International Trade in Services Rules:
The New Threat to Public and Private Services and Local Control

Introduction

The USTR is currently negotiating far-reaching new trade rules for "Trade in Services" which pose significant threats to workers, the environment, and consumers of both public and private services. These new rules potentially threaten the provision and regulation of areas as widespread as social security, postal services, police, prisons, healthcare, water, waste disposal, education, banking, insurance, accountancy, transportation, construction, mining, tourism, food preparation, and more. As proposed, services rules threaten to severely restrict the regulatory ability of Federal and sub-federal governments, potentially impacting tax laws, wage laws and other labor laws, regulations on accounting and other financial services, environmental and public health laws, regulations on government procurement, and much more. New rules on services also could significantly undermine the ability of Federal and sub-Federal governments to maintain viable public services such as water distribution, education, postal services, and transportation.

Context

Rules on services are currently being negotiated in two separate arenas: the General Agreement on Trade in Services (GATS) within the World Trade Organization (WTO), and the services chapter of the Free Trade Area of the Americas (FTAA). The GATS was established during the Uruguay Round of negotiations of the WTO in 1994. The 140-plus members of the WTO are currently in negotiations regarding the expansion of GATS coverage. These negotiations are scheduled for completion in 2005, but could be completed sooner. Negotiations on the FTAA, which would involve 34 nations of this Hemisphere, began in 1998 and are scheduled for completion in 2005.

The next ministerial meetings for both the FTAA and the WTO will be in the 4th quarter of 2003, and there are key deadlines in the next few months that will shape the content of those negotiations. February 15th is the stated deadline by which FTAA parties must announce which service sectors and regulations they wish to exclude from coverage by FTAA services rules. March 31st is the deadline by which GATS countries will announce their 'offers' for coverage.

The way in which services are provided and regulated, especially public services, is of great importance because it impacts the safety and accessibility of essential services such as water and healthcare, as well as the viability of our social safety net. The service sector has a massive impact on our economy and lives, covering 70% of our economy, and over 100 million jobs. It's also an area with significantly lower wages and benefits than other sectors, and has been increasingly subjected to pressures of deregulation, budget cuts, outsourcing, and privatization.

Definition of "Services" and scope of coverage

Services are defined in the FTAA and GATS to cover much more than just the supply of services across borders. Explicit coverage differs between the two agreements. In the GATS, services are defined to include not just cross-border supply of services (purchasing a service from a provider in another country to be performed in that same country), but also foreign direct investment in service provision (the physical branching out of a service-providing corporation into another country), consumption abroad (receiving a service in another country), as well as temporary entry programs for workers (workers traveling to another country to provide services). Proposed services rules within the FTAA cover these same areas plus the extensive area of government procurement of services, threatening a wide range of procurement regulations designed to ensure safety and meet societal goals. GATS rules currently exempt government procurement of services, however this is an area that is being proposed for revision. In addition, government

subsidies is another area that is open for expansion of commitments in current GATS negotiations, as well as inclusion in the FTAA. All GATS rules apply to government actions by local, state, and national governments, and FTAA rules will likely do the same.

Exactly which services are covered by services rules in GATS and FTAA depends on what specific commitments and or exceptions are taken by each country. Under GATS, application of most services rules is "bottom-up" in that only services which are explicitly offered by a country are covered. The FTAA, however, utilizes a "top-down" application under which all services are covered unless they are explicitly excluded. This top-down model is particularly problematic in that it is almost impossible to anticipate and delineate each service that might be impacted by a particular rule, especially since new services are continually being developed.

In general GATS and FTAA services rules apply to both public and private services. There is an exclusion in GATS (which will likely be the same for the FTAA) for public services that are "provided in the exercise of government authority", and "supplied neither on a commercial basis nor in competition with one or more service suppliers." In the case of public services in the U.S., and increasingly, those in other countries, most fail to meet the criteria for this "public services exclusion." Our public postal system, for instance, operates on a commercial basis, and our public education system is in competition with private schools. Almost all public services in the U.S. are also provided in the private sector.

Approaching deadlines

Under the FTAA negotiations, participating governments have until February 15th to make initial requests for specific access to other countries' markets. Under the GATS, the initial request period ended June 2002. The next phase of the negotiations is that each GATS country will respond to the requests with its initial "offers" of access before March 31, 2003.

U.S. negotiators have not released information on what requests they have made of other countries, or what requests have been made on the U.S. thus far. A summary of the E.U. requests to the U.S. was leaked, however, revealing that the E.U. is pushing for application of GATS rules to U.S. water collection, purification, distribution and wastewater treatment, large parts of the energy sector and various other sectors, including tourism, transportation, and financial services. The requests name specific state laws which would be in conflict with GATS rules, including, laws in ten states restricting purchase of public and or private land by foreign entities, and state laws on residency and other requirements for the practice of law.

Key Services Rules in the GATS and FTAA and their Potential Impacts

1) Most Favored Nation Treatment: requires countries to accord services from one foreign country the best of the treatment accorded to any other foreign country.

Potential impact: Would outlaw any future procurement policies prohibiting procurement of services from companies doing business in countries with repressive regimes such as the Burma or South African apartheid divestment policies. This could also apply to cases in which countries believe they are being unfairly targeted with import restrictions for having poor environmental or labor practices.

2) National Treatment: requires countries to treat foreign service providers at least as well as domestic service providers, even if the foreign service provider is private and the domestic service provider is public, and even if the treatment of different service providers is not discriminatory.

Potential impact: The U.S. has many laws which intentionally preference domestic service providers such as Buy America, Buy Local laws, tax breaks and other benefits for local businesses, or restrictions on foreign ownership of particular services. Under the National Treatment rule, these laws would be illegal. Additionally, the National Treatment rules could force Federal, state, and local governments to provide equal funding to foreign private service providers as is provided to public service providers. This would make it impossible for governments to maintain adequate funding levels for public services such as education, postal services, fire fighting, public prisons, environmental services, and a myriad of other critical services. In addition, a wide range of domestic regulations could be determined to be *de facto* discriminatory if compliance with those regulations is easier for domestic providers. For instance, requirements that all nurses speak English, laws requiring environmental reviews, or Project Labor Agreements for government contracting may all be more difficult for foreign service providers to follow.

3) Domestic Regulation: requires that countries limit domestic regulations (licensing requirements, technical standards, or qualification requirements) to those "based on objective and transparent criteria" and which are "not more burdensome than necessary to ensure the quality of the service."

Potential impact: Any of the following laws could be determined "more burdensome than necessary:" worker health and safety laws, licensing laws, professional standards, apprenticeship programs, drinking water standards, pesticide application regulations, toxic waste handling regulations, etc. The loss of any of these laws could have serious repercussions on public health and safety. We have already seen a glimpse of the harmful effects of deregulation of services in the recent Enron and California energy crises.

4) Market Access: prohibits governments from limiting the number of service providers, the total monetary value of services transactions, the total number of service operations, the total quality of service output, the total number of people employed in a particular service sector or by a particular service provider, the type of legal entity through which a service can be provided, or the amount of foreign capitol involved in providing a service.

Potential impact: This rule is incredibly far-reaching in that it practically eliminates entire types of policies including economic needs tests, quotas, or monopolies. Limiting the number of providers of a particular service is how the government maintains the viability of certain public services. We could not maintain a viable public postal service if it was forced to compete with four other postal service providers. In addition, because private service providers are not required to accommodate low income or special needs cases, they can cater to a less cost-intensive/higher revenue market and leave public service providers with less revenue and more costs. Market access rules could force the privatization of critical public services leading to serious consequences in quality and accessibility.

Regulating the number of service providers is also a mechanism for protecting public health and the environment. We have zoning laws limiting the number of waste incinerators in a particular community, blue laws regulating alcohol sales, and laws limiting tourism outfits or oil drilling operations in an ecologically sensitive area. All of these could potentially violate Market Access rules. Licensing laws could also be viewed as restricting market access. Additionally, Market access laws could lock in privatizations by prohibiting governments from limiting the number of providers for a particular service once it has been privatized. This would prevent government actions to reverse privatization such as the recent Federalization of airport security.

The ban on regulating the type of legal entity through which a service can be provided could impact requirements that services providers be incorporated, or that social service providers such as childcare or eldercare providers be non-profit entities.

Enforcement
Once countries have finalized commitments and exclusions to the services rules in GATS and FTAA, the final interpretation of services rules would be decided by closed dispute resolution tribunals consisting of trade lawyers with a mandate to take only trade factors into consideration, and to ignore social, or environmental consequences. The enforcement of these tribunal rulings is binding through trade sanctions. Similar dispute resolution mechanisms in NAFTA and the WTO have overwhelmingly ruled in favor of commercial interests and against the public interest.

Conclusion
The overriding impact of these rules would be a severe diminution of the ability of Federal and sub-Federal governments to regulate public and private services in the public interest, an erosion of the funding base for public services, and the eventual privatization of many crucial public services regardless of the will of lawmakers. Under Fast Track authority, Members of Congress will only have the opportunity to vote up or down on the implementing legislation for the GATS , scheduled for 2005. In addition, any implementation language which comes before Congress will only cover changes to Federal law. GATS rules which require limits on state and local authority and changes to state and local laws will not ever come before Congress. The FTAA, if completed, will come before Congress, but only after extensive negotiations are complete, and again under Fast Track procedures, Congressional debate will be limited. Critical negotiating windows are currently open, however, in both the GATS and the FTAA. It is therefore crucial that Congress act now to insert transparency into the negotiating process, demand to know what U.S. negotiators are placing on the table, and make sure that trade rules are not being established which undermine the safety and viability of crucial services, or the regulatory authority of state and local legislators.

Citizens Trade Campaign – 1/03
www.citizenstrade.org