WTO agreement, it does note that any international settlements system needs to be transparent (everyone should know how it is working in practice) and non-discriminatory (foreign and private firms should be treated the same as domestic and state owned ones) [emphasis added]." "For richer or poorer, the impact of telecomms accounting rate reform on developing countries," Panos, Special Briefing, March, 1998, p. 8.

83, The "Understanding" is contained in World Trade Organization, Report of the Group on Basic Telecommunications, February 15 1997 (S/GBT/4). Without exemptions, the differential rates could violate the GATS most-favoured-nation rule.

84. Telmex panel, supra, para 7.138.

85. The EC bananas, Canada autos, and Canada split-run magazine cases are discussed in Scott Sinclair, GATS: how the World Trade Organization's new 'services' negotiations threaten democracy, (Canadian Centre for Policy Alternatives, 2000), chapter 3. In November 2004, a WTO panel finally issued its much-delayed ruling that found that a U.S. prohibition on on-line gambling violated U.S. Uruguay round GATS commitments. A USTR spokesperson stated that "the language on U.S. services commitments used by the Clinton Administration clearly

intended to exclude gambling when the U.S. joined the WTO in 1995." "U.S. to appeal Ruling against internet gambling prohibition," Inside U.S. Trade, April 2, 2004.

86. The quote is from former deputy United States Trade Representative Jeffery Lang who was the U.S. lead negotiator on GATS. Lang further observed that: "Virtually every normative provision of the GATS is interesting and even novel. Some of these provisions are so obviously problematic that they cry out for substantive renegotiation." "So little is known about their origin and intention," he continued, "that it may be years before we discover the impact of these provisions." Lang, Jeffrey and Charles D. Lake II, "The First Five Years Of The WTO: General Agreement On Trade In Services." Law & Policy in International Business, Spring 2000, Vol. 31. Quoted in Scott Sinclair and Jim Grieshaber-Otto, Facing the Facts: A Guide to the GATS debate, Ottawa, Canadian Centre for Policy Alternatives, 2002, p. 72.
87. Telmex panel, para. 4.192.
88. For example, it is not clear that a panel would accept that limitations to the Reference Paper are even permitted. The GATS permits limitations only to the national treatment and market access provisions. Even these must be appropriately crafted or, as the panel made clear, they will be treated as ineffective.
89. See "Telecom: the Day After," Business Week, June 28, 2004, p. 98.
90. "U.S. praises broad reach of reference paper in WTO telecom dispute," Inside U.S. Trade, April 9, 2004.
91. Gould, supra, note 74, p. 1.
92. Negotiators missed the September 30 deadline for concluding the important market access negotiations. The Miami agreement to hold a ministerial meeting in Brazil before the end of 2004 has also gone by the boards. "Next FTAA Ministerial Likely Pushed Back to Early 2005 date," Inside U.S. Trade, October 1, 2004.
93. For example, Ecuador and Peru they are being pressured to resolve favourably outstanding tax cases with major U.S. corporations as a condition to joining an agreement between their Andean-Pact partner Colombia and the U.S.. Amy Taxin, "Ecuador admits disputes put US trade deal at risk," Reuters , September 30, 2004.
94. Examples range from compelling acceptance of the controversial U.S. position on e-commerce and digital products to defining express delivery services in ways that undercut public postal services.
95. More ominously, another explicit criterion is support for U.S. security and foreign policy positions. The USTR has pointed out that the CAFTA governments supported U.S. objectives in Iraq. See U.S. General Accounting Office, "Intensifying Free Trade Negotiating Agenda Calls for Better Allocation of Staff and Resources," January 2004, p. 8.
96. "The U.S.-Central America Free Trade Agreement (CAFTA)," Report of the Industry Sector Advisory Committee on Services for Trade Policy Matters (ISAC 13), March 17, 2004, available at ref "http://www.ustr.gov/assets/Trade_Agreements/Bilateral" www.ustr.gov/assets/Trade_Agreements/Bilateral.
97. Robert Vastine, "Coalition of Service Industries Lauds CAFTA Completion," December 18, 2003. available at http://www.uscsi.org.
98. As Dean O'Hare of the U.S. Coalition of Services Industries remarked, without any trace of irony, at the outset of the current GATS negotiations "we can't any longer expect to be able to win our case in private closed meetings with governments. We have to convince wider publics of the benefits of trade." Quoted in Scott Sinclair "The GATS negotiations: state of play," February 9, 2001, Canadian Centre for Policy Alternatives, ref "http://www.policyalternatives.ca" www.policyalternatives.ca.
99. With the announcement that it will create a new state energy company, the new Argentine government has also taken steps towards reviving the mixed economy. This new state enterprise will be funded from the revenues generated by energy export taxes. It should be noted that the NAFTA-FTAA treaty model would prohibit such export taxes. NAFTA Article 314 stipulates that a country may not tax the export of a good to another NAFTA country unless the tax also applies to any such goods destined for domestic consumption. Similar provisions occur in other U.S. trade treaties (for example, the U.S.-CAFTA Article 3.11 and the U.S.-Chile FTA Article 3.13.)

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