NEW WTO NEGOTIATIONS

Facing the Facts:

A guide to the GATS debate

Scott Sinclair and
Jim Grieshaber-Otto

Canadian Centre for Policy Alternatives

Facing the Facts:

A guide to the GATS debate

Scott Sinclair and
Jim Grieshaber-Otto

Canadian Centre for Policy Alternatives
2002

Copyright © 2002 Canadian Centre for Policy Alternatives and the authors.

All rights reserved. No part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, or by any information storage or retrieval system, without permission in writing from the publisher or the author.

National Library of Canada Cataloguing in Publication Data

Sinclair, Scott

Facing the facts : a guide to the GATS debate

Includes bibliographical references.
ISBN 0-88627-278-5

1. General Agreement on Trade in Services (1994) 2. Service industries—Government policy. 3. World Trade Organization. 4. Organization for Economic Cooperation and Development. I. Grieshaber-Otto, Jim II. Canadian Centre for Policy Alternatives. III. Title.

HF1379.S557 2002 382'.45 C2002-900954-5

Printed and bound in Canada

Published by

Canadian Centre for Policy Alternatives
Suite 410, 75 Albert Street
Ottawa, ON K1P 5E7
Tel 613-563-1341 Fax 613-233-1458
http://www.policyalternatives.ca
ccpa@policyalternatives.ca

CAW 567 OTTAWA

Contents

Acknowledgements

The authors wish to thank Patricia Arnold, Bruce Campbell, Tony Clarke, John Dillon, Murray Dobbin, Ed Finn, Kerri-Anne Finn, Ellen Gould, Paul Mably, Karen Philp, David Price, Mathew Sanger, Noel Schacter, Steven Shrybman, Michelle Swenarchuk, Ken Traynor, Elisabeth Tuerk and members of the CCPA Trade and Investment Research Project, who have provided suggestions, comments and other invaluable support. Any errors or omissions that remain are the sole responsibility of the authors. We are also very grateful to the many organizations that made this book possible by providing financial assistance to the Trade and Investment Research Project. The inspirational efforts on GATS issues of a growing number of researchers, organizations and citizens around the world are also gratefully acknowledged. Finally, we thank our families for their unstinting support, steadfast encouragement and deep generosity.

Summary: The growing GATS debate

Shrouded in obscurity when the last round of World Trade Organization (WTO) negotiations were concluded in 1994, the General Agreement on Trade in Services (GATS) is only now beginning to receive the public scrutiny that it deserves. As non-governmental organizations have examined this exceptionally broad treaty, they have expressed growing concern about its potentially far-reaching impacts. In response, GATS proponents recently issued two official works contesting GATS critics: "GATS: Fact and Fiction" by the WTO Services Secretariat and "Open Services Markets Matter" by the Trade Policy Committee of the Organization for Economic Cooperation and Development (OECD). Both tracts challenge critics' arguments, the former characterizing them as "scare stories."

A challenge for those in the public, media and politics trying to sort out the GATS debate is that the different sides sometimes seem to be saying directly contradictory things about the same agreement. At other times, one side gives the impression of disagreeing sharply with the other while seeming to say much the same thing in a slightly different way. This analysis seeks to tease apart some of the most important GATS issues and to dispel the confusion that often exists even for the most discerning observers.

This analysis provides a detailed critique of official WTO and OECD rebuttals, documenting numerous instances where they provide simplistic or misleading assurances. It examines the growing controversies over GATS coverage of public services, GATS flexibility, governments' right to regulate,

and the policy impact of the most important GATS rules It also examines the key concerns of critics—that *the GATS threatens public services systems and public interest regulation*—and concludes that these concerns are, in fact, well-founded. For these reasons, *the GATS, together with the negotiations now underway to expand the treaty, is slated to become a lightning rod for growing debate and controversy.*

Agreeing on the point of departure: The scope of the GATS is immense

Both proponents and critics agree that the scope of the GATS is very broad. Its extraordinary breadth derives from the incredible diversity of services, the architecture of the agreement, and the expansive way the GATS defines key terms.

The subject matter of the GATS—services—is almost unimaginably broad. Services range 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). *The GATS applies to all measures affecting "trade in services," broadly defined. It covers measures taken by all levels of government, including central, regional, and local governments.* It also applies to professional associations, standards-setting bodies, and boards of hospitals, schools and universities, where these bodies exercise authority conferred upon them by any level of government. In other words, *no government action, whatever its purpose—protecting the environment, safeguarding consumers, enforcing labour stand-*

ards, promoting fair competition, ensuring universal service or any other end—is, in principle, beyond GATS scrutiny and potential challenge.

As a former director general of the WTO has correctly noted, the GATS extends "into areas never before recognized as trade policy." Not limited to cross-border trade, it extends to every possible means of providing a service internationally, including investment. While this broad application does not mean all services-related measures violate the treaty, it does mean that any regulatory or legislative initiative in any WTO-member country must now be vetted for GATS consistency or risk possible challenge.

The treaty covers "any service in any sector" with only limited exceptions; no service sector is excluded *a priori.* This all-inclusive framework binds member governments to certain GATS rules that already apply across all sectors—even those where no specific commitments have been made. It also means that *all service sectors are on the table in ongoing, continuous negotiations.*

Does the GATS cover public services?

Nowhere are GATS proponents on shakier ground than when they claim that the GATS fully protects public services through its so-called governmental authority exclusion. For example, WTO Director General Michael Moore has asserted that "GATS explicitly excludes services supplied by governments"—a bald statement that is clearly untrue. This controversial exclusion only applies to those governmental services which are provided *neither* on a commercial *nor* a competitive basis. These critical terms are left undefined. *The GATS governmental authority exclusion—which proponents claim protects public services — is, at*

best, unclear and subject to conflicting interpretations. At worst, if narrowly interpreted by dispute panels, the exclusion is of little or no practical effect.

Just how flexible is the GATS?

The flexibility of the GATS, and its limits, is another important area of controversy. GATS proponents indicate that the treaty provides governments "remarkable flexibility," to open their services markets at their own pace, according to an "*a la carte* approach to liberalization." But this is an oversimplification**.** *Certain GATS obligations, most notably the most-favoured nation rule, apply unconditionally across all service sectors*; governments now have little choice in this matter. *Moreover, while it is true that the most forceful GATS obligations only apply to sectors that governments explicitly agree to cover, there are serious limits to this flexibility.*

In practical terms, a significant amount of this flexibility no longer exists since most governments already made substantial commitments when the agreement was adopted, and all limitations to these commitments had to be scheduled then. Also, member governments are and will remain under intense pressure to cede more flexibility by liberalizing further under the treaty. The treaty specifically mandates successive rounds of negotiation aimed at achieving "a progressively higher level of liberalization." As well, developed country governments actively promote negotiation and classification devices designed to force governments into making broader and deeper GATS commitments than they otherwise might. Moreover, there are enormous practical difficulties in protecting government policies or measures through country-specific exceptions. Any protective exceptions: must be

drafted extremely carefully; will be interpreted narrowly; usually protect existing measures, not future policy flexibility; become targets in ongoing negotiations; and are of uncertain effectiveness until tested in dispute settlement.

Significantly, the GATS does provide a means for governments to withdraw previously made commitments, but only so long as they are prepared to compensate other governments whose service suppliers are allegedly adversely affected.

Finally, there is an insidious bias against permanently insulating public policies from GATS rules. Wherever there is domestic multipartisan consensus, it is conceivable that country-specific exceptions will endure. But wherever there are serious ideological divisions on contentious issues, country-specific limitations that protect policy flexibility are likely to endure only until a single government committed to a market-oriented approach eliminates them, binding all future governments. In this way, the GATS interferes with the normal ebb and flow of policy-making in a democratic society.

The GATS contains just two general exceptions to which governments can turn to try to save otherwise nonconforming measures. The more important of these, GATS Article XIV, has not yet been invoked in any WTO dispute, but there is little reason to be optimistic that it will protect public interest measures from successful GATS challenge. Despite the far broader scope and political sensitivity of the GATS, the treaty's general exception is crafted even more narrowly than the weak GATT Article XX provisions, which have been interpreted very restrictively in over 50 years of GATT and WTO jurisprudence.

The only reliable GATS exception is Article XIVbis for national security measures.

The policy implications of GATS rules

Controversy over governments' right to regulate

A common refrain in every official rejoinder to GATS critics is that the GATS specifically recognizes governments' right to regulate. Regrettably, it is terribly misleading to suggest that the mere affirmation of the right to regulate, contained in the treaty preamble, fully protects the right to regulate. It does not. While the preamble does contain a clause that "recognizes the right of Members to regulate," this language has strictly limited legal effect. It would have some interpretive value in a dispute, but should not be construed as providing legal cover for regulations that would otherwise be inconsistent with the substantive provisions of the treaty. In short, *governments retain their freedom to regulate only to the extent that the regulations they adopt are compatible with the GATS*.

The MFN rule: More powerful than generally acknowledged

Despite its acknowledged importance, the GATS Most-Favoured Nation Treatment (MFN) rule is discussed only briefly in the WTO and OECD tracts. MFN has proven to be a surprisingly powerful obligation in two recent GATS-related disputes. The rule is better understood as a most-favoured-foreign *company* rule, as it requires that any regulatory or funding advantage gained by a *single* foreign commercial provider must be extended, immediately and unconditionally, to *all*. *The MFN obligation has the practical effect of consolidating commercialization wherever it occurs.* While not legally precluding a new policy direction, this

rule makes it far more difficult for governments to reverse failed privatization and commercialization.

The National Treatment and Market Access rules

The hard core of the GATS is comprised of restrictions that apply only to the sectors, or sub-sectors, where governments have made specific commitments. These commitments, together with any country-specific limitations, are listed in each government's GATS schedule.

The GATS national treatment rule requires governments to extend the best treatment given to domestic services (or service providers) to like foreign services (or service providers). In the GATS, this rule is quite intrusive, as it explicitly requires government measures to pass a very tough test of *de facto* non-discrimination. That is, measures that on their face are impartial can still be found inconsistent if they *modify the conditions of competition* in favour of domestic services or service providers. This gives dispute panels wide latitude to find measures GATS-illegal even when they are, on their face, non-discriminatory or when such measures alter the conditions of competition merely as an unintended consequence in the legitimate pursuit of other vital policy goals. *The GATS' stiff national treatment requirement thus opens the doors for non-discriminatory public policy to be frustrated for reasons that are unrelated to international trade.*

The GATS Market Access rule in one of the treaty's most novel, and troublesome, provisions. While the WTO and OECD documents play down its significance, there is nothing quite like this rule in other international commercial treaties. Framed in absolute rather than relative terms, it precludes certain types of policies whether they are discriminatory or not. A government intent on maintaining

otherwise inconsistent measures is forced to inscribe them in its country schedule when it makes its specific commitments. This rule prohibits governments from placing restrictions on: 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. This prohibition calls into question, for example, the GATS-consistency of limits imposed to conserve resources or protect the environment. Also, many governments restrict the private delivery of certain social services such as childcare to non-profit agencies. Many also confine certain basic services such as rail transportation, water distribution, or energy transmission to private, not-for-profit providers. Such public policies certainly restrict the market access of commercial providers, whether domestic or foreign. But they have never before been subject to binding international treaty obligations. Now, whether this was intended or not, these policies are exposed to GATS challenge.

Other important GATS obligations: Restrictions on monopolies and regulation

The WTO and OECD tracts contain little discussion of the policy implications of the GATS restrictions on monopolies and exclusive service suppliers. Neither piece fully acknowledges that *the GATS imposes new burdens on monopolies and exclusive service supplier arrangements.* In fact, monopolies and exclusive service suppliers are GATS-inconsistent and must be listed as country-specific exceptions in committed sectors. Any government wishing to designate a new monopoly in a listed sector is required to

negotiate compensation with other member governments or face retaliation.

Monopolies, while not so prevalent as they once were, are still relied upon to provide basic services in many countries. 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 consequences of these GATS rules, which so far have gone largely unexamined, are likely to be significant in all of these important areas.

If new restrictions on domestic regulation, now being negotiated in Geneva, were ever agreed to, they would constitute an extraordinary intrusion into democratic policy-making. 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 evenhandedly. 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.

Critically, these proposed restrictions are intended to apply some form of "necessity test," that is, that regulations must not be more trade restrictive than necessary and that measures must be necessary to achieve a specified legitimate objective. Perversely, the proposed GATS restrictions would turn the logic of the long-established GATT necessity test on its head. It would transform it from a *shield* to save clearly *discriminatory* measures from challenge into a *sword* to attack clearly *non-discriminatory* meas-

ures. Finally, since the GATS architecture does not permit it, no exceptions are contemplated to these sweeping proposed restrictions on domestic regulation. *The proposed GATS restrictions on domestic regulation are a recipe for regulatory chill; they are among the most excessive restrictions ever contemplated in a binding international commercial treaty.* This excess is concrete evidence of the hazards of leaving the ambitions of commercial ministries—and the corporate lobbyists driving them on—unchecked by broader public scrutiny and debate.

Conclusion

When the Uruguay Round was concluded in 1994, the GATS was little known outside a small circle of negotiators and corporate lobbyists. Early insider analyses of the GATS then frankly conceded, even celebrated, the novelty of the treaty and its sweeping scope and ambition. By contrast, as the GATS has attracted more public attention, proponents now strive to imply that the GATS is so flexible that it leaves governments almost completely free to govern as they choose. But *the GATS is a deservedly controversial agreement.* It is, by design, a formidable instrument to encourage and to entrench the commercialization of services, including public services. *Its broadly worded provisions give too much weight to commercial interests, constraining essential public services, legitimate public interest regulation, and democratic decision-making.*

GATS proponents would prefer to keep its dangers out of the public eye. They adhere to what has been called the bicycle theory of international trade negotiations, insisting that the WTO's momentum into new sectors and fields of regulation must not be allowed to falter—out of

fear that if the bicycle slows down it will fall over. One prominent GATS architect has even suggested that pausing to understand "the overwhelming uncertainty" about its provisions amounts to "frustrating progress." Indeed, in the power bargaining and pressure tactics employed at the recent WTO ministerial meeting in Doha, the call for assessment of the GATS by non-governmental organizations and a number of key southern governments was brushed aside. Instead, *negotiations to broaden and deepen GATS coverage will be one of the centerpieces of the new Doha Round of WTO negotiations.* Firm timelines for the services negotiations were agreed to as part of the Doha package, with initial requests for specific commitments due by June 30, 2002, initial offers by March 31, 2003, and a finalized renegotiation by the ambitious deadline of January 1, 2005. In short, the bicycle theorists appear to be in firm control and setting a furious pace.

As the prominent author Susan George remarked recently, however, it would be far wiser to get off the bicycle, put our feet on the ground, and have a look around to see where we are. If there is one lesson proponents should have learned from the Seattle debacle and the failed Multilateral Agreement on Investment (MAI), it is that no matter how emphatic or strident their voices, they cannot shut down or control the debate. *The GATS is such a broadly-worded, sweeping agreement, and the negotiations now underway to expand it raise such serious threats to democratic governance, that it will almost certainly stimulate greater public interest.* In this circumstance, the WTO's *Fact and Fiction* and the OECD's *Open Services Markets Matter* are so filled with misleading assurances that they could prove counterproductive—provoking citizens to greater efforts. After all, with modest effort, non-governmental organi-

zations, elected officials, and ordinary citizens are more than capable of understanding the critical issues, of separating GATS fact from fiction. And when they do, they are likely to react with shocked disapproval at how far, and in what direction, the proverbial bicycle has been driven. They will then demonstrate just how quickly they can mobilize, and how effectively they can bring their considerable influence to bear on their respective governments, both to change the nature of GATS negotiations now underway in Geneva and to chart a more balanced future.

Chapter 1:
The growing debate about the GATS

The General Agreement on Trade in Services (GATS) is only now beginning to receive the public scrutiny and debate that it deserves. The treaty has leapfrogged, from the near obscurity it enjoyed when the World Trade Organization (WTO) negotiations were concluded in 1994, to close to the forefront of the current debate about WTO rules. Faced with growing concerns, criticism and opposition voiced by increasingly well-informed non-governmental organizations, GATS proponents recently responded with a coordinated counterattack. The purpose of this analysis is to respond to this counterattack and to rebut the main arguments employed in this official backlash against non-governmental critics of the GATS.

Does the GATS threaten public services? Does it restrict public interest regulation? Or, as proponents claim, are public services and public interest regulation explicitly safeguarded? Are suggestions to the contrary merely ill-informed and hostile criticism?

A challenge for those in the public, media and politics trying to sort out the GATS debate is that the different sides sometimes seem to be saying diametrically opposed things about the same agreement. At other times, one side gives the impression of disagreeing sharply with the other while seeming to say much the same thing in a slightly different way. This analysis seeks to tease apart some of the most important GATS issues and to dispel the confusion that often exists even for the most discerning observers.

This analysis will focus on the two principal official works contesting GATS critics: *GATS: Fact and Fiction*[1], by

the World Trade Organization (WTO) Services Secretariat, and *Open Services Markets Matter*[2], by the Trade Policy Committee of the Organization for Economic Cooperation and Development (OECD).[3] *Fact and Fiction* was publicly released in March 2001 just before a group of international non-governmental organizations (NGOs) held a Geneva media conference to air GATS concerns. *Markets Matter*, completed by the OECD in September 2001, is a self-described "advocacy piece" that "against the backdrop of increasing public scrutiny and criticism of the GATS and services trade and investment liberalization" …seeks to "demonstrate the tangible benefits associated with the progressive liberalization of services trade and investment and address concerns over the operation of the GATS."[4]

The principal champions of the GATS in this debate have been officials working either in the trade ministries of the Quad countries[5] or international institutions such as the WTO and the OECD. But there is little doubt that this counterattack has been devised and coordinated in close alliance with corporate lobby groups representing multinational service industries, including the Global Services Network (GSN) the European Services Forum (ESF), the US Coalition of Service Industries (CSI) and the International Financial Services London (IFSL).[6]

In one sense, it is gratifying for non-governmental organizations that the WTO and the OECD have felt compelled to respond directly to their critiques of the GATS. This reaction underscores that this is a new era when citizen activism and broader public debate can influence otherwise secretive, behind-closed-doors negotiations. In the aftermath of the WTO's failed Seattle Ministerial and the OECD's abortive Multilateral Agreement on Investment

(MAI), even the trade policy elites recognize that they can no longer safely ignore these outside concerns.

But, not unexpectedly, the tone and substance of these two official documents is generally far from flattering. These are polemics. This suggests that the lesson drawn by some élites from the Seattle and MAI debacles is that critics must be neutralized by attacking their credibility or artfully sidestepping the issues they raise, rather than by addressing the substance of their criticism.

The tone of these documents, especially *Fact and Fiction*, is frequently aggressive.[7] For example, in its introduction to *Fact and Fiction*, the WTO complains that:

> "… the negotiations and the GATS itself have become the subject of ill-informed and hostile criticism. Scare stories are invented and unquestioningly repeated, however implausible. It is claimed, for example, that the right to maintain public services and the power to enforce health and safety standards are under threat, though both are explicitly safeguarded under the GATS."[8]

Despite this dismissive tone, more open public debate about this important, but previously little-known treaty, is welcome and to be encouraged.

To get right to the crux of the disagreement between the WTO and its critics: claims that the GATS threatens public services and public interest regulation are neither scare stories nor implausible. This analysis argues that the critics' concerns, accurately represented,[9] are, well-founded.[10]

Technically speaking, GATS proponents are correct in claiming that the GATS itself does not *force* individual governments to privatize public services. But this narrow,

technical assertion is only part of the truth. Through continuous rounds of repeated negotiations that are mandated in the treaty, the GATS exerts constant pressure to open up public services to foreign commercial providers—in other words, to privatize or commercialize them.[11] As the book will discuss more fully later, the GATS not only makes it more difficult for governments to *maintain* public service systems intact, it especially threatens governments' ability to restore public services where they have been privatized, revitalize them where they have shrunken from neglect, and to expand them in future to meet new or changing public desires and needs.

The GATS creates legally enforceable rights that foreign governments can invoke on behalf of their commercial service providers. This threat can reasonably be expected to steadily erode the public, not-for-profit provision of essential services such as health, education, and water. The biggest threat to public services in the existing GATS is that it legally entrenches their commercialization wherever foreign, for-profit providers get a foothold. While these incursions are not irreversible, governments must pay a price to do so, making the reversal of public service commercialization—even when critical to the public interest—far less likely and more difficult.

GATS proponents are also technically correct, though misleading, when they claim that the GATS does not *do away with* governments' right to regulate. As will be discussed further, WTO member governments retain the right to regulate, *provided the regulation is consistent with the GATS.* Only in this narrow and peculiar sense does the GATS not affect the "right to regulate."[12]

There are compelling reasons to be concerned that the existing GATS—and especially proposals to expand re-

strictions on "domestic regulation" in ongoing negotiations under GATS Article VI.4—threaten vital public interest regulations. The range of affected regulations is far wider than just the "health and safety standards" referred to by the WTO; it also includes environmental, consumer and other protective standards.

There is, of course, much room for debate about the precise nature of these threats, their seriousness and what should be done to remedy them. On these matters, there is far greater diversity of views and respectful debate among the critics than among the Quad trade ministries, WTO and OECD officials and other insiders who have closed ranks to defend the GATS against outside criticism. But for the WTO to contemptuously label these concerns as implausible is both inaccurate and regrettable. Belittling serious concerns stifles genuine public debate, an inappropriate role for international public servants.

Although one would hardly know it from reading the WTO and OECD's pieces, GATS' critics are well aware that the agreement provides certain flexibility for governments when they make liberalization commitments, and that it also includes certain provisions that purport to safeguard public services and the right to regulate. Since *Fact and Fiction* was first released, many NGOs have produced thoughtful and effective rejoinders.[13] These demonstrate their knowledge of the agreement, the basis of their continuing concerns about it, and good reasons why the public should be skeptical of the WTO's assurances.

While critical of the GATS, this analysis is informed by the view that it is important for healthy public debate to try to find more common ground between GATS proponents and critics about the meaning and legal character of the agreement. Finding recognizable common

ground does not preclude strong disagreement about the agreement's likely impacts, its desirability[14] or even conflicting technical interpretations of GATS provisions. But the point of articulating shared understandings, as well as differing views, is to better enable those now on the sidelines to come to their own informed judgments about this important agreement and its likely impacts.

In fact, while they should be read critically, some of the most lucid explanations of the legal character of the GATS have been provided by the WTO Secretariat.[15] But these mostly date from an earlier era when the GATS was an obscure agreement almost unknown outside trade policy circles. The recent polemics out of Geneva and Paris are the products of a new, more politically charged environment.[16]

Occasionally stooping to diatribe, *Fact and Fiction* may score points with the casual or already decided reader, but it is riddled with oversimplification and shallow assurances. In fact, the WTO Secretariat adopts the sensationalist style it—in many cases falsely—attributes to its critics. Such ferocity may please some of the GATS stoutest supporters,[17] but it contributes to a deteriorating quality of public debate and, in time, may deservedly undermine the Secretariat's own credibility with the public.

The tone of the OECD's critique, *Markets Matter*, is more civil and less confrontational than *Fact and Fiction*. It acknowledges, for example, that many of the GATS critics' concerns are "genuine" and "can be seen as warnings to national governments that the terms of the domestic social contract should be negotiated at the national—and not supranational—level."[18] But *Markets Matter* is also a self-described "advocacy piece," and condescendingly attributes most of the critics' concerns to various "mis-

conceptions" that it sets out, like an impatient schoolmaster, to correct.

The GATS is a broadly worded and complex agreement. While there have already been several important GATS-related cases, many of its provisions remain untested. Because the agreement itself lacks clarity, how these rules will be applied in any future dispute is, at least to some extent, a matter of interpretation. But, to GATS critics, this uncertainty is part of the problem: vesting wide-ranging discretion in a remote institution designed primarily to benefit foreign commercial interests is one of the GATS most serious flaws. On the other hand, those vested with the power to shape and interpret this broadly worded treaty are, as one might expect, quite comfortable wielding it. Its chief beneficiaries, global services corporations, can be expected to exploit and defend the advantages the GATS affords them. Those who are less likely to experience direct benefits—but who must nevertheless live with the policy consequences of negotiators' and dispute panelists' decisions—cannot afford to be so sanguine and self-satisfied.

Finally, and critically, in rebutting the WTO's Secretariat's and the OECD's critiques, this book will argue that the GATS purported protections for public services and governments' ability to regulate in the public interest are unacceptably weak and inadequate.

This book is divided into two sections.

- The first section considers the debate over the scope and coverage of the GATS—that is, what is covered, what is not, and under what conditions?
- The second section deals with the controversy over the substance of GATS provisions—that is, what is the

content and force of GATS provisions and what are their policy implications?

The book then concludes by returning to the overarching themes of the effects of the GATS on public services, public interest regulation and, more generally, on democratic governance.

Chapter 2:
GATS scope and coverage

One point on which both proponents and critics agree is that the scope of the GATS is very broad. While the agreement's impacts may be debatable, its breadth is not. Relative to earlier GATT disciplines, which applied primarily to border measures affecting internationally traded goods, the scope of the GATS is truly immense. This extraordinary breadth follows from several factors, including the incredible diversity of services themselves, the architecture of the agreement, and the expansive way the GATS defines key terms such as "measures" and "trade in services."

Even in partisan debate, GATS proponents acknowledge this breadth. *Fact and Fiction*, for example, notes "the very broad scope" of the GATS.[19] Where proponents and critics diverge is that GATS supporters, while acknowledging the breadth of the agreement in principle, emphasize that, in practice, the agreement provides governments with "remarkable flexibility which allows governments, to a very great extent, to determine the level of obligations they will assume."[20] This flexibility, and its limits, will be discussed in the final part of this section.

First, this section considers the breadth and diversity of services themselves. Then it turns to three of the important "top-down" features of the GATS:

- the GATS applies to all government measures;
- the GATS covers all means of supplying a service internationally; and
- no services are excluded a priori.

Next, the book examines the highly controversial exclusion for services provided "in the exercise of governmental authority" which GATS proponents often—misleadingly—suggest provides a blanket exclusion for public services. Finally, the book will consider the flexibility that is provided by the so-called "bottom-up" features of the GATS and the significant limits to this flexibility.

The breadth and diversity of services

It is difficult to grasp the full range of services that exist in any complex society.[21] Delving into one of the comprehensive classification systems developed under the auspices of the United Nations provides invaluable insight into the myriad of human activities classified as services.[22] These range from birth (midwifery) to death (burial), the mundane (dry cleaning services) to the sublime (theatre and music), 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 telecommunications), and from our wants (retail sales of games and toys) to our needs (water distribution).

The subject matter of the GATS—services themselves—is therefore almost unimaginably broad. As *Markets Matter* aptly observes, "Services encompass a vast and disparate array of economic activity, and imply a similarly wide scope of issues, institutions and interests."[23]

Surprisingly, for a legal document, the GATS does not define services.[24] Elsewhere, services are often defined not only by what they are, but by what they are not. Broadly defined, a service is a product of human activity aimed to satisfy a human need, which does not constitute a tangi-

ble commodity.[25] Or, as some wag put it, a service is any product that "you can't drop on your foot."

Even these broad definitions are oversimplifications. In practice, it is very difficult to draw a clear line between the production of goods and services. Services are embodied in tangible products, e.g. advertising in a magazine, which *can* be dropped on your foot. This is not a purely theological matter. It means that the WTO rules on trade in goods and services overlap and that government measures must conform to both. As the WTO panel that ruled against Canadian cultural policies designed to support indigenous magazines observed: "Overlaps between the subject-matter of disciplines in the GATT 1994 and in GATS are inevitable, and will further increase with the progress of technology and the globalization of economic activities."[26]

To a casual observer, the widely assumed intangibility of services may also suggest an absence of environmental or resource impacts. It should not. For example, producing primary commodities such as wood, minerals, or agricultural products involves many environmentally sensitive services. These include silviculture, roadbuilding, drilling, applying pesticides, transportation, and more. The same holds true of manufacturing, for which wastes must be disposed of and goods transported to markets. Even services such as tourism and retailing must, of course, be carefully managed and planned to minimize adverse environmental impacts. In short, safeguarding the ability to conserve natural resources and to protect the environment is as critical in services rule-making as for any other sphere of economic activity.[27]

Markets Matter attributes the current wave of GATS criticism to the idea that some services are "simply too

important to bring within the scope of international trade rules.[28] There is something to this. Many services are arguably too important to submit to rules designed chiefly to expand international commerce and to benefit commercial interests. Societies have deliberately insulated many important services from the full brunt of private market forces. Even after two decades of widespread neo-liberal reform, services such as water, health, and education are still, in many countries, either heavily regulated or publicly provided to ensure greater equity and access—regardless of the ability to pay. Many GATS critics regard the encroachment of international trade treaty restrictions into services as part of a broader trend to appropriate these remaining "global commons" for private profit-making.

The "top-down" features of the GATS

To follow the twists and turns of the GATS debate, it helps to understand some trade policy jargon. A "bottom-up" agreement refers to one that applies only to those specific government measures and sectors that individual governments explicitly agree to cover. So, for example, Jamaica's tourism sector would only be covered if a Jamaican government agreed. This is also called a "positive listing" approach.

By contrast, "top-down" treaties automatically apply to all measures and sectors unless governments explicitly exclude them by negotiating them off the table. In this case, for example, the French health care sector would be covered unless France successfully negotiated a country-specific exemption to exclude it. This is also known as a "negative listing" or, more graphically, as a "list it or lose it" approach.

The GATS is frequently referred to as a "bottom-up" agreement.[29] This characterization is only partly true. In fact, the GATS is a hybrid agreement that combines both bottom-up and top-down features.

The most significant top-down features of the GATS include:

- the GATS applies to all government measures;
- the GATS covers all means of supplying a service internationally; and
- no services, except those supplied in the exercise of governmental authority, are excluded a priori.

Each of these is now considered in turn.

The GATS applies to all government measures affecting trade in services.

The GATS scope and coverage is determined by Article I which states that the "GATS...applies to measures by Members affecting trade in services (Article I:1)."[30] Such measures, or government actions, can take any form including laws, regulations, administrative decisions, or even unwritten practices.[31] WTO panels and the Appellate Body have clearly established that "no measures are a priori excluded from the scope of application of the GATS."[32]

The GATS also applies to measures taken by any level of government. While negotiated exclusively by national governments, its restrictions cover measures by "central, regional, or local governments and authorities (GATS Article I:3.a.i)." This includes provincial, state, municipal, Aboriginal, and all other governments. The GATS also applies to "non-governmental bodies in the exercise of powers" delegated by any level of government (GATS

Article I:3.a.ii). This catches, for example, professional associations, standards-setting bodies, and boards of hospitals, schools or universities where they exercise authority conferred upon them by any level of government.

Moreover, in the EC Bananas case, the panel elaborated that in Article I:1, which defines the GATS' scope: "we note that the ordinary meaning of the term 'affecting,' in Article I:1 of GATS, does not convey any notion of limiting the scope of the GATS to certain types of measures or to a certain regulatory domain. On the contrary, Article I:1 refers to measures in terms of their effect, which means that *they could be of any type or relate to any domain of regulation* (emphasis added)."[33] In other words, no government action, whatever its purpose—protecting the environment, safeguarding consumers, enforcing labour standards, promoting fair competition, ensuring universal service, or any other end—is, in principle, beyond GATS scrutiny and potential challenge. Because of this stunning breadth alone, it is not only legitimate, but vital, for citizens, NGOs, and elected representatives at all levels of government to critically examine potential GATS impacts on an almost unlimited range of public interest measures.

The GATS covers all possible means of supplying a service internationally.

A second top-down feature of the GATS is that it applies to every possible means of providing a service internationally. As noted, the GATS "applies to measures by Members affecting trade in services (Article I:1)." If the GATS applies to any measure that has an effect on "trade in services," what then does "trade in services" mean?

The GATS defines "trade in services" quite unconventionally to include not just cross-border trade—where a supplier located in one country provides a service to a consumer located in another—but also every possible means of supplying services internationally. The four GATS "modes of supply" are:

- **cross-border services trade (mode 1)**. This mode is closest to the conventional meaning of international trade, and includes, for example, a consultant located in one country giving advice to a client located in another country by mail, phone or Internet.
- **consumption abroad (mode 2)**. Examples of this mode include tourism or a student travelling abroad to attend university.
- **commercial presence (mode 3)**. This mode includes all forms of foreign direct investment; for example, a health care company setting up a private clinic, a fast-food chain establishing a franchise, or a bank setting up a branch in another country.
- **natural persons (mode 4)**. This mode covers persons travelling internationally to provide services; for example, a technician or management personnel physically travelling to another country to provide services.

Significantly, the GATS covers investment—services provided through commercial presence (mode 3). This fact alone greatly expands its coverage relative to previous GATT rules. As the WTO Secretariat observed in a less guarded era, "This [i.e., mode 3] is probably the most important mode of supply of services, at least in terms of future development, and also raises the most difficult issues for host governments and for GATS negotiations."[34]

Foreign direct investment is present in all national economies. Indeed, in a globalized economy it is difficult to conceive of a government measure that would not in some way affect some foreign investor providing services in the host country. As the WTO Secretariat commented in 1999, "rules governing commercial presence are very different from the tariffs and other border measures that principally affect trade in goods. GATT has only gradually become involved in some sensitive domestic policy issues such as subsidies and technical standards. Right from the beginning, however, the GATS has been forced to grapple with internal policy issues such as rights of establishment that are inherent in the commercial presence of foreign interests."[35] Because foreign investment is pervasive, almost any government action could fall into the category of measures affecting "trade in services" as broadly defined by the GATS.

To avoid any misunderstanding, it should be stressed that simply because a measure falls within the scope of the GATS does not make it GATS-inconsistent—that is, contrary to GATS rules. But, conversely, it is also true that any regulatory or legislative initiative in any WTO-member country—including many that have never before been considered trade-related—must now be vetted for GATS consistency or risk possible challenge.

In fact, the GATS defines "trade in services" so broadly and unconventionally that it restricts any government measure that might, even unintentionally, adversely affect competitive conditions relating to the supply of a service through any mode.[36] In the WTO Appellate Body's authoritative opinion, "the use of the term 'affecting' reflects the intent of the drafters to give a broad reach to the GATS.

The ordinary meaning of the word 'affecting' implies a measure that has 'an effect on,' which indicates a broad scope of application."[37] This effect of a regulatory or other measure on "trade in services" need not be large. In fact, panels have ruled that, if a measure's adverse effect on the conditions of competition is minimal or even hypothetical, it may nevertheless be found GATS-inconsistent.[38]

This excessive reach further validates rising global concern among non-governmental organizations and others about the impact of GATS restrictions on a huge range of public interest measures and regulation. As a former director-general of the WTO frankly conceded, the GATS is no ordinary trade agreement; it extends "into areas never before recognized as trade policy."[39]

No service sector is excluded a priori: The governmental authority exclusion

A third top-down feature of the GATS is that it covers "any service in any sector except services supplied in the exercise of governmental authority (GATS Article I:3.b)." As *Fact and Fiction* acknowledges, "the GATS covers all services with two exceptions—i.e., services provided in the exercise of governmental authority, and [certain services] in the air transport sector."[40] Similarly, *Markets Matter* observes that "the GATS covers in principle international trade in all services except those supplied in the exercise of governmental authority and [certain aspects of] the air transport sector."[41]

This universal sectoral coverage is critical to the GATS' intended development. This all-inclusive framework binds member governments to certain rules that already apply across all sectors—even those where no specific commitments have been made. Critically, the GATS uni-

versal coverage also means that all sectors are on the table in ongoing negotiations. Such negotiations to achieve progressively higher levels of liberalization, mandated in Article XIX, are part of the agreement's so-called built-in agenda. The current phase began in February 2000 in Geneva and is now part of the broader WTO round that was launched in Doha, Qatar in November 2001. As 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."[42]

The exclusion for "services provided in the exercise of governmental authority" is arguably the only significant carve-out from the GATS' universal scope. No GATS provision has been more controversial, at least outside the walls of the WTO complex in Geneva. Article I:3, if it had left governments to define for themselves the services they provided in their exercise of governmental authority, might have been a broad exclusion that preserved governments' flexibility to protect public services from the commercializing pressures of the GATS. But, presumably anticipating this, negotiators strictly circumscribed it.

The governmental authority exclusion is qualified by two criteria, both of which must be satisfied for the exclusion to apply. These criteria are that a service 1) must not be supplied on a "commercial basis", and 2) must not be "supplied...in competition with one or more service suppliers."[43] Neither of these critical criteria is further defined in the GATS text.

Markets Matter maintains that this "provision 'carves out' a potentially wide category of services from the scope of GATS rules." It also grudgingly concedes that Article I:3 "does not precisely define the scope of this category,

however, a lacuna that some anti-GATS analysts have drawn attention to and interpreted as having ominous implications."[44]

The precise scope of this exclusion is certainly a critical issue with significant—and quite possibly ominous—public policy implications. All services that do not fit within its scope are covered by the GATS. That is, all services that are supplied either on a commercial basis or in competition with one or more service suppliers, regardless of whether they are public or private, are subject to all of the GATS obligations that now apply across-the-board. Where member governments have made specific commitments, GATS national treatment, monopolies and market access rules also apply to committed services—including public services—that are supplied either on a commercial basis or in competition with other service suppliers. In addition, these services will also be subject to any new unconditional obligations, including the controversial new restrictions on non-discriminatory domestic regulation being negotiated under GATS Article VI.4, that may be adopted in future.

Prominent GATS supporters have confused matters considerably by making categorical, but unsupported, assurances about the GATS and public services. For example, in a widely published opinion piece, WTO Director-General Michael Moore baldly asserted that "GATS explicitly excludes services supplied by governments."[45] This is clearly untrue; the statement is at odds with the GATS text. A 1994 analysis by the OECD also directly contradicts Moore's assertion, stating, "A category of services which is excluded from the coverage of the GATS, are...services supplied in the exercise of government authority. This exception is, however, limited: where a Gov-

ernment acts on a commercial basis and/or as competitor with other suppliers, its activities are treated like those of any private supplier."[46]

Because the key terms "commercial" and "in competition with" are not defined in the GATS, GATS dispute panels will turn, under applicable international law, to the ordinary meanings of these words.[47] As a recent governmental analysis points out, "the ordinary definitions of these terms are broad, making the set of services that they describe very large, and the set of services that falls outside them—and hence outside the scope of the agreement—quite small."[48] Another recent analysis concludes that a WTO Appellate Body "would be in conformity with international law if it adopted a narrow understanding" of the exclusion.[49] Indeed, a similar exclusion in the European Communities Treaty has been interpreted restrictively and has failed to exclude the services in dispute every time it has been tested.[50] Moreover, the WTO's own Council for Trade in Services noted the need for the exclusion to be interpreted narrowly.[51]

In most WTO countries, "public services" are rarely delivered exclusively by government. Instead, vital public services are delivered to the population through a mixed system that is wholly or partly funded, and tightly regulated, by governments at the central, regional, and local levels. Health, education, and other social service systems, for example, consist of a complex, continually shifting mix of governmental and private funding. These systems also entail a mixing—or co-existence—in the same sector, of governmental, private, not-for-profit and private for-profit delivery. To be effective, a GATS exclusion for these services needs to safeguard governments' ability to deliver public services through the mix that they

deem appropriate, to shift this mix as required, and to closely regulate all aspects of these mixed systems.

The GATS exclusion clearly falls well short of this ideal, although by how far remains uncertain. This depends on how restrictively it will be interpreted in future GATS disputes. At best, it would appear that the exclusion is narrow and is likely to be interpreted restrictively. At worst, the exclusion may be so narrow as to be of little practical significance or, at the extreme, to provide no protection at all.

It is, in fact, difficult to conceive of a "public service" that is unequivocally both non-commercial and not in competition with any other service supplier. To date, despite the controversy surrounding this GATS provision, no one—including the WTO Secretariat and the OECD Trade Directorate—has yet provided a credible example of a service that would satisfy the terms of the GATS governmental authority exclusion.[52] Moreover, no matter how narrow the exclusion is at present, it seems beyond question that, because of increasing commercialization and competition in many countries, its scope is steadily diminishing.

Unfortunately, far from allaying the critics' main concerns, both *Fact and Fiction* and *Markets Matter* stick to the now-familiar pattern of sidestepping difficult issues while offering inappropriate reassurances. Both of these documents implicitly reinforce concerns about the limits of this controversial exclusion. For example, *Fact and Fiction* acknowledges that "Those services which are provided on a commercial or competitive basis are covered by the GATS."[53]

Markets Matter briefly considers the possible meaning of the two criteria underlying the governmental author-

ity exclusion, although this discussion is not very enlightening. With respect to the "competition" criterion, it notes, as have many GATS critics, that "the co-existence of public and private providers is common to virtually all OECD countries' social services sectors, such as health and education, a condition that pertains also to numerous developing countries."[54]

But it goes on to assert that "such co-existence does not *necessarily* mean that they are 'like services' nor that they are in competition, and therefore does not bring public services into the purview of the GATS (emphasis added)."[55] This bland assurance is quite misleading. It is true that the co-existence of public and private service providers does not mean, as a matter of logical necessity, that these providers are in competition with each other. However, the critical point is that such co-existence may, and indeed often does, entail competition—for clients, revenues, concessions, contracts, and scarce public resources. And wherever such competition is deemed to occur[56], the public service in question would, by definition, fall outside the governmental authority exclusion and "into the purview of the GATS."

A normal meaning of competition is "to try to get what others also seek." [57] In this sense, for example, a public university or community college offering a non-credit computer training course could be considered to compete for the same students with private, for-profit universities or training institutes offering similar courses. In many countries, public hospitals could be considered to compete with private hospitals for wealthy patients who are prepared to pay for services either out of their own pocket or through private insurance.[58] Even public police services sometimes compete with private security services, for

example, in contracts to provide security for special events such as a rock concert.[59] In these and many other similar instances, if the public institutions enjoy government-provided advantages (e.g. public funding, exclusive degree-granting authority, access to publicly funded facilities, publicly paid staff, research grants, etc.) that are not also available to their private competitors, GATS conflicts may well arise.

Markets Matter thus obscures, but never explicitly denies, a very important point. GATS dispute panels can be expected to view the co-existence, in many service sectors, of public, private-non-profit and private-for-profit service providers as involving competition. In these circumstances, the governmental authority exclusion would provide no protection, and the GATS would apply to the public services and providers concerned.

With respect to the "commercial" criterion, *Markets Matter* asserts that

> "It would seem highly implausible to claim that the fact that fees might be charged for some governmental services, e.g., for school enrolments, *automatically* makes the service supplied 'on a commercial basis' (emphasis added)."[60]

Perhaps charging small fees (as some Canadian provinces do for compulsory medical insurance) would not automatically put these services on a commercial footing. But, for example, as university tuition fees rise, at what point might they, in GATS terms, put the service on a commercial basis?[61] As the OECD statement implies, this is a matter of judgment and degree.[62]

As these examples illustrate, the pertinent issue is whether "public services" are supplied *neither* on a com-

petitive *nor* a commercial basis. If one or the other of these cumulative conditions is not satisfied, then the GATS applies. Governments and citizens should be alert to possible GATS implications and conflicts, not lulled into a false sense of security by the soothing, but shallow, assertions of GATS promoters.

Significantly, like many official statements about the governmental authority exclusion, both documents signal a willingness on the part of GATS proponents to contemplate a "clarification" of the provision. *Markets Matter* acknowledges that the agreement "does not precisely define the scope of" the exclusion, noting that this issue "is almost certainly one that Member governments may wish to address in the context of the ongoing set of negotiations with a view to providing greater definitional clarity and legal certainty."[63]

Such positive signals are a credit to the citizens and NGOs that have persistently raised concerns about the adequacy of the GATS governmental authority exclusion. A new legally binding, authoritative interpretation of Article I:3 or, better still, a new GATS exclusion that truly protected governments' flexibility to deliver public services in the manner they see fit, would be a positive development.[64] This matter is far too important to be left to WTO dispute settlement. As one thoughtful NGO analysis of the governmental authority exclusion concludes, the larger issues about the scope of the agreement "are policy questions which must be resolved by the governments of the WTO members which are accountable to their constituencies."[65]

But a grimmer scenario is the release of a public statement without binding effect that merely repackages the existing exclusion, with all its faults, in a more publicly

presentable way. In one passage, *Markets Matter* hints at just such an approach. Rather than obtaining greater clarity and legal certainty,[66] it suggests that OECD Member governments could merely "clarify" their "intent" and so "go some way towards assuaging some of the concerns expressed by civil society groups."[67] Such a cynical project would simply further obscure the application of the GATS treaty to public services and provide political cover for governments that have already made, or are planning to make, new or more onerous GATS commitments affecting critical public services.

Nowhere are GATS proponents on shakier ground than when they assert that this highly qualified exclusion fully protects public services. This exclusion is, at best, unclear and subject to conflicting interpretations and, at worst, if narrowly interpreted, of little or no practical effect.[68]

The "bottom-up" features of the GATS

How flexible is the GATS?

GATS proponents assert that, notwithstanding its broad scope, the agreement provides "remarkable flexibility" which, according to *Fact and Fiction*, "allows Governments, to a very great extent, to determine the level of obligations they assume."[69] Similarly, *Markets Matter* argues that "WTO Members are not required under GATS rules to open any specific sector to foreign competition. The Agreement instead features a series of provisions by which countries can, if and when they choose, exempt specific sectors from liberalization, set conditions or limits on the nature and pace of any domestically determined liberalization, or even suspend or modify concessions that

they have already made."[70] These arguments refer to the "bottom-up" features of the GATS, those rules which apply only to sectors or sub-sectors where governments make explicit GATS commitments.

This flexibility, and its limits, is another important area of controversy. Proponents emphasize the opportunity these bottom-up features give governments to open their services markets at their own pace. Critics stress the pressure under which governments are put to make further commitments and the difficulties they face in changing course, once commitments are made. Another point of contention is that the proponents stress the ability of governments, even where they agree to make commitments, to preserve non-conforming measures by listing them as exceptions in their country schedule. Critics point to the formidable practical obstacles to preserving policy flexibility through country-specific exceptions. A final consideration is that the GATS includes a provision that allows governments to withdraw or renegotiate its commitments, but they must compensate other GATS members for doing so.

As will be discussed below, certain GATS obligations, such as the most-favoured nation rule, apply unconditionally across all service sectors. Governments have little choice in this matter.[71] The most forceful GATS obligations, however, including national treatment and market access, apply only to sectors that governments explicitly agree to cover. Each member government has its own unique country schedule which lists these "specific commitments" on a sector-by-sector basis. These schedules are an integral, legally binding part of the GATS.

The OECD refers to this as "a highly flexible, a la carte approach to liberalization under the GATS."[72] The WTO

Secretariat goes even further, declaring that "there is complete freedom to choose which services to commit."[73] While GATS scheduling procedures do provide governments with certain flexibility, there are serious limits to this flexibility that the proponents understate or ignore.

The GATS and power bargaining

The first problem with likening the process of formulating a GATS schedule to casually ordering from a menu—let alone complete freedom—is that it completely ignores negotiating pressure. Such pressure can be intense. For example, at the end of the Uruguay Round in 1994, the U.S. refused to conclude an agreement covering the financial services sector because it was dissatisfied with developing countries' financial services offers. The U.S. refusal resulted in two years of further financial sector negotiations during which southeast Asian countries in particular were subjected to powerful pressure to open their financial services sectors to U.S. and European interests.[74] Likewise, countries acceding to the WTO since the end of the Uruguay Round have also come under strong pressure on services issues. Haggling over services commitments was a major factor delaying China's accession and remains a significant obstacle to Russia's accession to the WTO.[75]

In the case of indebted developing countries, there is pressure from other quarters: especially from the International Monetary Fund and the World Bank, whose standard policy prescriptions and conditions include privatization of state enterprises, public spending cuts, user fees for basic services, and financial and other services liberalization. The functional role of the WTO agreements, and the GATS in particular, in enforcing "the Washington

Consensus" is to lock in market-oriented policies wherever they occur.

Negotiating pressures to make further substantial commitments will be part and parcel of the GATS 2000 negotiations and of future rounds. As previously indicated, GATS Article XIX, Progressive Liberalization, ensures that these successive rounds of negotiation are aimed at achieving "a progressively higher level of liberalization." The U.S., Japan and the EC have already made clear that they intend to push for ambitious levels of liberalization and the elimination of country-specific limitations on existing coverage.

This pressure can also take forms other than straight power bargaining. Developed country governments have actively promoted a variety of negotiating and classification devices designed to coerce governments into making broader and deeper GATS commitments than they otherwise might. These so-called "horizontal negotiating modalities" refer to the negotiation of cross-cutting GATS commitments that would apply across members, sectors, and/or modes of supply. Some examples might include requiring that each government make baseline commitments in every sector, that governments make commitments that apply to entire clusters of services, or that governments eliminate certain types of non-conforming measures altogether.[76] Despite stiff resistance by developing country governments, the GATS 2000 negotiating guidelines leave the door open to horizontal negotiating approaches.[77]

Some readers may be surprised to learn that the intellectual muscle behind horizontal negotiating approaches has been provided by the OECD Trade Committee. While its document, *Markets Matter*, now celebrates GATS flex-

ibility, this committee has tirelessly advocated so-called "formula approaches" as tools to reduce this flexibility. Some of the potential formulas suggested by the OECD include: obliging "all participants to make initial offers in sectors where they presently have no commitments;" that "measures listed in GATS Article XVI (Market Access) be phased out by all participants by a designated date;" and the "removal of or phase-out of economic needs tests for approval, quotas on number of firms permitted, and limitations on majority foreign ownership as general principles for establishment of new services businesses."[78]

The limits of limitations

Another major problem is that, even if such "complete freedom" to make specific commitments existed once, it clearly no longer exists. Most governments, especially those from developed countries, have already made very substantial GATS commitments.[79] While a few sensitive sectors such as the health and education services remain relatively uncommitted, most important service sectors are already very heavily committed. Although little understood or, until recently, even discussed outside trade ministries, these commitments already bind governments. This status quo, not some pre-Uruguay Round "state of nature" where governments enjoyed "complete freedom to choose which sectors to commit," must be the starting point of any serious discussion of GATS policy implications.

Markets Matter, for example, suggests that a country that wishes to restrict the extent of its GATS commitments,

> "might establish a 'horizontal' commitment that applies to all services. For example, many countries have listed horizontal (i.e., applicable to all

> sectors) limitations on the commitments for movement of persons. (The term 'commitment' can be deceptive in this context, as in practice it often means across-the-board limitations on market access and national treatment.)"[80]

But this option, while possible when initial commitments were made in 1994 or when a new member accedes to the WTO, is now practically unworkable. A WTO member government that wanted to add a horizontal limitation to its schedule would be on the hook to provide compensation to foreign governments on behalf of every affected foreign service provider in every sector that is already committed.[81] To imply that horizontal limitations remain a widely available and viable option to protect policy flexibility under the GATS is therefore quite misleading.

GATS proponents further emphasize that, even where governments make commitments, they can exempt otherwise non-conforming measures. *Fact and Fiction*, for example, states that, "for those services that are committed, Governments may set limitations specifying the level of market access and the degree of national treatment they are prepared to guarantee."[82] The GATS certainly permits governments to enter country-specific exceptions in their country schedules. But what is left unsaid is that such limitations must be scheduled when a government makes its initial commitments. When a member government makes a binding commitment in a specific sector or subsector, it has a one-time opportunity to list non-conforming measures that it wants to protect. Any non-conforming measures that are not listed are lost—that is, they must be brought into conformity with GATS rules or risk challenge.

Even where governments recognize in time that a policy or measure must be protected, the whole exercise is fraught with difficulty. As a joint civil society response to *Fact and Fiction* aptly remarks, protecting "the ability to regulate depends on governments knowing how, and when, to make exceptions and impose limitations when they commit sectors to liberalization. This requires an unrealistic level of foresight and capacity."[83]

In short, GATS country-specific exceptions:

- must be drafted carefully,
- will be interpreted narrowly,[84]
- usually protect existing measures, not future policy flexibility,
- become targets in ongoing negotiations, and
- cannot be changed without compensation.

Moreover, their effectiveness is uncertain, until they are tested in dispute settlement.

Even identifying all potentially non-conforming measures in a sector or sub-sector is enormously difficult. During the Uruguay Round, subnational governments, whose measures are fully covered, were not adequately consulted about the GATS in many countries. For example, there is no indication that Canadian federal negotiators directly consulted local governments or informed them of the opportunity to exempt potentially non-conforming measures. As a result, there are no purely municipal-level limitations in Canada's GATS schedule.

It is also up to a country's negotiators to consult with other ministries and levels of government. The quality of these consultations, if they even occur, may vary enormously. Trade negotiators may not be familiar with the

programs of social policy ministries or the preoccupations of local governments and may thus not fully appreciate the importance of protecting them in negotiations. Understandably, many trade negotiators often favour advancing export interests over so-called defensive interests. Negotiators tend to be predisposed to resist exceptions, because every limitation must be paid for with precious negotiating coinage. Finally, negotiators are usually reluctant to take a precautionary approach because the mere listing of a grey area measure draws attention to it and may raise concerns about similar measures that have not been similarly protected.

All these difficulties are compounded by the novelty and the sweeping scope of the GATS and the uncertainty about key GATS provisions such as the exclusion for services provided in the exercise of governmental authority. The frenetic atmosphere at the conclusion of the Uruguay Round was not conducive to sober reflection about potentially non-conforming measures. Indeed, few people outside of GATS negotiators understood the agreement. There was no phase-in period during which governments could consult, reflect, and add to their limitations. Not surprisingly, country schedules, including limitations, are rife with errors and inconsistencies.

The GATS does not permit governments to later add limitations for non-conforming measures that may have been overlooked, to revise poorly drafted limitations that do not provide the protection that was intended, or to protect measures that governments did not realize, at the time they made their initial commitments, were exposed to GATS challenge. Nor, critically, does the GATS permit governments to schedule future measures in already committed sectors. In all such cases, a government would in

effect be subtracting from its GATS obligations and would be required to provide other affected members "compensatory adjustment."[85]

For these many and varied reasons, country-specific limitations are, in practice, far less effective safeguards for public policy flexibility than advertised by the WTO and the OECD.

Paying to govern: Withdrawing GATS commitments

The GATS does provide a means for governments to withdraw previously made commitments, so long as they are prepared to compensate other governments whose service suppliers are allegedly adversely affected. As both *Markets Matter* and *Fact and Fiction* highlight, GATS Article XXI allows countries to modify or withdraw a specific commitment after three years from the time the initial commitment is made.

As *Markets Matter* notes, if this article is invoked, "compensation must be provided to other countries."[86] If a negotiated settlement can be reached, such compensation takes the form of replacing the withdrawn commitments with others of equivalent value. But, in the more likely scenario that a negotiated settlement cannot be reached, the government withdrawing a commitment faces retaliation in the form of affected foreign governments imposing trade penalties of equivalent value. While there is some dissent, the predominant view appears to be that Article XXI permits cross-retaliation; retaliatory sanctions need not be confined to services but could also be applied, to exert maximum pressure, to agricultural or goods trade.[87]

Article XXI is a potentially important provision; it would be imprudent for non-governmental critics of the GATS to discount it. No member government has yet in-

voked this feature, but some may well avail themselves of this provision in future. But, by the same token, GATS proponents should frankly acknowledge that Article XXI is designed to make it difficult to use. In fact, the WTO described this GATS provision much more frankly and accurately in 1999, when it stated that, "because unbinding is difficult, the commitments are virtually guaranteed conditions for foreign exporters and importers of services and investors in the sector to do business."[88]

Trade negotiators are quite comfortable with the notion that governments must pay if they want to lessen or withdraw previous commitments. This concept originated in the notion of bound tariffs on goods. GATT members negotiated bound tariff rates, agreeing that, if they were ever raised higher than the bound rate that equivalent compensation—in the form of lower tariffs on some other goods—would be forthcoming.

Arguably, this arrangement worked well enough when confined to tariffs and tariff rates. When transposed to the GATS, however, the very notion of bound commitments is quite problematic. The scope of the GATS is not confined to a well-defined set of government measures such as tariffs. In fact, as we have seen, its scope is, in principle, very broad, restricting an almost unlimited range of measures, many of which independent observers would not readily agree were trade-related.

To take one example: suppose a government is elected on a pledge to implement public automobile insurance. If, as typically would be the case, some private insurers that would be affected are foreign-owned, the new government could find itself challenged under the GATS rules on government monopolies (if a previous government had made commitments in the insurance sector). Previously,

insurance providers would have considered the possibility of such a democratic policy change a commercial risk to be borne by all providers, domestic or foreign.[89] Because of the expanding reach of the new generation of international commercial treaties such as the GATS, however, such domestic policy choices have been transformed into international treaty issues. Only a government determined enough to negotiate GATS compensation and to face potential retaliation would proceed. The very prospect of compensation might even be enough to tip the balance against fulfilling such a promise. In this important sense, the transposition of the practice of bound commitments from tariffs to a vast new range of public policies and measures diminishes democratic choice.

No doubt many in the corporate and trade policy community believe that limiting democratic flexibility in this way is a good thing. If so, they should make their case more openly instead of resorting to platitudes about the purported benefits of increased services trade. Many citizens, quite legitimately, will not be persuaded. In reality, the GATS is more of a governance agreement than a trade agreement. One suspects that, as more people realize how tenuously related to international trade are many of the matters now restricted by so-called "trade treaties" such as the GATS, dissent will grow.

The GATS general exceptions

For all the supporters' emphasis on the GATS flexibility, the agreement contains just two general exceptions to which governments can turn to try to save otherwise nonconforming measures. The first of these, and the most important from a public interest regulatory perspective,

is GATS Article XIV, General Exceptions, which is modelled on the GATT Article XX. The second is Article XIVbis, a far stronger exception for essential security interests that is fashioned after GATT Article XXI, Security Exceptions.

Markets Matter inappropriately blends, or conflates, these two fundamentally different general exceptions, creating a false picture of the protection afforded for public interest measures. To deflect NGO concerns, it asserts that "A country can take advantage of the various general exceptions to justify existing regulations, or to enact new ones in pursuit of legitimate public policy concerns. Such exceptions can be invoked where *governments deem it necessary* to protect major public interests, including safety, human, plant or animal life or health, national security, or public morals (emphasis added)."[90]

This passage suggests to an unwary reader that, if a government deems a measure necessary, then it is exempted.[91] But this is true only of the Article XIVbis national security exception, which provides that nothing in the GATS shall be construed to prevent "any Member from taking any action *which it considers necessary* for the protection of its essential security interests (GATS Article XIVbis, emphasis added)." This powerful exception is "self-judging," testifying that, when governments attach a high priority to protecting important interests, their negotiators can craft highly effective exceptions.

Unfortunately, the cover provided by Article XIV for other vital public interest measures is far, far weaker. Unlike the national security exception, Article XIV is not self-judging. To successfully invoke this exception, defendant governments bear the burden of demonstrating that a challenged measure is aimed at one of the specific legitimate objectives listed in Article XIV, that it satisfies

the qualifying language of the specific exception invoked, and that it meets the conditions in the introductory chapeau of Article XIV that the measure is neither "arbitrary or unjustifiable discrimination" nor a "disguised restriction on trade in services."[92]

These are formidable hurdles. While the general exceptions under GATS article XIV have not been invoked yet in any WTO dispute, there is little reason to be optimistic that they will protect public interest measures from successful challenge. To date, the dispute settlement system of the WTO (and before it of the GATT) has interpreted the similar language in GATT Article XX very restrictively. Under the necessity test that has been developed in Article XX interpretation, the government invoking the GATT exception must demonstrate that no alternative, consistent measure was reasonably available to it, and, that, if all available measures were inconsistent, that they chose the least trade restrictive measure. Since, in the abstract without reference to real-world costs or political realities, there is usually an alternative less trade restrictive means available, this strict interpretation has rendered Article XX ineffective as an exclusion.[93]

But there is another important concern: in certain crucial important respects, the GATS Article XIV general exception has been crafted even more narrowly than GATT Article XX. The wording of the chapeau contains the same references to arbitrary or unjustifiable discrimination and disguised restriction to trade found in GATT Article XX. There is little doubt that it will be interpreted in the same stringent manner as Article XX. But the list of permitted legitimate objectives in Article XIV is considerably shorter than that in Article XX.[94]

Subject to the provisos in the chapeau, the first two clauses of Article XIV permit a defendant government to save otherwise GATS-inconsistent measures if it can demonstrate that these are "necessary to protect public morals or to maintain public order" or are "necessary to protect human, animal or plant life or health." Significantly, GATS Article XIV omits the GATT Article XX reference to measures "related to the conservation of exhaustible natural resources." This omission is glaring and obviously deliberate. It suggests that the grounds to defend environmental protection and conservation measures are even narrower under the GATS than under the already desultory record of GATT Article XX. Otherwise inconsistent environmental protection measures would have to be argued to fall under Article XIV(b), measures "necessary to protect human, animal or plant life and health." This omission could prove highly problematic, especially given the broad interpretation of GATS as covering measures aimed primarily at goods (e.g., natural resources), but affecting services.[95]

The third clause in GATS Article XIV contains new references to measures necessary to prevent deceptive and fraudulent practices, for the protection of personal privacy, confidentiality of data, and consumer safety. These are all vital grounds for regulation, especially in the area of services. But this clause refers only to measures "necessary to ensure compliance with laws and regulations that are not inconsistent with the GATS." This extraordinary qualification neuters the effectiveness of the exception for important consumer protection laws and regulations that themselves could be challenged under the GATS. In this respect, it hardly qualifies as an exception at all.[96]

The final clauses under Article XIV shelter differential treatment "aimed at ensuring the equitable or effective imposition or collection of direct taxes" from the GATS national treatment article and differential treatment that results from agreements on the avoidance of double taxation from the GATS MFN article. These attest to the bureaucratic clout of finance ministries in international trade negotiations. GATS critics can only wish that social service, health and environmental protection advocates wielded similar influence.

In short, the national security exception is the only GATS general exception that can be firmly relied upon. The GATS Article XIV exception is even narrower than in its moribund GATT counterpart, notwithstanding the far broader scope—and political sensitivity—of GATS coverage. It is very troubling that the GATS general exception is so weak. Amending it to provide for a more comprehensive list of legitimate objectives and breathing new life into its interpretation so that it provides greater protection for public interest regulation should be a high priority.

General exceptions to protect legitimate objectives are a critical feature of any trade treaty. They are a permanent part of the agreement that can only be changed by amending the agreement. By contrast, the limitations discussed earlier are a form of reservation—mere country-specific exceptions that can be eliminated unilaterally by any future government. And, as a practical matter, once removed, they are gone forever.

As *Markets Matter* notes, it is possible that such limitations can be maintained indefinitely. But the GATS is designed to create pressure to remove them over time. This is not only a function of the built-in negotiations that

are aimed at broadening and deepening GATS coverage. It is also a function of the interplay between the GATS and the normal ebb and flow of democratic policy-making.

On matters where there is a broad multipartisan consensus to insulate certain national policies from the GATS—for example, as appears to exist for French cultural policy—it is conceivable that the limitations will remain in place a very long time. But in societies where there are serious ideological divisions on contentious issues, such as the role of private, for-profit provision of health care and education, the country-specific limitations that protect policy flexibility in these sectors are very likely to disappear over time. All it takes is the unilateral decree of a single government committed to a market-oriented approach to eliminate them. This insidious bias interferes greatly with the normal ebb and flow of policy-making in a democratic society. All future governments, whatever their policy orientation, will be bound by this decision and the full force of GATS provisions.

It is to the policy implications of these GATS provisions that the book now turns.

Chapter 3:
GATS policy implications

In their account of the GATS, both *Fact and Fiction* and *Markets Matter* put so much emphasis on the treaty's flexibility that the agreement's exceptions appear almost to eclipse its rules. Obviously, rules and exceptions must be read together. The previous section of this book explored the limits of this GATS flexibility. This section focuses on the powerful GATS rules themselves and their serious policy implications. It deals with the controversy over GATS substantive provisions—that is, what is the content and force of GATS provisions and what are their potential public policy implications? First, it discusses the reference to the "right to regulate" in the GATS preamble, which GATS defenders continually suggest protects public interest regulation from GATS challenge. It then analyzes the policy implications of the most important GATS unconditional obligation, the most favoured nation treatment rule. This section then turns to the two powerful GATS conditional obligations, national treatment and market access, which apply only where governments have made specific commitments. Finally, it discusses the GATS provisions restricting monopolies and exclusive service suppliers and the highly controversial GATS negotiations to develop new restrictions on non-discriminatory domestic regulation.

The right to regulate in the GATS preamble

A common refrain in every official rejoinder to GATS critics is that the GATS specifically recognizes governments'

right to regulate.[97] Both *Fact and Fiction* and *Markets Matter* take up this theme in virtually the same terms. *Markets Matter* states that: "The Agreement specifically recognizes the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives."[98] *Fact and Fiction* asserts that: "The right to regulate is one of the fundamental premises of the GATS. The objective of the GATS is to liberalize services trade, not to deregulate services, many of which are closely regulated for very good reasons. The GATS specifically recognizes 'the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives.'" [99]

These assurances, while textually based, are deceptive. The reference to the right to regulate occurs in the GATS preamble. It recognizes "the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives…."[100] This recital was also repeated in the Doha Ministerial Declaration.[101]

But, as the WTO and OECD authors are well aware, the GATS preamble has strictly limited legal effect.[102] Affirming the right to regulate in the preamble has some interpretive value that it would be wrong to discount entirely. But this preambular reference cannot be construed as excusing government regulation from conforming to the GATS. Regulations are clearly listed among the wide range of government measures restricted by the GATS.[103] Regulatory measures, whatever their form or purpose, must conform with the GATS provisions in the main text and a member's specific commitments.

A 1999 publication by the WTO Secretariat puts "the right to regulate" in better context: "The GATS expressly recognizes the right of members to regulate the supply of services in pursuit of their own policy objectives, and does not seek to influence those objectives. Rather, the GATS establishes a framework of rules and disciplines to ensure that Members regulate their services sector in a manner which avoids that any ensuing trade restrictions and distortions are more burdensome than necessary."[104] Later in the same document, the WTO expresses this relationship even more plainly: "Governments are free in principle to pursue any national policy objectives *provided the relevant measures are compatible with the GATS* (emphasis added)."[105]

Dispute panels and the Appellate Body should take the preamble of the GATS into account when interpreting the particular provisions of the GATS. But, as the Appellate Body, citing the Vienna Convention, has repeatedly stated, "a treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought."[106] For example, where the meaning of a particular GATS provision is unclear, the preamble may provide "colour, texture and shading to the rights and obligations of Members" under the main provisions of the Agreement.[107]

But the preamble does not create enforceable rights or obligations. Rather it provides the context in which the operative provisions (the rights and obligations of the GATS) should be interpreted.[108] In other words, the preambular reference to the right to regulate does not

provide legal cover for regulations that are otherwise inconsistent with GATS provisions.

Moreover, the affirmation of the right to regulate is only one of the objectives enumerated in the GATS preamble. The preamble also recognizes "the growing importance of trade in services for the growth and development of the world economy," and that the GATS aims "to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization."[109] There is no hierarchy established among these recitals, leaving panels and the Appellate Body considerable discretion in the balancing of possibly competing objectives in any specific case.

In short, affirming the right to regulate in the preamble may give WTO panels or the Appellate Body some leeway to defer to legitimate government regulation in a difficult interpretive matter. But it is ludicrous and terribly misleading to imply that the mere affirmation of the right to regulate in the GATS preamble fully protects the right to regulate. Government regulations, whatever their aim or purpose, must conform with a member government's GATS obligations and commitments. If they do not, they can be challenged and found inconsistent. As a matter of fact, the GATS legally qualifies and restricts governments' ability to regulate.

Most-Favoured-Nation Treatment (Article II)

The GATS contains a number of general rules that apply to all members and, for the most part, to all services.[110] These include transparency and most-favoured nation.[111] There is little debate that the most important of these cross-

cutting obligations is GATS Article II, Most-Favoured-Nation Treatment. *Fact and Fiction*, for example, acknowledges that: "The Agreement contains a number of general obligations applicable to all services, the most important of which is the MFN rule."[112]

But, despite its acknowledged importance, MFN is discussed only briefly in both the WTO and OECD tracts. Any binding trade treaty provision that applies universally and unconditionally merits far more serious examination. While MFN is a long-established principle governing tariff rates on goods, transposing it to the far broader realm of "trade in services," including investment matters, is quite problematic.

In the limited number of GATS-related disputes to date, MFN has proven to be a surprisingly powerful obligation. In the EC Bananas case, the Europeans were caught unawares when the U.S. and a group of Latin American countries successfully challenged the EC regime favouring bananas imported from its former colonies. The EC had secured a GATT waiver for this preferential regime, but it was unexpectedly ruled inconsistent with GATS rules, including MFN. Likewise, the Canadian government was caught flatfooted when a WTO panel ruled that Canada's Auto Pact violated the GATS MFN obligation.[113]

Basically, the MFN provision states that the best treatment given to any foreign service or service provider must be extended to all like foreign services and service providers—"favour one, favour all."[114] When concerns are expressed about the policy implications of MFN, trade officials sometimes react with surprise. They point out that MFN allows countries to be "trade restrictive," as long as they treat all foreign services and service providers consistently. Why, they ask, would a government ever wish

to discriminate between, say, a Swedish and a Japanese service provider? This reaction, however sincere, misses an important point. MFN is better understood as a most-favoured-foreign company rule.[115]

In effect, MFN requires that any regulatory or funding advantage gained by a single foreign commercial provider must be extended, immediately and unconditionally, to all. MFN rights, which apply to all services except those "provided in the exercise of governmental authority," therefore helps to consolidate commercialization wherever it occurs. For example, if a single foreign-owned, for-profit clinic gains the right to perform surgical procedures that require overnight stays, then the same right must be extended to all foreign-owned clinics on the same terms. Or if a single foreign commercial education provider gains degree-granting authority or access to public subsidies, then all others are entitled to degree-granting authority and subsidies on the same terms.

MFN treatment, as *Markets Matter* accurately observes, "does not entail any specific degree of market openness."[116] But even where governments retain the right to reverse the commercialization of services—that is, where they have not made any specific market access commitments—they are confronted with the opposition of not one, but many, foreign service providers if they try to do so. As a practical matter, MFN rights make it considerably more difficult for governments to retreat from the previous high-water mark of commercialization.

Although it is still largely untested in dispute settlement, Article II has been interpreted forcefully in two GATS-related cases to date. These unexpected rulings in the EC Bananas and Canada Autos cases starkly underline more limits to the GATS vaunted flexibility. When

the GATS entered into force in 1994, member governments had a one-time opportunity to take exceptions to the universally applicable MFN rule. But a government can hardly protect itself against a threat that it did not understand existed.

In 1999, a senior WTO services official acknowledged that in the bananas case "both the panel and the Appellate Body endorsed a broader view of the MFN principle, covering cases of both de jure and de facto discrimination, than hitherto used by the defendant (European Communities) and, possibly, other WTO members as well." [117] Both European and Canadian trade officials were caught unawares by the expansive interpretation of MFN.

Clearly, if either government had understood that there was a possible conflict, they would have negotiated an MFN exception for these important policies. The Europeans made the effort to negotiate a GATT waiver for their bananas regime. As recently as 1998, the Canadian government, after a comprehensive government review involving all stakeholders, reaffirmed the Auto Pact as an important benefit to Canada. But, by the time these governments realized their mistake, it was too late to protect their policies. Such unanticipated results raise serious issues about the legitimacy of a treaty whose provisions are so broadly worded that its full implications are not understood—even by those who negotiated it.

This is not the place for a full assessment of MFN, but such a discussion is clearly needed. Universal coverage should have triggered far more caution. Basically, any measure of any WTO member government that affects the production, sale, distribution, or import of any service in any sector must not result in discriminatory treatment between like foreign services or foreign service pro-

viders. This is the sort of top-down edict that might make even the most zealous central planner blush.

MFN, while it does not legally preclude doing so, certainly makes reversing any foothold gained by a foreign commercial service provider more difficult. MFN ensures that any advantage granted to, or wrested by, any single foreign service provider must immediately and unconditionally be extended to all. This results in "piling on." Advantages gained by any single foreign service provider, even in controversial sectors such as health, education, social services, water, and energy—all of which are covered by MFN—must be extended to all on the same terms. A government that intends to reverse commercialization would no longer face opposition from just a *single* foreign service provider. Instead, it would confront a far more politically powerful bloc of *many* foreign service providers, all of whom have a stake in preventing the change in public policy from taking place.

National Treatment (Article XVII)

The hard core of the GATS is comprised of those restrictions that apply only to the sectors, or sub-sectors, where governments have made express commitments. These specific commitments, along with any country-specific limitations, are listed in each member government's GATS schedule. The country schedules are an integral part of the GATS.

The foremost of these conditional rules is national treatment. The GATS national treatment rule, Article XVII, requires that governments extend the best treatment given to domestic services or service providers to like foreign services or service providers.

National treatment is a long-standing principle in trade in goods, where it has generally meant that once imported goods clear the border and enter a country they must be treated no differently than domestically produced goods. Under the GATT, countries could control imports through tariffs and other measures, but once foreign goods entered the country they had to be treated the same as any other. National treatment is not a commitment to harmonize. Countries are able to adopt differing regulatory policies or standards, as long as these do not discriminate between domestic and foreign goods.[118]

Nevertheless, the national treatment rule is quite intrusive. The GATS adopts a very tough test of de facto non-discrimination. Measures which on their face are impartial can still be found inconsistent if they "modify the conditions of competition in favour of domestic services or service providers."[119] Moreover, a measure that treats foreign services supplied from within a member's territory without discrimination can still be found GATS-inconsistent if it disadvantages service providers located outside the territory that could supply services through another committed mode. Finally, panels have interpreted these obligations so strictly that a measure need only be capable of adversely affecting a foreign service supplier. That is, even if a measure has no actual effect on "trade-in-services," it can be ruled GATS-inconsistent if, in the panel's view, it is merely *capable* of doing so.[120]

These strict tests give panels wide latitude to find measures GATS-illegal even when they are, on their face, non-discriminatory. While domestic courts typically strain to defer to legislators, WTO panels sometimes seem to relish rebuking them. For example, there is no trace of indecision or irony in the WTO panel decision that ruled

that the Auto Pact, arguably Canada's most successful industrial policy ever, was GATS-inconsistent even though the panel acknowledged that the policy likely had no actual effect on trade in services.[121]

Both *Fact and Fiction* and *Markets Matter* devote so much effort to extolling GATS exceptions that it is worth considering some examples of GATS-inconsistent measures. There are many useful policy instruments that are outright inconsistent with GATS national treatment. These include:

- adjustment programs that target assistance to companies set up by dislocated timber workers;
- assistance targeted to economic development corporations controlled by directors chosen from and accountable to the local community;
- programs that favour enterprises owned or controlled by indigenous peoples;
- restrictions on non-resident ownership of farm land;
- programs that direct research and development subsidies to locals or nationals;
- technology transfer requirements;
- requirements that skilled foreign employees provide training to locals; and
- requirements that publicly-funded research and development produce benefits in the local or national economy.[122]

Not everyone would agree that such measures are protectionist, or inappropriately so. But, where GATS commitments are made, all such measures must be scheduled as limitations in order to be protected from possible GATS challenge. Nor can new measures of these types be adopted.

Because of the extraordinary toughness and scope of GATS national treatment criteria, there may be many other less obvious conflicts with important public policy measures. Many government regulations and programs alter the conditions of competition, often as an unintended consequence of other policy goals. Some examples of measures that arguably modify the conditions of competition in favour of domestic services or service suppliers include:

- Government subsidies offered exclusively to non-profit child care providers could be argued to constitute de facto discrimination where most private, for-profit child care providers were foreign-owned while most not-for-profit child care providers were local.
- Requirements that grants to social service providers—for example, of services to the physically or mentally disabled—go first to those with the support of local or regional organizations representing the client group.
- Requirements that retailers recycle packaging could be argued to constitute de facto discrimination if the impact on cross-border, mail-order retailers were deemed more burdensome than the impact on domestic retailers selling through local outlets.
- Government subsidies or other advantages directed exclusively to small business could constitute de facto discrimination in sectors where most small businesses are locally owned and large businesses are foreign.
- Requirements that, to operate in lucrative urban areas, courier service providers must have counter service or depots in rural areas, or poor urban neighborhoods could be construed as favouring na-

tional postal administrations which already have a dense network of service outlets covering all areas.
- Requirements that toxic waste be treated on-site or at a local facility could be argued to disadvantage foreign industries or foreign waste treatment companies that have invested in facilities outside the local region.

Perhaps not all such challenges will materialize, or succeed, but many more can be imagined. The GATS strong de facto standard of non-discrimination opens the doors for multinational companies, aggressive trade lawyers, or foreign trade ministries to frustrate a wide variety of formally non-discriminatory policies that foreign corporations may oppose for reasons that are unrelated to international trade. This is another reason why the GATS is better understood as a governance agreement than a trade agreement.[123]

Market Access (Article XVI)

Article XVI, Market Access, is one of the GATS most novel, and troublesome, provisions. 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, the GATS market access provisions preclude certain types of policies, whether they are discriminatory or not.

GATS Article XVI prohibits six types of mostly non-discriminatory measures. In sectors where specific commitments are made, there must be no limits on, for example:
- the number of service suppliers,

- the value of service transactions,
- the number of service operations, or
- the number of natural persons that may be employed in a sector.

Such limits are prohibited, whether expressed "in the form of numerical quotas, or the requirements of an economic needs test."[124] Article XVI also prohibits restrictions on types of legal entities through which suppliers may supply a service and limits on foreign capital participation. 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."[125]

There is nothing quite like GATS Article XVI in other international commercial treaties. The NAFTA services chapter, for example, simply requires federal governments to list non-discriminatory quantitative restrictions on the number of service providers or the operations of service providers in an annex. But this list is merely for transparency purposes.[126]

Reading *Fact and Fiction*'s account of the GATS market access provisions, it is easy to lose sight of their import.[127] Through a subtle change in emphasis, *Fact and Fiction* minimizes the impact of Article XVI, stating that,

> "If commitments are made, they can be subject to the six types of limitations specified in the agreement, which include, besides quantitative limits, restrictions on the share of foreign capital and on the type of legal entity permitted."

But Article XVI is not permission to employ these six types of limitations. Rather, it prohibits them unless they

are specifically exempted in a member's country schedule.

As the WTO Secretariat states more plainly elsewhere, "Measures restricting market access and national treatment are prohibited, unless scheduled, in sectors where specific commitments have been undertaken.…"[128] A government can maintain otherwise inconsistent measures only if it inscribes them in its country schedule when it makes its specific commitments.[129]

From a public policy perspective, one of the biggest problems with Article XVI is that it is framed in absolute, not relative terms. As the WTO Secretariat emphasized in 1999 in its proposed revisions to GATS scheduling guidelines, "Another confusion that sometimes arises is the idea that only discriminatory measures should be scheduled under Article XVI. This is not the case. Article XVI covers all measures that fall within the six categories listed, whether they are discriminatory or not."[130]

"For instance," the Secretariat analysis continues, "if a limitation on the types of legal entity permitted in a given sector is applied to both nationals and foreigners, it has to be scheduled."[131] What are the policy implications of prohibiting non-discriminatory restrictions on the types of legal entities permitted to provide services in scheduled sectors? For example, many governments restrict the private delivery of certain social services, such as child care, care for the elderly, or support for the physically or mentally challenged, to non-profit agencies. In the education sector, many governments restrict degree-granting authority to public or private educational institutions legally constituted as non-profit entities. In many countries or regions, the provision of certain basic services such as

rail transportation, water distribution, or energy transmission is confined to private, not-for-profit providers.

Such public policies certainly restrict the market access of commercial providers, whether domestic or foreign. But they are non-discriminatory and have never before been subject to binding international trade treaty obligations. Nor should they be. But now, whether this was intended or not, they are exposed to GATS challenge. Asserting that governments could protect such inconsistent measures by listing them as country-specific exceptions is completely unsatisfactory. Governments also need the flexibility to adopt new measures to meet changing needs and circumstances. Such public policies are only tenuously related to trade, and their prohibition has no place in an international trade treaty.

If the intent of negotiators was simply to address specific market access issues such as, for example, China's limits on the number of foreign insurance providers or U.S. restrictions on foreign bank branches, these could readily be dealt with through specific understandings inscribed as additional commitments. Instead, by devising general rules, framed in absolute terms, the GATS has created a host of policy problems. It also betrays its sponsors' characteristic animus towards public policy prerogatives and flexibility.

Fact and Fiction engages substantively, although cursorily, on an important public policy issue related to Article XVI. Many NGO critics have raised concerns that limits on the number of service providers put in place for conservation or environmental protection purposes could be exposed to GATS challenges. The Secretariat dismisses these concerns as "absurd," stating that:

> "even...where no limitation has been scheduled, it is absurd to suggest that a Government or local authority would have to set aside planning rules because a foreign company wanted to open a hotel, set up a golf course or expand a waste dump. These are questions of domestic regulation, not market access, and foreign suppliers operating on the basis of a market-access commitment are subject to exactly the same domestic regulations as national suppliers; *they have no right to exemption from planning or zoning rules, or any other kind of regulation* (emphasis added)."[132]

This carefully worded response implies that, if planning limitations were to become a GATS issue, it would be under Article VI, Domestic Regulation. But it also insists that there is no inconsistency with Article XVI.

These categorical assurances about Article XVI must be treated skeptically. As North Americans have learned under NAFTA's investment chapter, when international investment and services treaty obligations are framed in absolute terms they can lead to disturbing, sometimes absurd, public policy results. Despite emphatic official assurances to the contrary, foreign investors have employed the NAFTA investment chapter to argue that non-discriminatory planning measures, permits, and product bans are NAFTA-illegal.[133] Concerns that the blunt wording of Article XVI which, like the most contentious articles in NAFTA's investment chapter, is also framed in absolute terms,[134] may also interfere with environmental and resource conservation policies are well-founded and need to be addressed.

There is nothing in the plain language of Article XVI to suggest that numerical limits justified by physical or natural limits, such as resource conservation or environmental carrying capacity, would be treated any differently than other numerical limits—limits that are clearly prohibited. Restrictions on beach front developments, limits on the numbers of fishing licenses, even anti-pollution provisions restricting new sources of pollution in degraded air or water sheds, are all "limitations on the number of service suppliers."

To take a specific example, at a GATS briefing in Ottawa in May 2000, a senior WTO services official confirmed that new restrictions on the number of whale-watching operators, applied for conservation reasons, could violate Canada's existing commitments in tourism. Canada's existing commitments in tourism are bound and there is no limitation that would provide legal cover for numerical limits on whale-watching operators, a relatively new service industry. During a subsequent meeting in Geneva, the same official insisted that "there was absolutely no legal doubt" that limits applied for legitimate resource conservation purposes were consistent with GATS Article XVI. The official did offer that this legal point could perhaps be made more explicit through an interpretive clarification to Article XVI.[135]

A legally effective interpretive note stating that Article XVI does not interfere with governments' ability to apply limits for conservation reasons would be a welcome development. Perhaps, with political will, this is one of the critics' concerns that can be satisfactorily addressed. A straightforward step would be to ensure that Article XVI only applies to quantitative restrictions that discriminate against foreign investors or service providers.

But such an exercise would certainly bring some vexing issues to the fore.[136] Who is to decide whether limits applied for conservation purposes are "objective, timely, transparent and non-discriminatory?" Judgments about the appropriate level of development are complex and inescapably qualitative; they involve aesthetic, economic, scientific and other criteria. So are decisions about the appropriate rate of exploitation of non-renewable resources. Canadians know well that such decisions, for example about the appropriate number of tourist establishments in a wilderness area, can trigger fierce debate and strongly divergent political and scientific views.

Moreover, restrictions on development may also commercially advantage incumbents, those already established within a sector or region, to the detriment of outsiders or new entrants. These incumbents may support limits on new entrants for purely self-interested reasons. But these undeniably narrow self-interests should not be construed as negating the legitimate conservation imperatives expressed by the broader community.

Rather, these unavoidably mixed motives, trade-offs and judgments are political decisions properly made democratically by the governments and communities directly concerned. On such vital matters, commercial treaties should defer to democratically elected governments, not entangle these decisions in international trade law and possible second-guessing by WTO dispute panels.

Monopolies and exclusive service suppliers (Article VIII)

GATS Article VIII, Monopolies and Exclusive Service Suppliers, is one of the GATS general obligations that applies

in principle across all sectors. But in fact only certain aspects of Article VIII apply generally to all services. Other aspects of Article VIII are triggered only where services are listed. In other words, the GATS restrictions on monopolies are hybrid provisions that combine both unconditional and conditional obligations.[137]

These obligations include:

- Article VIII.1 obliges governments to ensure that the actions of monopolies, public or private, conform with the most-favoured nation obligation and a government's specific commitments.
- Article VIII.2 obliges governments to ensure that a monopoly supplier—where it supplies services outside the scope of its monopoly rights, but that are covered by a government's specific commitments—does not "abuse its monopoly position."
- Article VIII.3 stipulates that, if a government grants a monopoly in sectors where it has previously made GATS commitments, it must negotiate compensation with other member governments or face retaliation.
- Finally, all these provisions "also apply to cases of exclusive service suppliers, where a member formally or in effect a) authorizes or establishes a small number of service suppliers, and b) substantially prevents competition among those suppliers in its territory" (Article VIII.5).

Once again, there is surprisingly little discussion of the policy implications of the GATS restrictions on monopolies in either *Fact and Fiction* or *Markets Matter*. *Fact and Fiction* simply notes that "it is possible to maintain a monopoly supplier, whether public or private, of any service."[138] *Markets Matter* goes somewhat further, asserting

that "governments retain the right to designate or maintain monopolies, public or private."[139]

Neither tract acknowledges the new burdens imposed on monopolies, nor that monopolies and exclusive supplier arrangements are, in fact, inconsistent with GATS Article XVI. In order to maintain a monopoly or exclusive supplier arrangement in any listed sector, governments had to inscribe it as a country-specific exception in their schedules. Furthermore, if a government wants to designate a new monopoly in a listed sector, Article VIII.3 requires it to negotiate compensation with other member governments or face retaliation. It is remarkable that the OECD describes this disagreeable prospect as a "right."[140]

Monopolies, while not so prevalent as they once were, are still relied upon to provide basic services in many countries. Postal services, the sale and distribution 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. What then are some of the practical implications of the rather formidable GATS restrictions on such monopolies and exclusive service suppliers?

The consequences of applying MFN unconditionally to government monopolies have, to date, gone largely unexamined. In one instance, some time after the GATS was signed in 1994, international postal officials became concerned about the possible inconsistency between GATS MFN obligations and the multilateral rules that regulate international postal services under the Universal Postal Union (UPU). The problems occur in two main areas: developing countries pay lower fees to developed countries

that process and deliver inbound international mail; and the UPU has rules to prevent these preferential rates from being abused by commercial "re-mailers" who transport mail in bulk from one country to be posted in another with lower rates.[141] Both sets of arrangements were probably GATS-inconsistent. In 1994, no member governments lodged MFN exceptions insulating UPU rules from challenge. It is now too late to do so and the UPU regime is being adjusted to conform to GATS obligations.

There may well be other conflicts that have gone undetected. For example, the activities of alcohol monopolies and public electrical utilities typically involve preferential agreements for sale of products or the wheeling of electricity. These may be preferential or applied on the basis of reciprocity, not MFN. There is little evidence that the consistency of such arrangements with the GATS universally applicable MFN obligations has ever been publicly discussed.

The GATS also exposes government monopolies, public or private, to charges that they are competing unfairly in listed services outside the scope of their monopoly. For example, universities, where a small number of service suppliers have an effective monopoly over degree-granting authority and public financial support, could readily be construed as "exclusive service suppliers." Where a government makes specific commitments covering private education, this could trigger complaints that post-secondary institutions are abusing their monopoly position.[142] For example, if a university offers a non-credit course that competes with courses offered by private training institutes, it could be exposed to charges that it is leveraging its monopoly position by using facilities and

faculty supported by its monopoly status outside the scope of this monopoly.

Unfortunately, such aggressive interpretations of international trade obligations are not fanciful. United Parcel Services Inc., the world's largest courier company, is currently suing the government of Canada for at least $US160 million under NAFTA.[143] UPS alleges that Canada Post uses its monopoly of letter-mail services to "leverage" its position in the competitive portions of its activities, including courier services.[144] In its claim, UPS is trying to invoke NAFTA anti-monopoly articles that are very similar to the GATS provisions.[145]

The GATS requirement that governments that designate a monopoly must negotiate compensation with other member governments or face retaliation is also a formidable hurdle.[146] For example, many WTO members, including Canada, have made commitments covering health insurance.[147] Consequently, any decision to expand compulsory public health insurance plans to cover new areas such as prescription drugs or home care could result in GATS claims for compensation on behalf of private foreign insurance companies. This prospect of litigation and possible trade sanctions creates a serious disincentive to strengthening the fabric of public health insurance in Canada and other countries.

Under most countries' domestic laws, the possibility of such democratic policy changes are considered commercial risks borne by all insurance providers, domestic or foreign.[148] But, because of the expanding reach of the new generation of international commercial treaties such as the GATS, such a domestic policy choice has been transformed into an international treaty issue. Only a government determined enough to negotiate GATS compensa-

tion and to face potential retaliation would proceed. As already noted, the very prospect of paying compensation might be enough to chill such an initiative.

Domestic Regulation (Article VI)

As *Markets Matter* rightly remarks: "the work programme envisaged under Article VI(4)...has provoked the strongest reactions from groups concerned about the GATS impinging upon governments' regulatory rights."[149] Critics have directed their harshest criticism at the GATS provisions authorizing the negotiation of new restrictions on non-discriminatory domestic regulation. This is understandable. Such restrictions, if ever agreed to, would be an extraordinary intrusion into democratic policy-making on a broad range of important regulatory matters that are only obliquely related to trade.

GATS Article VI.4 specifies that Members shall develop any "necessary disciplines" to ensure that "measures relating to qualification requirements and procedures, technical standards and licensing procedures do not constitute *unnecessary barriers to trade in services* (emphasis added)." Sub-paragraph (b) of Article VI:4 further specifies that such disciplines shall aim to ensure that regulatory measures are "not more burdensome than necessary to ensure the quality of the service."[150] These negotiations are currently underway in Geneva under the auspices of the GATS Working Party on Domestic Regulation (WPDR).

The first point to grasp regarding the profound significance of these negotiations is that the proposed "disciplines" explicitly target non-discriminatory domestic regulations. In fact, the GATS Article VI restrictions are

intended to apply *exclusively* to non-discriminatory measures, regulations that treat local and foreign services and service providers evenhandedly. So, even if a regulatory measure were wholly consistent with the tough non-discrimination rules of the GATS (Articles II and XVII) and did not violate the GATS market access prohibitions (Article XVI), it could still be overturned under the proposed domestic regulation restrictions.[151]

A simple table reproduced from a 1994 OECD analysis of the GATS graphically presents how implementing Article VI would fulfill the truly universal ambitions of the GATS' architects:

	Quantitative restrictions	Qualitative restrictions
Discriminatory Regulations	Market Access Article XVI	National Treatment Article XVII
Non-discriminatory regulations	Market Access Article XVI	Domestic Regulations Article VI

Source: OECD

As the table illustrates, the GATS aims to restrict the full gamut of government measures affecting "trade in services," whether these measures are discriminatory or not. National treatment and MFN restrict discriminatory measures, Article XVI targets "quantitative non-discriminatory regulations" and Article VI is aimed at "qualitative non-discriminatory regulations."[152]

A second consideration is that the subject-matter of these new restrictions—measures relating to qualification requirements and procedures, technical standards and licensing procedures—is very broad. While none of the four terms—"qualification requirements and procedures, licensing requirements and technical standards"—are pre-

cisely defined in the GATS, many types of governmental measures and regulatory authority would be restricted. Qualification requirements refer to professional accreditation, educational requirements, certification of competency, and the like. Licensing requirements obviously include professional licensing, but also apply to a wide variety of other licensing requirements such as broadcast licenses, university accreditation, facilities licensing for clinics, hospitals and laboratories, waste disposal permits, and many other matters. Technical standards is a nearly all-inclusive category, referring, according to the GATS secretariat, not only to regulations affecting the "technical characteristics of the service itself," but also to "the rules according to which the service must be performed."[153] Water quality standards, pipeline safety, and toxic waste disposal and storage standards are just a few important examples.

Article VI.4 catches not only these four broad categories of measures themselves, but all measures relating to them. For example, public subsidies that are made conditional on services meeting high technical standards, or on service providers attaining certain levels of accreditation, would be caught by this broader language. The proposed restrictions, therefore, would cover a wide swath of vital government regulatory measures.

A third, critically important, point is that the proposed restrictions are intended to apply some form of "necessity test" to this wide range of non-discriminatory domestic regulations. The WTO Secretariat describes the two aspects of a potential GATS necessity test in these terms: "the first aspect is the general requirement that regulations not be more trade restrictive than necessary; the second aspect is to examine whether an individual measure

is actually necessary to achieve the specified legitimate objective."[154]

Necessity tests are a long-standing feature of the GATT-WTO system. Under GATT Article XX, a government can, as a last resort, try to save an otherwise GATT-inconsistent measure from successful challenge by arguing that it is necessary to achieve a GATT-sanctioned legitimate objective. But this general exception has been interpreted very restrictively. Indeed, under GATT jurisprudence, "a measure cannot be deemed necessary if satisfactory and effective alternative means to achieve the same objective are reasonably available to the Member enacting it."[155]

Because it has been interpreted so restrictively, GATT Article XX has been strongly criticized as an ineffective safeguard for legitimate public interest measures. It is of questionable value as a backstop to save important, albeit trade-restricting, public interest measures. But Article VI.4 turns the logic of the necessity test on its head—with potentially alarming results for public interest regulation. Under GATS Article VI.4, the necessity test is transformed from a *shield* to save clearly discriminatory measures from challenge into a *sword* to attack clearly non-discriminatory measures.

Fact and Fiction disapprovingly quotes from a CCPA book that argues that the GATS provisions on domestic regulation pose one of the Agreement's most "dangerous threats to democratic decision-making".[156] *Fact and Fiction* observes that "The book claims that 'governments would be compelled to demonstrate, first, that non-discriminatory regulations were necessary to achieve a WTO-sanctioned legitimate objective, and secondly, that no less commercially-restrictive alternative measure was possi-

ble'." This claim, however, is accurate, and *Fact and Fiction* does not contest it. Instead, the WTO Secretariat, rather lamely, objects that "the only circumstances in which any Member would be required to justify a domestic regulation would be in dispute settlement—when a specific measure had been challenged by another Government."[157]

It is odd that the Secretariat seems to suggest that governments and citizens need only be concerned about WTO rules when a measure is challenged—in effect, when violators are caught.[158] The WTO Agreements set out binding international norms. A basic principle of treaty law is *pacta sunt servanda,* the Latin for "agreements are to be kept." Dispute settlement is just the tip of the iceberg when considering the policy impacts of treaty obligations. It is fully expected that WTO Agreements will be implemented domestically and that domestic laws and procedures will be modified to the extent that they conflict with WTO obligations.

Even in the absence of disputes, the impact of broadly worded restrictions—such as those under consideration under Article VI.4, on the domestic policy-making process—would be considerable. Because of uncertainty regarding their consistency, non-discriminatory regulations may be discarded or defeated before they ever see the light of day. This chilling effect on domestic regulatory capacity can be as important as the results of the (comparatively speaking) fewer matters that proceed to full dispute settlement.

GATS critics are, in any case, well aware that WTO enforcement is complaint-driven. It is precisely this ability of multinational corporate interests to internationalize the domestic contest over non-discriminatory public

interest regulation that concerns them. Corporate interests are already very powerful within the domestic policy-making and legislative process. On those increasingly rare occasions when public interest regulations strongly opposed by corporate interests are enacted domestically, Article VI.4 restrictions would give multinationals the option to convince a foreign government to take up their fight by litigating at the WTO. This deeply troubling scenario must be avoided.

As the WTO Secretariat candidly acknowledged in an official discussion of Article VI, "The necessity test—especially the requirement that regulatory measures be no more trade restrictive than necessary—is the means by which an effort is made to balance between two potentially conflicting priorities: promoting trade expansion versus protecting the regulatory rights of governments."[159] But the WTO, with its structural bias toward commercial interests and its closed dispute settlement procedures, is not the place to balance these potentially conflicting priorities. These words of warning apply with even greater force when the regulatory measures at issue are clearly and incontestably non-discriminatory.

Furthermore, for all their stress on GATS flexibility and exceptions, neither the WTO nor the OECD acknowledges that no exceptions are contemplated to the proposed restrictions on domestic regulation under Article VI.4. The architecture of the GATS only allows country-specific limitations to Articles XVI and XVII. It does not permit country-specific exceptions to the domestic regulation restrictions. In an analysis of Article VI.4, the WTO Secretariat notes that "measures [subject to Article VI disciplines] cannot be entered as limitations in a Member's schedule."[160] And if a measure fails the necessity test under

Article VI, it is logically inconsistent to expect it to be saved by the necessity test employed under the general exceptions in Article XIV. Elsewhere, the OECD has argued that even those measures a government explicitly exempts from Articles XVI and XVII in its country schedule could still be challenged as more burdensome than necessary under Article VI.[161]

The provisions envisaged under Article VI.4 are among the most excessive restrictions ever contemplated in a binding international commercial treaty. Procedurally, they are unlike NAFTA Chapter 11 in that they cannot be invoked directly by investors. But, substantively, they are similarly framed in absolute terms and, arguably, as extreme. As noted elsewhere, the reasoning underlying the proposed Article VI.4 restrictions is similar to the dangerous logic behind the abused "minimum standards of treatment" and measures "tantamount to expropriation" provisions of NAFTA's investment chapter and the failed Multilateral Agreement on Investment.

Indeed, under GATS Article VI, a complainant would actually have a lower legal threshold to meet. To argue that a regulatory measure is "tantamount to expropriation" is (or should be) a difficult task. But to argue that a regulation is "more burdensome than necessary to ensure the quality of the service" (or that it is not "pro-competitive") would be a far easier case to sustain.[162] Put another way, measures "equivalent to expropriation" are a mere subset of "burdensome measures."

The proposed restrictions are a recipe for regulatory chill. Their excess is concrete evidence of the hazards of leaving the neoliberal ambitions of commercial ministries—and the corporate lobbyists driving them on—unchecked by broader public scrutiny and debate. It would

be a considerable initial achievement if the GATS' non-governmental critics are able to draw public and political attention to, and to unsaddle, these extreme proposals.

Chapter 4: Conclusions

When the Uruguay Round was concluded in 1994, the GATS was little known outside a small circle of negotiators and corporate lobbyists. As two well-placed observers noted in 1999: "The negotiations were largely driven by specific industry interests and trade negotiators themselves.… After its inception, the GATS continued to attract little public attention. Its provisions, let alone its existence, remain relatively unknown or understood, even among those who have an interest in the functioning of the trading system…."[163] Largely due to the efforts of non-governmental organization critics and, more recently, of some Southern WTO member governments, this period of obscurity is now ending.[164] The GATS is a deservedly controversial agreement and, as its provisions become more widely known, public and political concern about its policy implications is certain to grow.

In most countries, the entire WTO agreements were hurriedly ratified and implemented, with little public or legislative debate. Legislatures, where they were consulted, were presented with a "single undertaking;" no part of the negotiated Uruguay Round package could be altered without unraveling the whole. In this pressurized context, it is not surprising that an agreement as complex as the GATS largely escaped public notice.

Many GATS insiders, however, were keenly aware of the novelty and import of this new treaty. Then Director-General of the WTO Renato Ruggiero hinted at the potential political controversies inherent in these new restrictions: "[T]he GATS provides guarantees over a much

wider field of regulation and law than the GATT; the right of establishment and the [obligations]...in all relevant areas of domestic regulation extend the reach of the Agreement into areas never before recognized as trade policy. I suspect that neither governments nor industries have yet appreciated the full scope of these guarantees or the full value of existing commitments."[165]

Another key actor in the negotiations, former deputy United States Trade Representative Jeffery Lang, highlighted "the overwhelming uncertainty about the meaning of the provisions of the GATS." Lang 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."[166]

"Discovering" the practical impacts of the GATS may prove a trying experience, at least for WTO member governments and their citizens. There have been only a few GATS dispute cases so far, but in all three that have gone to full panel, the defendant government has lost.[167] More significantly, the panels and the Appellate Body have interpreted the broadly worded GATS provisions forcefully.[168] While the GATS negotiations proceed, governments will be reluctant to bring controversial GATS cases that could upset the progress of the talks. But when these negotiations conclude—or falter—this self-restraint will likely vanish.

GATS negotiators, in their eagerness to service corporate desires, were remarkably casual about the consequences of these broadly worded provisions for democratic governance. "Overwhelming uncertainty" about

legally binding treaty obligations is debilitating and costly—for the public, if not for commercial interests.[169] The nearly open-ended prospect of litigation and possible trade sanctions advantages commercial interests over other legitimate societal interests in the to-and-fro of policy debate. It chills regulatory initiative. It impedes the expansion and revitalization of public services. It consciously and deliberately tips the balance of power further in favour of already powerful multinational corporate interests.

But GATS proponents make no apologies. "I do not advocate," Lang declared, "pausing in the movement forward to accomplish some kind of ecclesiastical exercise of figuring out what these provisions mean. That can only aid and abet those who want to frustrate progress."[170]

It is fascinating to compare the early insider analyses of the GATS—which frankly concede, even celebrate, its novelty, scope and ambition—with the current defensive accounts. By contrast, today's GATS proponents strive to imply that the GATS is so flexible that it leaves governments completely free to govern as they choose. It appears that frank discussion and analysis are reserved for corporate and trade policy audiences, while the broader policy concerns raised by critics must be categorically dismissed.

For example, compare Ruggiero's candid assessment of the GATS with that of his successor, Michael Moore, who, at the opening of the Doha Ministerial, hectored civil society delegates concerned about the policy implications of the GATS for "wast[ing] time fighting windmills." In a by-now-familiar mantra, Director-General Moore declared that: "There is absolutely no requirement in the GATS to privatize any service. Governments retain the right not

to make commitments on health and education services, or indeed any other services, if they so choose. Services provided in the exercise of governmental authority are wholly excluded from the scope of the GATS. The GATS specifically protects the right of governments to regulate services and to introduce new regulations."[171] These emphatic reassurances are half-truths: incomplete and misleading. Indeed, Moore's belligerence leads him to make unsupportable statements that slight not only the intelligence of his critics, but of the broader public to whom he is ultimately responsible.

It is remarkable that Moore bristles at any suggestion that the GATS is an instrument of privatization. In the simplest terms, privatization is the transfer of ownership of public resources or assets to private hands. Liberalization is the opening of domestic markets to foreign ownership and competition. While privatization and liberalization are not interchangeable terms, they are certainly fellow travellers.

Liberalization presupposes the existence of private markets. This is especially so in the realm of services where, despite two decades of widespread neoliberal policies, many essential services—such as health care, education, social services, the arts, water, and electricity—are still dominated in many countries by public and not-for-profit provision. The global pool of resources devoted to these basic services is enormous. For example, worldwide spending on health is roughly US$3 trillion annually, on education US$2.2 trillion annually, revenues from the generation and distribution of electricity over US$1 trillion annually, and spending on postal and express delivery services roughly US$250 billion annually.[172] As the corporate lobbies active in the GATS negotiations clearly

grasp, the more these services are privatized, the greater the commercial opportunities.

Moreover, in many sectors, the commercial provision of these basic services is dominated by a handful of multinational corporations based in the developed world. In these cases, the clear alternative to public, not-for profit services is provision by foreign multinationals. In ideology and in practice, therefore, privatization and liberalization are intimately connected.

Claiming that the GATS does not force governments to privatize public services is, deliberately, beside the point. As some southern WTO member governments recently expressed the relationship: "GATS does not mandate countries to liberalise and privatise. However, it certainly does encourage and lock-in a country's liberalisation. Liberalisation in turn encourages privatisation. Many of the problems that have been experienced by countries through privatisation, could therefore well happen through GATS."[173]

As previously discussed, through continuous built-in negotiations the GATS exerts constant pressure to open services, including services now provided publicly or by non-profits, to foreign commercial providers. The universally applicable GATS MFN rule generalizes and helps consolidate commercialization wherever it occurs. The GATS market access restrictions clearly identify public monopolies as market access barriers that must be specifically exempted or dispensed with whenever governments make GATS commitments. The general rules on monopolies make it more difficult for governments to maintain public monopolies by hamstringing their ability to compete with commercial suppliers in areas outside the scope of their monopoly. Critically, once GATS

commitments are made, the GATS restricts the ability of future governments to restore, revitalize, or expand public services. In such cases, compensation must be negotiated or retaliatory sanctions faced.

The GATS is, by design, a formidable instrument to encourage and to entrench privatization. As argued elsewhere, the GATS is, at root, hostile to public services. It treats them, at best, as missed commercial opportunities and, at worst, as unfair competition or barriers to entry for foreign services and suppliers.[174]

Moore's statement that "services provided in the exercise of governmental authority are wholly excluded from the scope of the GATS" is even more misleading. It is an empty statement, that merely repeats the wording of the controversial GATS exclusion. It avoids the critical issue: what is the scope and effectiveness of the GATS governmental authority exclusion? As discussed, this exclusion is highly qualified, subject to conflicting interpretations, and, quite possibly, ineffective in protecting even existing public services.

A truly effective GATS exclusion for public services would need, above all, to ensure governments' flexibility to restore and revitalize public or not-for-profit services where experiments with private market provision fail. However dubious the value of the current exclusion in hiving off existing public services from GATS restrictions, it is incontestable that, as commercialization and competition increase, the scope of the governmental authority exclusion diminishes. As a result, the restrictive terms of the Article I:3 exclusion render it ineffective when it is needed most: when services privatization and commercialization go badly and lose public support. By making it more difficult to reverse failed privatizations, the GATS

interferes significantly with democratic flexibility. WTO member governments should reinterpret or amend this exclusion to provide much-needed flexibility for public services, preferably by simply eliminating the qualifications in Article I:3.c and making the exclusion self-defining.

Finally, we are left with Moore's statement, echoed in paragraph 7 of the Doha Ministerial declaration, that "The GATS specifically protects the right of governments to regulate services and to introduce new regulations."[175] Certainly, the GATS does not eliminate governments' ability to regulate. But it does require that government regulation, whatever its form or purpose, be consistent with the GATS.

If Moore's statement were taken, as intended, at face value and in isolation, his audience would not know that the recognition of the right to regulate in the GATS preamble has little legally enforceable effect. Or that the GATS clearly applies to the full range of government regulatory measures. Or that the GATS applies a very tough test of non-discrimination when considering the possible adverse effects of regulatory measures on foreigners. Or that the GATS prohibits certain types of regulatory measures, even if they are non-discriminatory. Or, finally, that the general exceptions that purport to protect public interest regulation are extremely difficult to invoke successfully.

Nor would the pubic have any idea that there are ongoing GATS negotiations that aim to apply a necessity test to non-discriminatory domestic regulation. If Article VI is ever fully implemented, it would give the WTO dispute settlement process the authority to rule a wide range of regulatory measures GATS-inconsistent. All that would be required is for dispute panels to find that some less-

restrictive or less-burdensome means was, in the panel's or the Appellate Body's view, reasonably available to achieve a particular regulatory objective. These controversial negotiations would radically expand the reach of trade law restrictions and pose a very serious threat to crucial public interest regulations. This is a threat that Moore and other GATS proponents would obviously prefer to keep out of the public eye.

It is high time to apply a public interest version of the necessity test to the ambitions of corporate lobbyists and Quad trade negotiators. Are these new broadly worded protections really necessary? Must the scope of "trade treaties," which are ranging further and further afield from conventional trade issues, be inexorably expanded? Are there alternative means to achieve reasonable certainty for service providers and investors that are not so restrictive and burdensome for democratic decision-making and flexibility? Can a sustainable multilateral system be built around rules that privilege multinational commercial interests, conferring powerful rights without responsibilities?

The adherents of the bicycle theory of international trade negotiations insist that, if the WTO's momentum into new sectors and fields of regulation falters, then the whole edifice of multilateral trade rules will be in jeopardy.[176] As the remarkable statement by the former Deputy USTR Jeffery Lang quoted above shows, this insistence can degenerate into the bizarre or irrational, where simply pausing to understand what the GATS provisions mean is equated with "frustrating progress."

In the power bargaining and pressure tactics that led to Doha, the call for assessment of the WTO's novel services agreement from NGOs and, importantly, a number

of key Southern governments was brushed aside. Instead, negotiations to broaden and deepen GATS coverage will be—along with agriculture and industrial market access—one of the centerpieces of the new Doha Round. The WTO negotiating agenda now includes other new and contentious topics such as investment, competition policy, and strengthening the WTO's dispute settlement provisions.

Firm timelines for the services negotiations were agreed as part of the Doha package, with initial requests for specific commitments due by June 30, 2002, and initial offers by March 31, 2003.[177] The GATS rule-making issues, including the contentious talks on domestic regulation, are supposed to conclude prior to the end of the market access phase of the services talks. All the elements of the services packages are to be finalized, along with the many other elements of the new negotiating agenda by the ambitious and seemingly unrealistic deadline of January 1, 2005. In short, the bicycle theorists appear to be in firm control and setting a furious pace.

But, as author Susan George remarked at a recent conference on the WTO, it would be far wiser to get off the bicycle, put our feet on the ground, and have a look around to see where we are.[178] Unfortunately, there is little sign that this much-needed debate and deliberation on the GATS will occur soon. The message from Doha is that confrontation and brinksmanship work—at least for the powerful insiders who dominate WTO affairs. But this approach is bound to undermine the legitimacy of negotiations in the eyes of the public and, ultimately, will probably prove unsustainable.

It is hardly surprising that such a broadly-worded, sweeping agreement as the GATS has become a lightning rod for controversy. It is highly inappropriate for Mr.

Moore or other GATS partisans to disparage the critics and to attempt to dismiss out-of-hand their well-founded concerns. If there is one lesson proponents should have learned from the Seattle debacle and the failed MAI, it is that, no matter how emphatic or strident their voices, they cannot simply shut down or control the debate. With modest effort, non-governmental organizations, elected officials, and ordinary citizens are more than capable of sorting out the issues, of separating GATS fact from fiction. And when they do, they are likely to react with shocked disapproval at how far, and in what direction, the proverbial bicycle has been driven. Then the main questions will be how quickly citizens mobilize and how effectively they bring their considerable influence to bear on their respective governments—both in changing the nature of GATS negotiations that are now underway in Geneva, and in charting a more balanced future.

Endnotes

1 Hereafter, *Fact and Fiction*.

2 Hereafter, *Markets Matter*.

3 World Trade Organization, Trade in Services Secretariat, *GATS: Fact and Fiction*, Geneva, March 2001, available on the WTO web site at http://www.wto.org.
OECD, Working Party of the Trade Committee, *Open Services Markets Matter*, September 3, 2001, TD/TC/WP(2001)24/PART1/REV1.

4 The September 3, 2002 document is the first part of a 2-part study. Part 1 mainly addresses concerns about how the GATS operates, while part 2 is to present evidence of the benefits of services trade and investment liberalization.

5 The United States, the European Union, Japan and Canada comprise the so-called Quad countries.

6 Here are just a few illustrations of close government-corporate collaboration in the response to GATS critics:
In mid-November 2000, shortly after the Canadian Centre for Policy Alternatives published the first book-length GATS critique, photocopies of the CCPA book were tabled by the European Services Forum at one of its regular meetings with EC trade officials and the influential Article 133 committee. The managing director of the ESF reportedly complained about emerging civil society criticism of the GATS while warning the EC and Article 133 representatives against delays in the GATS negotiations.
Speaking recently at the World Services Congress, Andrew Buxton, chair of the ESF, praised the OECD polemic and corporate-government alliances, "I think that the sort of alliance that exists in some parts of the world … between government and industry through the CSI here in Hong Kong … is a way of having a combination that actually … needs to put the business case for services liberalization. … I thought the recent OECD report on services trade and investment was extremely good in setting out the case … So, we've got to publicize that. It's our job to do it. The gossip that is coming out of Geneva at the moment is that not enough people are doing that." Excerpt from discussion at World Services Forum, Hong Kong: Panel Discussion "Making Good Guys out

of Globalization" 20 September 2001, Congress Dinner, Transcribed by Corporate Europe Observatory from webcast available at http://www.tdctrade.com/tdcwebcast/wsc.htm.

Most disturbingly, confidential minutes of a high-level committee comprised of senior UK trade officials and service industry representatives "reveal that government officials have allied with business in planning a campaign to defeat civil society opposition against the WTO services negotiations." Erik Wesselius of Corporate Europe Observatory, who uncovered the previously confidential minutes, observes that: "While it is useful and justified for governments to take business concerns into account when formulating trade policy, privileged co-operative arrangements between business and government as embodied in IFSL/LOTIS do not belong in a truly democratic policy-making process." See Erik Wesselius, Corporate Europe Observatory, Liberalization Of Trade in Services: Corporate Power at Work, http://www.gatswatch.org/LOTIS/LOTISarticle.html.

7 *Fact and Fiction* was prepared under the former Director of the WTO Trade in Services Division, David Hartridge, with the provocative working title "Refuting the Lies." To view the original author and working title download the document in MS-Word format and pass your cursor over the document. The initiating author and working title will appear.

8 *Fact and Fiction*, p. 2.

9 That is, accurately represented, as opposed to being re-cast according to the WTO's characterization of them.

10 *The Oxford English Dictionary* defines "threaten" as "appears likely to cause or do something undesirable". It is in this ordinary sense that this book argues that key GATS provisions pose serious threats to public services and public interest regulation.

11 *The Oxford English Reference Dictionary* defines "commercialize" as:

"1 exploit or spoil for the purpose of gaining profit.
2 make commercial."

The same dictionary defines "privatize" as:

"make private, esp. assign (a business etc.) to private as distinct from state control or ownership"

The Penguin Dictionary of Economics is more detailed, defining of "privatization" as:
"Principally, the sale of government-owned equity in nationalized industries or other commercial enterprises to private investors, with or without the loss of government control in these organization…. Other types of privatization may take the form of … the subcontracting to the private sector of work previously carried out by state employees."
(*The Oxford English Reference Dictionary*, Oxford University Press, 1996; *The Penguin Dictionary of Economics*, Graham Bannock, R.E. Baxter and Evan Davis, 1998. Both are available online at http://www.xrefer.com).

[12] The draft WTO ministerial declaration states that "We reaffirm the right of members under the GATS to regulate, and to introduce new regulations on, the supply of services." Again, this dodges the important issue: what forms of regulation are consistent with the GATS and which are at risk of challenge? WTO Ministerial Conference, Fourth Session, Doha, Qatar, 9 - 14 November 2001, Ministerial Declaration, paragraph 7.
Trade negotiators and officials sometimes get quite sanctimonious about carefully worded, but largely empty, reassurances. Another example of this type of reassuring sounding, though misleading, statement is contained in an article in NAFTA's controversial investment chapter. NAFTA Article 1114 reads that "Nothing in this chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns (emphasis added)." This hardly protects the right to regulate to protect the environment—as the unwary or the credulous are meant to suppose.

[13] Some of the best of the NGO responses to the WTO's *Fact and Fiction* include:

- "Separating WTO Fact and Fiction," June 2001, Ellen Gould, Council of Canadians. Available at http://www.canadians.org/campaigns/campaigns-tradepubgats-fact_fiction.html.
- Technical Comments on the WTO's "GATS: Fact and Fiction" Paper, April 2001, Vice Yu, Friends of the Earth In-

ternational. available at http://www.xs4all.nl/~ceo/gatswatch/factfict/foei.html.

- World Development Movement's summary response to the World Trade Organisation document "GATS - Facts and Fiction", April 2001, World Development Movement. Available at http://www.wdm.org.uk/cambriefs/Wto/factfictionrebuttal.htm.
- "GATS—Fact and Fiction: at best a partial truth," April 2001, Chakravarthi Ragavan, Third World Network. http://www.twnside.org.sg/title/fiction.htm.
- "GATS—What Is Fact And What Is Fiction? A Civil Society Response to the WTO's Publication 'GATS—Fact and Fiction.'" 25 May 2001, available at http://www.xs4all.nl/~ceo/gatswatch/factfict/rebuttal-intro.html.

14 What certain interest groups view as beneficial results, others may rightly regard as negative impacts.

15 For example, "An Introduction to the GATS," WTO Secretariat, Trade in Services Division, October 1999. See also "The General Agreement on Trade in Services (GATS): An Analysis," OECD, Paris 1994.

16 Ironically, many of the policy objectives – for example, greater commercialization of public services or pro-competitive regulatory reform – that GATS supporters in trade policy and corporate circles now strenuously deny they plan to achieve through the GATS are openly embraced or promoted in documents published before the GATS became publicly controversial. See, for example, the papers presented at the 1999 World Services Congress, available at http://www.worldservicescongresss.com.

17 David Woods, a former Director of Communications for the WTO, now in the private sector, launched a furious attack on GATS critics that is even more extreme than *Fact and Fiction*. Tellingly, Woods contemptuously denounced not just the critics but "the limp-wristed acquiescence of ministers who cannot risk being seen publicly to challenge the demagogues of 'civil society'." "Lies, damn lies and what the GATS really says" at http://www.tradeagenda.com.

18 *Markets Matter*, p. 4.

19 *Fact and Fiction*, p. 6.

20 *Fact and Fiction*, p. 6. *Markets Matter*, p. 10 para. 12.

[21] cf. Scott Sinclair, *GATS: How the World Trade Organization's new 'services' negotiations threaten democracy*, Ottawa, Canadian Centre for Policy Alternatives, 2000, pp. 24 ff.

[22] See the United Nations Provisional Central Product Classification (New York: United Nations, 1991), also known as the provisional CPC, which most member governments have used as the basis for their GATS commitments. The provisional CPC and its subsequent versions are available online at http://esa.un.org/unsd/cr/registry/regrt.asp .

[23] *Markets Matter*, p. 6.

[24] GATS Article XXVIII (Definitions) contains no definition of services. GATS Article I simply states that "'services' includes any service in any sector, except those supplied in the exercise of governmental authority."

[25] This definition is adapted from: *The Oxford English Dictionary*, 1989, Clarendon Press, Oxford, Vol. XV, pp. 34-39; and from the *Canadian Oxford Dictionary*, 1998, Oxford University Press, Toronto, pp. 1322-3; *Webster's Encyclopedic Dictionary*, 1988, Lexicon, New York, p. 910; *Webster's New International Dictionary*, 2nd Ed., Mirriam, Springfield, Mass., p. 2288; and *A Dictionary of Canadian Economics*, David Crane, Hurtig, Edmonton, 1980, p. 308.

[26] WTO, "Canada: Certain Measures concerning Periodicals," Panel Report, 14 March 1997, para. 5.18.

[27] As noted later in the book, despite these clear ecological impacts of services, the GATS drafters omitted the general exception for measures "relating to the conservation of exhaustible natural resources" that is found in GATT Article XX governing goods – an omission that was almost certainly deliberate.

[28] *Markets Matter*, p. 9.

[29] For example, "Member governments individually have chosen and will choose in which sectors to make binding commitments and in which not. This is known as positive listing, or bottom-up approach and was the preferred method of developing countries in the original GATS negotiations." Briefing note on the GATS, United Kingdom Department of Trade and Industry, March 2001, p. 1, mimeo.

[30] Emphasis is added. Article I (Scope and Definition) must be read in conjunction with Article XXVIII (Definitions).

[31] Article XXVIII states that "'measure' means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form." Government procurement is the only broad category of measure that is excluded from certain, but not all, GATS rules. See GATS Article XIII.

[32] See, for example, "Canada: Certain Measures Affecting the Automotive Industry," WTO Appellate Body, 31 May 2000, para. 149.

[33] See "European Community: Bananas," Panel Report, 22 May 1997, para. 7.280. WT/DS27/R/USA.

[34] "An Introduction to the GATS," WTO Trade in Services Division, October 1999. p. 3.

[35] Ibid., p. 3.

[36] Cf. Sinclair, 2000, op. cit, p. 47.

[37] See "European Community – Bananas," Appellate Body Report, para. 220.

[38] The Canada Autos panel, for example, affirmed that the GATS non-discrimination provisions "protect competitive opportunities, not actual trade flows." Canada Autos, X Findings, D.6 (d) para. VIII.3. The complainants did not need to show that Canadian value-added requirements had any actual effect on trade flows in services, but only that, hypothetically or in the future, they might have. See Canada Autos, X Findings, D.6 (d) and (e). "Canada: Certain Measures Affecting the Automotive Industry," Report of the Panel, 11 February, 2000.

[39] Renato Ruggiero, former WTO Director, June 2, 1998.

[40] *Fact and Fiction*, p. 6.

[41] *Markets Matter* p. 17.

[42] 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.

[43] The relevant excerpt, contained in GATS Article I:3, is:
"For the purposes of this Agreement … 'services' includes any service in any sector except services supplied in the exercise of governmental authority;… 'a service supplied in the exercise of governmental authority' means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."

[44] *Markets Matter*, para. 102.

[45] "Liberalization? Don't reject it just yet", Mike Moore, *Guardian*, 26 February 2001.

[46] OECD, "The General Agreement on Trade in Services (GATS): An analysis," op. cit., p. 7.

[47] Article 31(1) of the Vienna Convention provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[48] "GATS and Public Service Systems: The GATS 'governmental authority' exclusion is narrower than it first appears, may undergo urgent review," Ministry of Employment and Investment, Government of British Columbia, Canada, April 2, 2001, 23 pp. (now available at http://members.iinet.net.au/~jenks/GATS_BC2001.html).

[49] "Public Services and the Scope of the General Agreement on Trade in Services," Krajewski, M., Center for International Environmental Law, May, 2001.

[50] The European Communities highlighted this fact to a WTO committee in 1999, stating:
"These provisions [Article 55 of the EC treaty] are similar with those of Article 1.3.(b) of GATS which excludes from its scope services 'supplied in the exercise of governmental authority'…. There are no examples in the European Court of Justice jurisprudence where the Court found that an activity would fall under the scope of Article 55." European Communities, Joint Communication from the Parties, Committee on Regional Trade Agreements, WT/REG50/2/Add.3; WT/REG51/2/Add.3; WT/REG52/2/Add.3 19 May 1999, Item 3, paras. 3 and 6.

[51] Council for Trade in Services, Report of the Meeting Held on 14 October 1998, Note by the Secretariat, S/C/M/30, 12 November 1998, p. 4. Cited in GATS and Public Service Systems, op. cit..

[52] Some official publications, including the WTO paper previously cited, refer to central banking as a specific example of an excluded governmental service. But central banking is a special case; it is positively listed as excluded in the GATS Financial Services Annex (see Financial Services Annex Article 1(b)(i)), and thus is not directly relevant to the exclusion contained in the main text of the GATS.

[53] *Fact and Fiction*, p. 10.

[54] *Markets Matter*, para. 101.

[55] *Markets Matter*, para. 101. The OECD's reference to "like services" is puzzling. A recent legal opinion draws attention to the fact that the GATS drafters did not restrict the meaning of the term "competition" in Article I:3 to interaction between like services or like service providers:
"Placed in the context of its GATS provisions, the term 'competition' would normally imply the interaction of 'like' service providers. However, Article I:3 c) did not make reference to this notion which is commonly used in GATS and GATT non-discriminatory provisions to qualify 'competition.'"
In sharp contrast to the OECD, this legal opinion concludes that, "in accordance with Article I:3(c), service providers do not have to be 'like' service providers or provide 'like' services to be in competition with one another. To be in competition, they could simply 'try to get what others also seek'."
The opinion notes: "Had GATS drafters wanted to limit competition to like service providers, they would have used the word 'like' as it was used in GATS Article XVII in relation to national treatment (which also makes reference to the word 'competition')."
Gottlieb and Pearson, "GATS Impact on Education in Canada, October 2001." The full legal opinion is available on the web site of the Canadian Association of University Teachers at http://www.caut.ca.

[56] In the event of a dispute, this determination would be made by a GATS dispute panel, using the ordinary meaning of "competition" and "compete", which are very broad. A collation of definitions of these terms is contained in Gottlieb and Pearson, op. cit., and in GATS and Public Service Systems, op. cit..

[57] *Webster's Encyclopedic Dictionary*, 1988, New York, Lexicon, p. 200.
Cf. Gottlieb and Pearson, op. cit., 2.4.1.2: "The term 'competition' also has an ordinary meaning: 'The effort or action of two or more commercial interests to obtain the same business from third party,' *Black's Law Dictionary*, 7th Ed., 1999, West Group; 'The act of competing; a rivalry for supremacy, a prize, honor, or advantage,' *Random House Webster's College Dictionary*, 1997, Random House, New York; 'Rivalry between individuals (or groups or nations), and it arises whenever

two or more parties strive for something that all cannot obtain,' (*The New Pelgrave: A Dictionary of Economics*, Macmillan Press Ltd, 1987); 'Rivalry in the market, striving for custom between those who have the same commodities to dispose of,' *The Oxford English Dictionary*, 1989, Oxford Clarendon Press, p. 604; 'the act or an instance of competition or contending with others (for supremacy, a position, a prize, etc.)' *The Canadian Oxford Dictionary*, Don Mills, Oxford University Press Canada, p. 290.
'Compete' is defined as: 'to try to get what others also seek and which all cannot have, to compete for export markets.' *Webster's Encyclopedic Dictionary*, 1988, New York, Lexicon, p. 200."

58 Cf. "The hospital sector in many countries, however, is made up of government- and privately- owned entities which both operate on a commercial basis, charging the patient or his insurance for the treatment provided. Supplementary subsidies may be granted for social, regional and similar policy purposes. It seems unrealistic in such cases to argue for continued application of Article I:3 and/or maintain that no competitive relationship exists between the two groups of suppliers or services. In scheduled sectors, this suggests that subsidies and any similar economic benefits conferred on one group would be subject to the national treatment obligation under Article XVII." WTO Secretariat, Background Note, Health and Social Services, Sept. 18, 1998. S/C/W/50, para. 39.

59 Cf. "Police services don't 'compete' with the private security firms working alongside them." Speech by David Hartridge, Director, WTO Trade in Services Division, to the European Services Forum, Brussels, Nov. 27, 2000.

60 *Markets Matter*, para. 104.

61 Some business administration courses, for example, charge full cost fees. And in some countries, including Canada, foreign students are charged higher fees that approach full cost recovery.

62 As in the case of competition, the ordinary meanings of "commercial" and "commerce" are broad, making it quite likely that dispute settlement panels would judge many public services to fall outside the protective ambit of the governmental

authority exclusion. Some of these definitions are considered in Gottlieb and Pearson, op. cit..

63 *Markets Matter*, para. 102.

64 A thorough discussion of the "legislative options" for strengthening or replacing Article I:3 is contained in "Public Services and the Scope of the General Agreement on Trade in Services," by Markus Krajewski, Center for International Environmental law, May 2001, Section VII, available at http://www.gatswatch.org/docs/markus.html.

65 Ibid., Section VII, p. 17.

66 As is suggested earlier in the document, *Markets Matter*, para. 102.

67 *Markets Matter*, para. 139.

68 If one looks beyond the technical aspects, the controversy surrounding the governmental authority exclusion may have less to do with the threats that GATS entails for public services and more to do with a basic disagreement about the importance of public services per se. Tellingly, the Director of the WTO Information and Media Relations Division Keith Rockwell revealed a thinly disguised contempt for concerns about the potential for the GATS to pressure Britain and other Members to "open services like health, education, energy, film and television to competition from private corporations." Responding to a critical column by journalist Nick Cohen, Rockwell wrote: "It may have escaped Cohen's notice but competition between private and public services providers already exists in Britain in these sectors and yet the nation seems to be thriving." "WTO spokesman answers a critic," Keith Rockwell, Director, Information and Media Relations Division, 19 March 2001, available at http://www.wto.org.

69 *Fact and Fiction*, p. 6.

70 *Markets Matter*, p. 9.

71 As discussed, governments had a one-time opportunity to list country-specific exceptions to MFN. These exceptions are subject to further negotiation and, in principle, are limited to 10 years.

72 *Markets Matter*, p. 8.

73 *Fact and Fiction* , p. 1, emphasis added.

74 Chakravarthi Ragavan, "GATS—Fact and Fiction at best a partial truth," Third World Network. April 2001, http://www.twnside.org.sg/title/fiction.htm.

[75] See, for example, "Insurance Agreement Ends Stalemate on China's Accession to WTO," BNA WTO Reporter, September 18, 2001.

[76] For a fuller discussion of horizontal negotiating modalities see Sinclair, 2000, op. cit., pp. 72 ff. and Rachel Thompson, "Formula Approaches to Improving GATS Commitments" in Pierre Sauvé and Robert M. Stern, eds. *GATS 2000, New Directions In Services Trade Liberalization* Washington, Brookings Institution, 2000.

[77] The GATS negotiating guidelines, agreed in March 2001, state that "liberalization shall be advanced through bilateral, plurilateral or multilateral negotiations. The main method of negotiating shall be request-offer." This wording leaves open recourse to horizontal and formula approaches. WTO, "Guidelines and Procedures for the Negotiations on Trade in Services," March 29, 2001, S/L/93.

[78] OECD Trade Committee, "Assessing Barriers to Trade in Services: Cross-cutting (Formula) Approaches to Multilateral services Negotiations." September 1999. Box 4.

[79] Forty-four, mainly least-developed, countries have made GATS commitments in 20 sectors or less. But this is far from the norm. Most developed countries have already made commitments in 100 or more sectors. See Rudolph Adlung, "Services Trade Liberalization from Developed and Developing Country Perspectives." Table 5-1, in Sauvé and Stern, op. cit., p. 115.

[80] *Markets Matter*, p. 37.

[81] Canada, for example, has made commitments in over 100 sectors representing hundreds of billions of dollars of economic activity.

[82] *Fact and Fiction*, p. 7.

[83] "The GATS: What is Fact and What is Fiction, A Civil Society Response to the WTO's Fact and Fiction, Summary," May 25, 2001, available at http://www.gatswatch.org/docs/rebuttal.html.

[84] It is a general rule of treaty interpretation that country-specific reservations, as derogations from the general objectives of a treaty, will be interpreted narrowly. See Shaw, *International Law* (4th ed.) pp. 641-649 and J. K. Koh, "Reservations to Multilateral Treaties," *Harvard International Law Journal*,

1982, p. 71. The limitations in GATS country schedules are, arguably, a form of reservation.

[85] See the subsequent section of this book.

[86] *Markets Matter*, Table 4, "Exceptions for Goods and Services in the WTO Agreements.".

[87] Japan's dissenting view that cross-sectoral retaliation is not permitted is noted in the minutes of the July 1999 Committee on Specific Commitments meeting. Japan "recalled that its position was that the scope of retaliation was limited to services." Report of the Meeting Held on 19 July 1999," Note by the Secretariat , 25 August 1999, S/CSC/M/11.

[88] WTO, "Trading Into The Future," on-line guide to the WTO Agreements, 1999.

[89] Like all other interested parties, insurance providers would have the opportunity to make their case against such a change in the domestic policy debate.

[90] *Markets Matter*, para. 82, table 4.

[91] *The Canadian Oxford Dictionary* defines "deem" as "regard, consider, judge."

[92] For a discussion of these three elements in relation to GATT Article XX see Jon R. Johnson, *International Trade Law*, Concord, Ontario, 1998, pp. 66 ff.

[93] Cf. Robert Howse and Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, (Montreal: Rights and Democracy, 1999). The authors express the view that under a new interpretive approach developed by the Appellate Body, "the meaning of the necessity test would have to be considered in light of relevant rules of international law, including international agreements on human rights." Such an approach, Howse and Mutua hope, might breathe new life into GATT Article XX. See pp. 11-12.

[94] GATT Article XX describes ten categories of permissible measures, GATS Article XIV just five.

[95] All manner of conservation measures aimed primarily at natural resources as goods are nevertheless bound to affect many related services such as distribution, transportation, and processing, or related services such as silviculture, waste disposal, recycling and so on. GATS Article XVI 2(c) indicates that the prohibition of limitations on the total number of service operations, or on the total quantity of service out-

put, "does not cover measures of a member which limit inputs for the supply of services." This qualification would presumably insulate conservation measures limiting natural resource inputs from the application of this specific article. But it raises the concern that, by inference, other aspects of Article XVI and the GATS would apply to such conservation measures if they affected "trade in services." See GATS Article XVI, note 9 and Sinclair, 2000, op. cit., p. 58.

96 *Fact and Fiction* misrepresents this exclusion when it tries to deflect concerns expressed by Ralph Nader "about sovereign privacy protections deemed to be overly restrictive to international trade." *Fact and Fiction* asserts that "a safeguard for individual privacy is built into the framework of the GATS itself. One of the General Exceptions in Article XIV of the GATS, overriding all other provisions, covers measures Governments might find it necessary to take for 'the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.'" The Secretariat fails to note that this clause refers only to measures "necessary to ensure compliance with laws and regulations that are not inconsistent with the GATS" – and therefore provides no protection to privacy laws and regulations that are deemed overly restrictive to international trade in services. See *Fact and Fiction*, p. 13.

97 The Government of Canada web site, for example, states that "The GATS specifically recognizes the right of governments to regulate services, public or private, in order to meet national policy objectives." GATS: Frequently Asked Questions, available at http://strategis.ic.gc.ca/SSG/sk00100e.html.

98 *Markets Matter*, Executive Summary.

99 *Fact and Fiction*, p. 11.

100 GATS preamble.

101 "We affirm the right of members under the General Agreement on Trade in Services to regulate, and to introduce new regulations, on the supply of services." Paragraph 7, "Ministerial Declaration," Fourth Ministerial Conference, Doha, Qatar, November 9-13, 2001.

102 A chairman's report on a WTO consultation with NGOs raises a red herring when it states that "Concern was also expressed over whether the GATS preamble, which explicitly recognizes

the right of governments to regulate, and to create new regulations, was equally legally binding as the main GATS text. The response was affirmative ….” “Symposium on issues confronting the world trading system – summary reports by the moderators. Session IV Services.” July 6, 2001. Available on the WTO web site (http://www.wto.org). While the GATS preamble is a legally binding part of the GATS, it nonetheless has strictly limited effect – particularly when contrasted to the substantive provisions in the main text of the agreement.

103 “‘Measure’ means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.” GATS Article XXVIII (Definitions).

104 WTO Secretariat, Trade in Services Division, “The GATS: Objectives, Coverage and Disciplines (Everything you wanted to know about the GATS but were afraid to ask),” October 1999, p. 3.

105 Ibid., p. 5.

106 The preambular language comes into play “where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.” World Trade Organization, “United States - Import Prohibition Of Certain Shrimp And Shrimp Products,” Report of the Appellate Body, 12 October 1998, WT/DS58/AB/R. para. 114.

107 Cf. Ibid., para. 153.

108 We are indebted to Elisabeth Tuerk of the Centre for International Environmental Law for this point.

109 GATS Preamble.

110 See Part II of the GATS, “General Obligations and Disciplines.” Cf. WTO Secretariat, Trade in Services Division, “An Introduction to the GATS,” October 1999, p. 4.

111 Transparency is, in most respects, an unproblematic obligation. Most governments routinely publish changes in rules and regulations as a matter of course under domestic law. Certain GATS 2000 negotiating proposals, however, would go beyond simple transparency—for example, by requiring prior notification of regulations that affect foreign service providers. Such prior comment requirements could skew

domestic decision-making by giving multinational commercial interests greater rights than domestic interests such as consumer, environmental and public interest groups. Prior notification would give already powerful commercial interests a leg up in the policy debate—an opportunity to mobilize earlier and externally against regulatory initiatives they oppose.

112 *Fact and Fiction*, p. 9.

113 The WTO's Appellate Body later set aside the panel's findings on MFN. In doing so, it emphasized that it had not ruled that Canada's measures were consistent with the GATS MFN ruling, but simply that the panel's reasoning on this matter was flawed. In the decision's concluding passage, the AB observed that "Given the complexity of the subject-matter of trade in services, as well as the newness of the obligations under the GATS, we believe that claims made under the GATS deserve close attention and serious analysis. We leave interpretation of Article II of the GATS to another case and another day." "Canada – Certain Measures Affecting the Automotive Industry," Report of the Appellate Body, 31 May 2000, WT/DS139/AB/R, WT/DS142/AB/R. Section IX. B.

114 See the GATS section of "Trading Into the Future," an online guide to the WTO Agreements, available on the WTO web site (http://www.wto.org).

115 For example, insurance services were a major stumbling block during protracted negotiations to finalize China's accession to the WTO. China wanted to cap foreign ownership of life insurers at 50%. But a single US company, New York-based American International Group (AIG), which has been present in China since 1992, owned 100% of its Chinese ventures. The EC insisted that under MFN China must either limit AIG to 50% or extend the right to full ownership to European and other foreign service providers. US trade officials complained that the EU was seeking a "most favoured company treatment." "China Challenges US Interpretation of Insurance Provision in WTO Talks," BNA WTO Reporter, July 20, 2001. This dispute was fudged in the final accession deal, with AIG claiming that it will be able to expand its existing branch operations on the basis of its current 100% ownership structure, and the Chinese chief negotiator stating that China retained the right to limit all new insurance ventures to 50%.

Because of MFN, European insurers are satisfied that, whichever way the US-China dispute is settled, they will be entitled the best treatment given AIG. "Insurance Agreement Ends Stalemate on China's Accession to WTO," BNA WTO Reporter, September 18, 2001.

116 *Markets Matter*, para. 77.

117 Rudolph Adlung, "Services Trade Liberalization: Developed and Developing Country Perspectives, in Sauvé and Stern, op. cit., p. 121, n.20.

118 Although freer trade can create powerful competitive pressures to harmonize.

119 CF. GATS Article XVII, para. 3.

120 For example, the complainants in the Auto Pact case noted that "the national treatment obligation in Article XVII of the GATS … protects competitive opportunities, not actual trade flows." The panel agreed. It found that even though there was little or no existing cross-border supply, and that it might be impractical to supply certain services on a cross-border basis from Europe and Japan to the Canadian auto industry, that "any eventual inherent disadvantages due to the foreign character of services supplied through modes 1 and 2 do not exempt Canada from its national treatment obligation with respect to the Canadian value added requirements (Canadian Autos, para. 10.301). The panel also noted, with palpable relish, that even if the Canadian value-added requirements were currently met, as the Canadian government argued, on the basis of GATS-consistent labour costs alone, there could still be a hypothetical, discriminatory effect in future (Canadian Autos, op. cit., para. 10.303).

121 See note 38 above.

122 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 (S/CSC/W/19).

123 Many free traders complain that incorporating environmental and social considerations into trade deals risks "disguised protectionism," that is economic protectionism in the guise of environmental activism or social welfare concerns. But casting the net of trade treaty restrictions so widely that they catch non-trade-related regulatory initiatives invites "dis-

guised deregulation" – opposition to environmental and social policy regulation in the guise of pro-trade sentiments.

124 Monopolies and exclusive service suppliers are also GATS-inconsistent restrictions on "the number of services suppliers."

125 GATS Article XVI.

126 NAFTA Article 1207 provides for further negotiations on these lists, but these have never occurred. Local government measures need not be listed.

127 *Markets Matter* describes Article XVI (Market Access) as one of "the two key liberalizing principles of the GATS (para. 80)." It briefly describes the market access provisions and then never discusses them directly again. There is no analysis of the impacts of this key article, its policy implications, or the critics' concerns about it.

128 World Trade Organization, "Article VI:4 Of The GATS: Disciplines On Domestic Regulation Applicable To All Services." Note by the Secretariat, S/C/W/96, 1 March 1999, para. 14.

129 GATS Article XX.

130 WTO, Committee on Specific Commitments, "Revision of Scheduling Guidelines: Note by the Secretariat," 5 March 1999, S/CSC/W/19, p. 6.

131 Ibid., p. 6.

132 *Fact and Fiction*, p. 10.

133 See, for example, Metalclad Corporation vs. Mexico where a US investor successfully argued that the rejection by a Mexican municipality of a permit for a hazardous waste facility and a state government decree establishing an ecological reserve in the area where the hazardous waste facility was located violated the NAFTA investment protection provisions. See also Ethyl Corporation's successful claim, settled outside the arbitration, that a ban on a Canadian gasoline additive, MMT violated NAFTA and S.D. Myer's successful claim that a temporary Canadian ban on the export of toxic PCBs breached NAFTA's investment chapter. There are a significant number of other controversial claims that have yet to be decided, including challenges to: California's phase-out of the gasoline additive MTBE, a Canadian phase-out of an agricultural pesticide, the operations of the Canadian public postal services, US municipal planning decisions, US federal

procurement practices, and the awarding of punitive damages by a US jury, among others.

134 The most contentious NAFTA articles have been Article 1110 (Expropriation and Compensation), Article 1105 (Minimum Standards of Treatment), and Article 1106 (Performance Requirements). Like GATS Articles XVI and the restrictions intended to be developed under GATS Article VI, all are drafted in absolute terms, prohibiting certain practices, whether discriminatory or not.

135 The GATS information session, organized by the Department of Foreign Affairs and International Trade, took place in Ottawa on May 4, 2000. The informal meeting with WTO services officials took place at the WTO Geneva offices on November 30, 2000. See also note 95 above.

136 The GATS Telecommunications Reference Paper, which elaborates sector-specific obligations for telecommunications, provides that "any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. …"

137 As summarized by the WTO secretariat, GATS Article VIII requires that "a monopoly supplier of a service must not be allowed to act inconsistently with a member government's MFN obligations or any specific commitments, nor to abuse its monopoly position," An Introduction to the GATS, op. cit., p. 6.

138 *Fact and Fiction*, p. 10.

139 *Markets Matter*, para. 89.

140 Surely, rather than stating that governments "retain the right to designate or maintain monopolies," it would be more accurate to say that "the GATS restricts or qualifies governments' right to designate monopolies."

141 See Perrazzelli, Alessandra and Paolo R. Vergano (2000), "Terminal Dues Under The UPU Convention And The GATS: An Overview Of The Rules And Of Their Compatibility." *Fordham International Law Journal*, Vol. 23:736. and "US Postal Service: Unresolved Issues In The International Mail Market," U.S. General Accounting Office, GAO/GGD-96-51, March 1996.

142 The GATS restrictions against "abuse of monopoly position" do not define the key term "abuse." The chief US GATS negotiator during the Uruguay Round noted that "After con-

siderable debate, 'abuse' was left undefined …" Richard B. Self, "General Agreement on Trade in Services," in Terence B. Stewart, ed. *The World Trade Organization: the Multilateral Trade Framework for the 21st Century and US Implementing Legislation*, Washington, American Bar Association, 1996, p. 532-3.

143 See Appleton and Associates, "Notice of Intent, United Parcel Service of America Inc. v. Canada," January 19, 2000, available at http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp#Notes. For further discussion of this NAFTA claim and its relation to the GATS, see Scott Sinclair, "The GATS and Canadian Postal Services," Canadian Centre for Policy Alternatives, March 2001, available at http://www.policyalternatives.ca.

144 To be technologically up-to-date and financially viable national post offices must be active in providing services that complement their primary focus on letter-mail. This invariably brings them into competition with private courier companies.

145 NAFTA Article 1502.3.d states that NAFTA parties must ensure that any monopoly "does not use its monopoly position to engage … in anticompetitive practices in a non-monopolized market …". It is not clear that investors have the right to invoke directly this particular provision of NAFTA as UPS is attempting. However, a government-initiated dispute on behalf of courier companies, whether under NAFTA or the GATS, would have clear recourse to these agreements' respective anti-monopoly provisions.

146 In the GATS context, as discussed elsewhere, compensation takes the form either of adjustments to a country's GATS schedule or, if a negotiated settlement cannot be reached, of trade sanctions.

147 For further discussion of this issue see Mathew Sanger, *Reckless Abandon: Canada, The GATS and the Future of Health Care*, Ottawa, Canadian Centre for Policy Alternatives, 2001, esp. pp. 77-90.

148 Insurance providers would have the opportunity to make their case against such a change in the policy debate and in the domestic courts like all other interested parties. In Canada, domestic courts have rejected the view that expanding a public monopoly must result in governments paying compensa-

tion to affected investors. This has generally been treated as a commercial risk that is not necessarily compensable. For example, in a 1986 case a private home care company argued that it should be compensated because its business was adversely affected by a decision by the Manitoba government to directly provide home care through the public sector. The Court disagreed, stating that "Government decisions of the sort in issue have serious private repercussions, but they are essentially political choices made with justifiable impunity in the pubic interest as perceived by the elected government …". Home Orderly services, et al. vs. Government of Manitoba (1987) D.L.R. (4th) p. 365, quoted in Mathew Sanger, *Reckless Abandon, Canada, the GATS and the Future of Health Care,* op. cit., p. 107.

149 *Markets Matter*, para. 95.

150 See GATS Article VI.4 and "Application of the Necessity Test: Issues for Consideration," Working Party on Domestic Regulation, Informal Note by the Secretariat. Job No. 5929. 2 May, 2000.

151 Cf. Sinclair, 2000, op. cit., pp. 75-81.

152 OECD, "The General Agreement on Trade in Services: An Analysis," op. cit., p. 16.

153 World Trade Organization, Working Party on Professional Services, "The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade and on Import Licensing to Article VI.4 of the GATS," Note by the Secretariat, 11 September 1996 (S/WPPS/W/9).

154 "Application of the Necessity Test: Issues for Consideration," op. cit., 2 May 2000.

155 World Trade Organization, Council for Trade in Services, "Article VI.4 of the GATS: Disciplines on Domestic Regulation Applicable to all Services," Note by the Secretariat, March 1, 1999, para. 27 (S/C/W/96).

156 Sinclair, 2000, op. cit., p. 10.

157 *Fact and Fiction*, p. 15.

158 Professor Robert Stumberg made this point in his remarks to a recent symposium. Robert Stumberg, Remarks, Royal Society of Canada symposium on the WTO, November 17, 2001, Ottawa.

159 "Application of the Necessity Test: Issues for Consideration." op. cit.

[160] "The right to maintain domestic regulatory measures is however specifically recognized and will be subject to the disciplines to be developed under Article VI:4 with the aim of minimizing their negative impact on trade. These measures cannot be entered as limitations in a Member's schedule." Ibid., para. 13.

[161] An OECD analysis notes that "there is a fine, and indeed not always clear line between de jure non-discriminatory regulations which may be scheduled as limitations to national treatment under Article XVII because of their de facto discriminatory effect, and those which are to be treated as contrary to Article VI on domestic regulations because they are 'unnecessarily burdensome.' For instance, if the issuing of a license requires prior residency, such a requirement might have to be scheduled under Article XVII as a de facto discrimination, being less likely to be met by foreign nationals. But it could also be assessed, depending on the circumstances, as 'unnecessarily burdensome' under Article VI (5) – in which case it might have to be abandoned all together." The General Agreement on Trade in Services (GATS): An Analysis, op. cit., para. 61.

[162] Sinclair, 2000, op. cit., p. 79.

[163] Hoekman, Bernard and Messerlin, Patrick A., Liberalizing Trade in Services: From Reciprocal Negotiation to Domestic Regulatory Reform, Draft paper presented at the "Services 2000: New Directions in Services Trade Liberalization" Conference at the University Club in Washington, D.C., 1-2 June 1999, p 1-2.

[164] Prior to the Doha Ministerial, and subsequently, a number of southern governments have called for a thorough assessment of trade in services. Sensibly, these proposals insist that "further [GATS] negotiations may only commence after conclusions from this first assessment have been drawn, and negotiations should be adjusted in accordance with these conclusions." See Communication from Cuba, Dominican Republic, Haiti, India, Kenya, Pakistan, Peru, Uganda, Venezuela and Zimbabwe, "Assessment of Trade in Services," 9 October 2001, S/CSS/W114 and Communication for Cuba, Senegal, Tanzania, Uganda, Zimbabwe and Zambia, "Assessment of Trade in Services," 6 December, 2001, S/CSS/W/132.

[165] Address given by Mr. Renato Ruggiero, Director-General of the World Trade Organization, (2 June 1998) in Brussels, to the Conference on Trade in Services, organized by the European Commission.

[166] 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.

[167] The three cases are EC Bananas, Canada Autos and Canada Periodicals. See, "European Communities - Regime for the Importation, Sale and Distribution of Bananas: Complaint by the United States" Report of the Panel, 22 May 1997, WT/DS27/R/USA; "Canada: Certain Measures Affecting the Automotive Industry," Report of the Appellate Body, 31 May, 2000, WT/DS139/AB/R, WT/DS142/AB/R; and "Canada - Certain Measures Concerning Periodicals," Panel Report, 14 March 1997, WT/DS31/R. For a summary and analysis of each case, see Sinclair, 2000, op. cit., chapter 3.

[168] Five key themes emerge from the jurisprudence to date: 1) The GATS applies to any measure; 2) The GATS prohibits de facto discrimination; 3) The GATS is "modally neutral;" 4) WTO restrictions on goods and services are overlapping; and 5) Exceptions will be interpreted narrowly. The interpretation of GATS by dispute panels and the Appellate Body is analyzed in Chapter 3 of Sinclair, 2000, op. cit..

[169] Warming to his theme of "overwhelming uncertainty," Lang elaborated: "It gets worse. There is another half to the GATS commitment system, the specific sectoral commitments, which are contained in special schedules, and the provisions that surround them, called annexes. … The main difficulty with these provisions is the difficulty of reading them, much less interpreting them. The reading and writing of good tariff schedules was always something of an art, but the service schedules make this skill less art than fetish." Lang, op. cit.

[170] Ibid.

[171] Michael Moore, "Speaking Points to the ICFTU Conference on Making Globalization work for People: Development and Workers' Rights," Doha, Qatar, November 8, 2001.

[172] Estimates for health spending are from the World Health Organization. For education from Michael T. Moe and Henry Blodget, "The Knowledge Web: People Power—Fuel For The New Economy," by Merrill Lynch Global Securities Research

And Economics Group, May 23, 2000. For electricity from Marjorie Griffin Cohen, "From Public Good to Private Exploitation: The Deregulation of Electricity and the GATS," Canadian Centre for Policy Alternatives, forthcoming, 2002. For postal and courier services from the Canadian Union Of Postal Workers, Research Department, based on Manner-Romberg-Unternehmensberatung, "Demand for Communication: The increasing need for ways of efficient communication within the courier, express and postal markets," June 2001, and Universal Postal Union figures.

173 Communication from Cuba, Senegal, Tanzania, Uganda, Zimbabwe and Zambia, "Assessment of Trade in Services," 6 December, 2001, S/CSS/W/132, para. 8.

174 Sinclair, 2000, op. cit., p. 94.

175 Paragraph 7 of the Ministerial Declaration "reaffirms the right of Members under the General Agreement on Trade in services to regulate, and to introduce new regulations on, the supply of services." "Ministerial Declaration," Fourth Ministerial Conference, Doha, Qatar, November 9-13, 2001. This reaffirmation adds nothing to the similar recital in the GATS preamble and has the same shortcomings.

176 The analogy is that like a bicycle, multilateral trade negotiations must continue to go forward; if they slow down or stop, the bicycle will fall over.

177 Doha Ministerial Declaration, op. cit., para. 15.

178 Susan George, Remarks, Royal Society of Canada symposium on the WTO, November 17, 2001, Ottawa.

Appendix 1:
List of acronyms

CCPA	Canadian Centre for Policy Alternatives
CPC	Central Product Classification
EC	European Communities
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
MAI	Multilateral Agreement on Investment
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NGOs	Non-Governmental Organizations
OECD	Organization for Economic Cooperation and Development
UPU	Universal Postal Union
USTR	United States Trade Representative
WPDR	Working Party on Domestic Regulation
WTO	World Trade Organization

Appendix 2:
Glossary of key GATS terms

Commercial presence mode: applies to services provided by a foreign service supplier through investment in the territory of another member. This ensures the right of foreign firms to establish a commercial presence in a foreign country, for example through branches, subsidiaries, offices, or any type of business or professional establishment.

Consumption abroad mode: applies to services consumed by citizens or firms of one member country in the territory of another member where the service is supplied. Essentially, the service is supplied to the consumer outside the territory of the member where the consumer resides. Examples include tourism, students studying abroad, or patients travelling to a foreign country to get medical treatment.

Country schedule: each member government has a unique annex to the GATS that sets out the sectors that it has agreed to cover under the **national treatment** and **market access** provisions of the GATS. The schedule lists the sectors where a member has taken **specific commitments** as well as any **limitations** on commitments within those sectors. These annexes are an integral part of the GATS.

Cross-border mode: applies to services provided from the territory of one member into that of another. Only the service itself crosses the border, without the movement of per-

sons or investment. The service supplier does not establish any presence in the territory of the member where the service is consumed. Examples include information or advice provided through fax, phone or electronic means. This ensures the right of a foreign service supplier to supply services cross-border without having to establish locally.

***De jure* treatment:** cases where government **measures** give foreign service suppliers and services formally identical legal treatment to that offered to their domestic (**national treatment**) or foreign (**MFN**) counterparts.

***De facto* treatment:** Cases where government **measures** that treat service suppliers and services alike nevertheless allegedly modify the conditions of competition in favour of domestic services or service suppliers (**national treatment**) or in favour of certain foreign services and service providers compared to others (**MFN**). The GATS guarantees *de facto* treatment, which is sometimes referred to as "equality of competitive opportunity."

Dispute settlement: GATS disputes are settled under the general dispute settlement rules of the WTO. WTO dispute settlement decisions are binding. If a government that loses a case fails to bring its inconsistent **measures** into conformity with the GATS within a reasonable period, the complaining party can try to negotiate satisfactory compensation. If no satisfactory compensation can be negotiated, the complainant can impose equivalent trade penalties on the offending member. The WTO allows "cross retaliation" so penalties may be imposed on trade in any area.

Domestic regulation: The GATS calls for further negotiations to ensure that "qualification requirements and procedures, technical standards and licensing requirements" do not constitute "unnecessary" barriers to **trade in services**. The intended restrictions would apply to non-discriminatory government **measures** and allow WTO panels to decide whether such **measures** were based on transparent and objective criteria and not more burdensome than **necessary** to achieve their stated objective. These proposed restrictions are intended to apply **generally** to all services and all member governments.

Exceptions: Certain **measures** that are otherwise inconsistent with GATS rules can still be maintained if the government taking the **measure** can demonstrate to a WTO panel that it falls within the parameters of a GATS exception (e.g. GATS Article XIV). Such exceptions will be interpreted narrowly.

Formula approaches: are a type of **horizontal negotiating approach**. They do not aim to develop new rules to be incorporated into the GATS text, but are binding negotiating guidelines —for example, an agreement to make **specific commitments** in every sector or to eliminate all **limitations** in certain sectors.

General obligations: GATS obligations (such as **MFN** or **transparency**) that apply automatically and unconditionally to all member governments across all service sectors. General obligations apply regardless of a member government's **specific commitments**. (General obligations apply "horizontally" and are sometimes referred to as "horizontal obligations.")

Government procurement: The GATS does not define government procurement other than stating that it must be "for governmental purposes." Although definitions differ in different countries, government procurement is usually defined as governmental purchasing of goods, services or construction for the direct use or benefit of governments.

Horizontal negotiating approaches: refers to the negotiation of crosscutting commitments that would apply across members, sectors and/or modes of supply. These might include developing new horizontal rules or strengthening GATS rules that already apply horizontally. They might also include so-called "**formula approaches**."

"In the exercise of governmental authority:" The GATS applies to all services except those provided "in the exercise of governmental authority." This has been defined narrowly to mean only those services that are provided neither on a commercial basis nor in competition with other service suppliers.

Limitations: refer to notes in a country's schedule that limit, or qualify, the application of the GATS **national treatment** or **market access** provisions within covered sectors —for example, by exempting an existing, otherwise inconsistent, **measure**.

Market access: Market access has two meanings in the GATS. First, in a general sense, it refers to the right of a service supplier to supply a service through any of the four **modes** of supply. More specifically, it refers to GATS Article XVI, which prohibits government **measures** that

limit the number of service operations, the value of service transactions or assets, the number of operations or quantity of output, the number of persons supplying a service and the participation of foreign capital, and also any requirements for specific types of legal entities. Such **measures** are absolutely prohibited; that is, they are GATS-illegal even if they apply equally to foreign and domestic service suppliers.

Measures: government laws, regulations, rules, procedures, decisions, administrative actions, and any other form of government action affecting "**trade in services**." The GATS covers measures by all levels of government and any non-governmental bodies exercising authority delegated by government.

Most-favoured-nation (MFN) treatment: 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, both in law (***de jure***) and in fact (***de facto***).

National treatment: requires that governments give foreign services and service providers the best treatment given to like domestic services and service suppliers, both in law (***de jure***) and in fact (***de facto***).

Natural persons mode: applies to services provided by nationals of one member who travel to another member country to provide a service. This mode applies only to real, flesh-and-blood persons (as opposed to "legal persons," that is, corporations). This mode ensures the right of "natural persons" to stay temporarily in another coun-

try for the purpose of supplying services; for example, executives, consultants, or engineers who travel abroad for business purposes.

Necessary: Under the intended restrictions on **domestic regulation**, non-discriminatory government regulations must not "constitute unnecessary barriers to **trade in services**." Governments would have to demonstrate that regulations were "necessary" to achieve a WTO-sanctioned legitimate objective. A government could not justify a regulation as necessary if there were an alternative one that was less burdensome on **trade in services**. If the only regulatory **measures** that were reasonably available were all burdensome, then the government would have to employ the **measure** that was least burdensome.

Safeguards: refer to emergency actions intended to provide temporary protection against "fairly traded" products that cause or threaten to cause serious injury to domestic producers. Safeguards are permitted under the GATT rules on goods but would be a new concept under the GATS.

Service: The GATS does not define a service. Broadly defined, a service is a product of human activity aimed to satisfy a human need, which does not constitute a tangible commodity.

Specific commitments: The GATS **national treatment** and **market access** provisions apply only to those sectors that each government has listed in its country **schedule**. These listed commitments are referred to as specific commitments.

Subsidies: The GATS does not define subsidies. The GATT rules on goods define a subsidy as a financial contribution (or any form of income or price support) by a government, or any public body within the territory of a member, which confers a benefit.

"Trade in services:" The GATS defines this very broadly to include services supplied through every **mode** of supply whether through cross-border transactions, consumer travel, foreign investment, or labour mobility. The four **modes** of supply are called "**cross-border**," "**consumption abroad**," "**commercial presence**" and "movement of **natural persons**."

Transparency: the requirement that member governments make publicly available their laws, regulations, procedures, administrative rulings and judicial decisions. There are negotiating proposals to extend this concept to provide rights to foreign governments to be consulted on government **measures** affecting services both before and after they are introduced.

The GATS debate is heating up.

Non-governmental organizations have lifted the veil of obscurity on the little-known General Agreement on Trade in Services (GATS). To counter the growing public opposition that has resulted, the WTO and OECD recently published two booklets trying to reassure citizens and governments about what they call GATS "scare stories."

This book critiques these official responses. Meticulous and clear, it explains the practical implications of key features of the GATS, showing how the WTO and OECD reassurances are frequently simplistic or misleading. The book demonstrates that the key concerns of critics are well-founded: the GATS does in fact threaten essential public service systems and public interest regulation.

The GATS – and the negotiations now underway to expand it – are certain to be hotly contested during the broad new round of WTO negotiations. This timely book will be an essential resource for researchers, academics, policy-makers, activists and ordinary citizens as the debate about the GATS comes to a boil.

Scott Sinclair is a Canadian trade policy specialist with extensive international trade policy expertise and experience. Author of the influential book "GATS: How the World Trade Organization's new 'services' negotiations threaten democracy", he is currently a senior research associate with the Canadian Centre for Policy Alternatives.

Jim Grieshaber-Otto, Ph. D. is an independent trade policy consultant based near Vancouver, British Columbia, Canada. His recent work focuses on the impact of the GATS on health-based alcohol regulation and on public education and other public service systems.

$14.95

Canadian Centre for Policy Alternatives
http://www.policyalternatives.ca

ISBN 0-88627-278-5