

**A DISSERVICE TO THE EARTH:  
The Environmental Impact of the  
WTO General Agreement on Trade in Services (GATS)**

**David Waskow and Vicente Paolo B. Yu III  
Friends of the Earth – United States**

*The General Agreement on Trade in Services (GATS) was created as part of the formation of the World Trade Organization (WTO) in 1994. Under the terms of the GATS, member countries were obligated to continue further liberalization of services and to begin negotiations in 2000 to achieve that goal. Now underway, the negotiations to expand the reach of the GATS will have substantial implications for the environment around the world. Governments and citizens will be increasingly constrained in their efforts to protect the natural world from harmful service operations. Moreover, the expansion of service operations in a number of environmentally sensitive sectors, including energy, will likely have substantial environmental impacts.*

**I. Introduction: Global Trade in Services and the Environment**

Worldwide trade in services is now big business. Roughly one-fifth of total global trade now comes from trade in services, and over the past decade, trade in services has grown at an average of 6% per year to a total of US\$1.35 trillion. The United States is the world's leading exporter and importer of services in 1999, accounting for around US\$253.4 billion (18.7 percent) in global exports and US\$180.4 billion (13.4 percent) in global imports. Forty countries (mostly from North America, Western Europe, and East and Southeast Asia) accounted for over 90 percent of total global trade in commercial services in 1999.

Despite the rapid growth in services trade, however, the tremendous impact of services on the environment is seldom recognized. Services are frequently thought to involve only those sectors, such as finance or insurance, that have only indirect effects on the natural world. But service sectors – **including energy (including fossil fuel exploration, extraction, transport and power generation), water, transport, travel and tourism, waste disposal and sewage, construction, and retail distribution** – in fact touch nearly every aspect of the natural world and the environment. The activities of multinational service corporations such as oil companies, electricity producers, waste disposal businesses, private water companies, and hotel chains have major environmental impacts around the world.

The potential impact of these environmentally significant service sectors can be seen from their economic magnitude. The two leading sectors in services trade are tourism/travel services and transport services. Tourism/travel services accounted for 32.8

percent (US\$440 billion) of the total world trade in services in 1999, while cross-border transport services – including international transport of goods and people by air, land, sea, internal waterway, or pipeline – represented 23 percent (US\$310 billion) of services trade. The magnitude of other environmentally relevant services is more difficult to quantify because there is no consistent statistical method for classifying them. However, U.S. foreign direct investment in the petroleum sector alone reached nearly US\$100 billion in 1999, comprising 9% of total U.S. direct investment. From these data, it can be inferred that energy services are a significant proportion of total global services trade. In the “environmental services” sector – which is focused in waste disposal and sewage – the WTO has estimated that the global market in solid waste management and water treatment services totaled more than US\$167 billion in 1996.

## **II. GATS 2000 Negotiations**

Despite the failure of the World Trade Organization (WTO) to launch a new round of comprehensive global trade talks at the Seattle ministerial in 1999, the WTO began mandated negotiations in 2000 to expand the reach of the GATS. According to GATS Article XIX, member countries are required to “progressively liberalize” their service sectors in these negotiations. That is, no countries – including developing countries – are permitted simply to maintain their current level of access for foreign service operators. The GATS requires that service markets must be opened further. Given the importance of the service sectors that have a significant impact on the environment, the implications of these negotiations for environmental protection cannot be ignored.

The GATS is a combination of a so-called top-down agreement – which requires countries to abide by certain disciplines across all sectors – and a bottom-up agreement – which permits countries to decide in which sectors they will make “specific commitments” to market access and national treatment restrictions (see below on market access and national treatment). It should be noted, however, that even negotiations of apparently bottom-up market access commitments are essentially equivalent to negotiations of tariff rates, part of the traditional top-down trade regime in the WTO. In many ways, then, the GATS is in essence structured like traditional trade agreements.

The current negotiations aim both to expand the specific commitments made by countries in particular sectors and to elaborate the “general obligations” of the agreement. These substantial extensions of GATS rules will increase the market access of multinational service providers and will most likely restrict the ability of governments and citizens to protect the environment. Major countries have proposed that these negotiations address a number of sectors that have significant environmental impacts – including energy, transport, “environmental services” (including waste disposal and water), and tourism.

The negotiations will aim to expand the specific commitments made by countries throughout these broad sectors, while countries can also take new commitments in other sectors as well. At the same time, major countries have proposed that the general

obligations of the GATS be strengthened. Most notable is the effort to broaden the restrictions placed on the right of countries to adopt and enforce certain types of domestic regulation. Meanwhile, it is highly unlikely that the current GATS negotiations will do anything to address existing problems in the agreement that pose potential threats to environmental protection.

### **The Broad Reach of the GATS**

The environmental impact of the GATS will be substantial – both in the agreement's current form and after further expansion – because of the broad reach of its mandate. The GATS covers an extremely wide range of service delivery modes, and most importantly includes coverage of a service operator's actual presence in a foreign country (i.e. foreign direct investment). The 1994 GATS framework covers the methods of delivering services according to the following "modes of supply":

- Providing a service across country borders, for example by telephone or in the form of cross-border transport (Mode 1)
- Providing a service within one's own country to a citizen of another country (Mode 2)
- Providing a service within a foreign country by establishing a "commercial presence" there, i.e. a facility, branch office, or subsidiary (Mode 3)
- Providing a service through the presence of staff or employees, but not a "commercial presence," in another country (Mode 4)

Most significantly, the inclusion of commercial presence service operations (Mode 3) means that the rules of the GATS provides substantial rights for foreign service providers when they are operating in another country. As the WTO has itself indicated, the GATS is thus essentially a multilateral investment agreement. Like other types of investment agreements, it provides multinational investors with wide-ranging rights and can undermine the right of governments to regulate these investors in a domestic context, even for such public purposes as environmental protection.

The agreement is intended to cover all local and national governmental laws, rules, regulations, practices and procedures that will affect the supply of a service. The WTO Appellate Body ruled in a 1997 case that any government measure affecting the supply of services is covered by the GATS (EC-Bananas). The ruling confirmed an earlier decision by a WTO panel that found that there can be no *a priori* exclusion of government measures from the coverage of the GATS. According to the panel, "the scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service, regardless of whether the measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services."

In that case, the relevant measure was an import quota on bananas that indirectly affected banana distributors, whose activities are covered under the GATS classification for distribution services. The measure at issue was not a restriction on banana distribution itself, but rather a set of import limitations that could be viewed as having an

impact on the distributors. In other words, any government action that has an impact on a covered service provider – even when it does not directly address the relevant service – can be construed to fall under the purview of GATS rules.

The Bananas decision is directly significant for environmental concerns. The ruling means that government policies that affect the critical inputs for a service activity could be subject to the GATS. Indeed, in many service sectors, it is likely that operations will be affected in many ways by regulatory limits on natural resource use. For instance, oil and gas extraction and production operations would be affected if limits were placed on the amounts of oil and gas that could be extracted or produced. Similarly, water distribution activities would be affected if there were limits on the quantity of groundwater or bulk water that could be collected by water providers. Finally, land use policies will often affect service operations such as energy production, tourist facilities, and retail distribution facilities.

### **What's a Service?: Classification and Clusters**

The way in which services will be classified and grouped together in the GATS 2000 negotiations will have significant implications for the impact of the GATS in environmentally-sensitive sectors. Due to the relatively recent creation of the agreement, however, there is still a significant lack of clarity about key classification issues. Classification of specific services sectors and subsectors is necessary under the GATS in order to clearly identify the exact nature and scope of the service sector or subsector in which a particular GATS market access or national treatment commitment is made. The unsettled questions in many sectors include these: What exactly constitutes a service? In which categories or sectors should particular services be included? And how should services be grouped together?

#### *Classifications*

To facilitate the classification process during the Uruguay Round negotiations leading up to the formation of the WTO, the GATT Secretariat produced a list of services sectors in 1991 that were to be the subject of services negotiations. The WTO list was based on a provisional UN classification system called the Central Product Classification (CPC), and the GATS 2000 negotiations will use a revised version of the CPC for services sector classification purposes. The lack of clarity concerning GATS classification in the current negotiations has not been solved, however, by the use of this system.

The Council for Trade in Services' Committee on Specific Commitments (CSC) is tasked to work on classification issues in order to amend and make more coherent the system used during the Uruguay Round. The outcome of these classification discussions could have major implications for environmental protection. The classification of a sector or sub-sector as a service brings it within the purview of the GATS. That allows negotiations over specific commitments in that sector and would also – perhaps more importantly – make it subject to any of the general obligations under the GATS.

For example, in the energy sector, the United States has proposed a new cluster of energy services using a very broad definition of what constitutes such services. According to the U.S. proposal, energy services include those involved in the “exploration, development, extraction, production, generation, transportation, transmission, distribution, marketing, consumption, management, and efficiency of energy, energy products, and fuels.” While the U.S. notes that its proposal is not meant to prejudge its position on what should be brought under GATS disciplines, the U.S. has also stated its aim to achieve the broadest possible liberalization in this sector. Such a broad categorization of energy services could have substantial environmental impacts. In particular, given the environmental harm that is often caused by oil, gas and coal extraction, the inclusion of extraction-related services could be especially problematic.

“Environmental services” is another arena in which classification could have significant consequences. The GATS classification of environmental services has so far been limited almost exclusively to sewage services, refuse disposal services, and sanitation services. In other words, the prevention and even remediation of environmental damage are unaddressed in the current classification, while liberalization in this sector could lead to such results as increased access for waste incinerator operators and other environmentally-harmful “environmental services.” In addition, the EU has proposed a broad environmental services cluster that would include the collection and distribution of water. The inclusion of a classification for water collection and distribution raises fundamental and troubling concerns about the access to vulnerable natural resources that the GATS may provide to service operators.

### *Clusters*

The ways in which the GATS groups service activities together will have serious implications for the negotiations themselves and for impacts in environmentally-sensitive sectors. Under the GATS negotiating guidelines adopted at the WTO in March, 2001, negotiations will primarily be conducted according to a request-offer approach that requires a country to make a request of another country in a particular sector or subsector, followed by a reply from the second country. However, the negotiating guidelines also leave open the possibility that service activities from a variety of sectors can be brought together within a single rubric called a cluster. Such clusters have been proposed for a number of areas, including energy services, environmental services, and tourism services.

In general, clustering is intended to increase the negotiating momentum for specific commitments across a number of related sectors and sub-sectors. By forming clusters, it becomes more likely that all, or a substantial portion, of the sectors included in a cluster will be negotiated together. The negotiating force behind liberalizing throughout the clustered sectors – rather than in individual sectors – thus increases substantially. Moreover, a cluster approach makes it possible to demand broader and deeper liberalization across a wider range of sectors and subsectors than would be the case if negotiators had to proceed through a number of sectors. Such a dynamic may especially affect developing countries, which are typically in a weak bargaining position

in their negotiations with developed countries. Developing countries are therefore more likely to accept specific commitments across a number of clustered sectors without qualifications.

By substantially increasing the breadth of specific commitments, clustering will lead to a number of environmentally-sensitive sectors being liberalized to a greater degree than they otherwise would. Clusters in energy, environmental services, and tourism are likely to encourage the adoption of wide-ranging commitments in those sectors and increase the potential for the GATS to affect environmental protection.

### **III. Market Disciplines: Specific Commitments for Liberalization**

The current GATS negotiations will be focused in large part on substantially expanding the specific commitments made by countries in key services sectors. Major countries, including the United States and the EU, have presented proposals for increased commitments negotiations in a number of sectors, including energy, transport, environmental services (including water), tourism, and retail distribution. In many of these sectors, the expansion of service operations is likely to have significant environmental consequences. At the same time, however, the GATS rules may often impede effective regulation of these operations to protect the environment.

Under the 1994 GATS agreement, developed countries took 54% of the total number of specific commitments that could be taken, while developing countries took only 17 % of the maximum commitments possible. All WTO member countries are required under the GATS to undertake additional commitments through the negotiations beginning in 2000, and developing countries will clearly be under the greatest pressure to expand their level of commitments. However, the addition of new sectors and subsectors to the GATS will likely mean that developed countries will also face substantial pressure to increase the number and breadth of commitments they take.

Specific commitments are made in terms of both market access, which requires countries to provide unlimited quantitative access to their markets, and national treatment, which requires countries to provide the same or better regulatory treatment to foreign service operators as that provided to domestic operators. When countries make specific commitments in a particular sector, they may choose which of the modes of supply are covered by the rules that apply to those commitments. However, for those GATS obligations that apply across all sectors, all modes of supply are automatically covered.

Countries are, for all intents and purposes, locked into these specific commitments once they have been made. When countries make commitments, the GATS provides countries with the right to specify the qualifications under which they will provide market access and national treatment for foreign services and service suppliers. Once it is adopted, however, a sectoral commitment and its qualifications are extremely difficult to change. A country that wishes to reverse or limit a commitment it has already

made can only do so after waiting three years. The country must then successfully negotiate compensation in the form of increased services access in other areas for all countries that request such compensation. Thus, a country that has made a commitment and then realizes the environmental impact of opening its market in a sensitive sector, is extremely constrained in its ability to reverse course and ensure environmental protection.

### **Market Access Commitments**

Market access commitments essentially require countries to provide unlimited access for service operators and their operations, without regard for environmental impacts. When a country takes a market access commitment in a particular sector, the GATS prohibits the country from imposing any limitations on the number of service suppliers, the value of service transactions or assets, the number of service operations or output, the number of employees, or the participation of foreign capital in that sector. Only if a country clearly establishes some qualification in its schedule of specific commitments is the market access requirement limited in any way.

The environmental consequences could, for fairly obvious reasons, be quite substantial in a number of sectors. Completely unlimited activity in vehicle transport, energy extraction, energy transport (including pipelines), construction, tourism activities, water collection and distribution, and other sectors could be highly problematic. Moreover, the GATS specifies that the quantitative access prohibition applies not only at a federal level, but also to “regional subdivisions,” which clearly includes states and cities and would likely also include other kinds of designated subdivisions such as national parks. In addition, the GATS does not specify that market access commitments apply only to foreign service operators. A reasonable reading of the GATS would view it as a treaty that applies in all instances and could require countries to ensure the same unlimited access to their domestic service firms as well.

Under the market access provisions of the GATS, the following kinds of regulatory actions to protect the environment could be found WTO illegal:

- limitations on the number of oil or gas extractive operations or refineries in a regional area, possibly including an environmental zone such as the Arctic National Wildlife Refuge;
- limitations on the number or length of oil or gas pipelines or the volume transported through them;
- restrictions on the volume or number of surface or groundwater extractions by a water service operator.
- limitations on the number of retail outlets, including gasoline stations, in a regional area (including cities);

- limitations on the number of hazardous hazardous waste sites; and
- limitations on the number of diving boats allowed on coral reefs or restrictions on the number of ships in a sensitive waterway.

## **National Treatment**

When a country adopts a “national treatment” commitment, it is required to provide the same or more favorable treatment to foreign services and service suppliers as that provided to domestic operators supplying the same or similar (“like”) services. Since the environmental impact of the way in which a service is provided will most often not change its commercial nature or characteristics, environmental considerations will likely not change the way in which a service is treated under this obligation. Moreover, the reach of national treatment is extremely broad under the GATS. Discrimination occurs not only when a regulatory action intentionally treats a foreign service provider differently, but also whenever regulation “modifies the conditions of competition in favor of [domestic] services or service suppliers.” The result is that environmental laws that are not intended to discriminate but inadvertently favor a domestic service company would be unacceptable.

In other words, efforts to protect the environment are only acceptable if they don’t disadvantage foreign operators in any way. For example, if a domestic operator uses an environmentally friendly process consistent with a certain regulatory standard and a foreign service operator has not adopted the same process, the foreign operator could claim to be disadvantaged by the requirements imposed by the regulatory action. Such a claim of competitive disadvantage would be consistent with WTO panel decisions that have adopted a comparably broad reading of the national treatment principle in both the GATS and the GATT. In the EC-Bananas case, the panel even ruled that a regulation is in violation of national treatment if it is merely “capable of” creating commercial disadvantage, even if no real-world market impact occurs.

The impact of such decisions under the GATS would be to overturn new environmental protection efforts that have an unintended effect on foreign service operators and, most likely, to chill the adoption of such standards in the future. The GATS approach is quite unlike most countries’ domestic law, which would view all service operators on an equal basis and would not prevent regulation that impairs one firm’s competitive advantage compared to another’s.

Under the GATS, the following types of neutral regulation that affect a foreign firm’s competitive advantage could thus be found WTO illegal:

- requirements for the use of a certain percentage of renewable sources in electricity supply that disadvantage the cross-border provision of electricity from another country that does not use such renewable sources;

- a ban on the use of nuclear energy in electricity supply that disadvantages a foreign nuclear power producer;
- regulations for hazardous waste shipment that happen to disadvantage a foreign service operator whose methods differ from those used by most U.S. firms;
- preferences for granting of resource extraction licenses (such as for fishing) to members of local or indigenous communities; and
- limitations on the land available to establish hotels in certain areas, thus disadvantaging foreign latecomers to those areas.

Finally, it should also be noted that the national treatment requirement would forbid countries – including developing countries – from distinguishing between domestic and foreign service operators in order to limit “cut-and-run” service operations. For example, many countries may seek to protect their natural resources by limiting the extraction rights of foreign service operators that may have no interest in protecting a particular country’s resources for the future. However, the GATS national treatment discipline does not permit such distinctions unless a country has made clear qualifications in its schedule of commitments.

#### **IV. Market Disciplines: General Obligations**

##### **Restrictions on Domestic Regulation**

Perhaps the most potent of all GATS disciplines are the ones in Article VI that impose restrictions on the domestic regulatory efforts of governments, including environmental laws and regulations affecting service operations. Article VI provides a set of criteria for acceptable domestic regulation that currently apply only to sectors in which countries have made specific commitments. However, in Article VI.4, the GATS also indicates that any disciplines needed to impose these criteria as a general obligation for all sectors should be adopted. The aim of the current negotiations is thus to broaden to all sectors the restrictions for domestic regulation that currently apply only to sectors in which a country has made a specific commitment. Since the criteria for committed sectors are already highly restrictive, this extension would in essence result in an across-the-board constraint on the ability of governments to protect the environment.

The Article VI criteria restrict “technical standards,” which can include almost any type of environmental law or regulation. In a recent communication, the WTO Secretariat has affirmed that the domestic regulation criteria in the GATS deal with all measures “intended to serve regulatory or other public policy objectives.” To be acceptable under Article VI, environmental protection must be “based on objective and transparent criteria” and must “not be more burdensome than necessary to ensure the quality of the service.”

That effectively means that a country must cross a number of hurdles to show, in

the event of a dispute, that its environmental regulatory efforts are appropriate. In what has come to be known as a “necessity test,” a country must prove to a dispute panel that its environmental protection rules are the least burdensome ones available. In other words, a country cannot simply adopt a reasonable regulatory approach, but must instead identify a full range of alternative approaches and adopt the approach that will affect the economic interests of foreign service operators the least. This imposes a requirement that goes far beyond that in place in the standard regulatory systems of most countries, and it could be an especially difficult standard for cities and other local governments to comply with. Further, countries must also establish domestic adjudication bodies to which service suppliers can apply for the review of and remedial action on administrative decisions affecting their trade.

In addition, a country must prove to a trade dispute panel, in the event of a challenge, that its environmental standards are objective. Under that requirement, panels might demand proof that the environmental standard is based on absolute evidence that the harm that will be caused is scientifically ascertainable. Such a requirement would depart from the standard precautionary approach, which requires scientific proof of environmental safety for a product or service and would allow for regulation even when there is a lack of full scientific certainty of possible harm. While environmental protection has traditionally rested on the principle of requiring producers to demonstrate safety, past WTO decisions have shifted much of the burden of proof to the consumer’s country even when there is no discrimination against another country involved.

Such requirements under the GATS can clearly hinder – if not entirely halt – reasonable efforts to protect the environment. Proposals in the current negotiations are aimed at extending the reach of these requirements to all service sectors. The GATS requires that any disciplines needed to implement these domestic regulation requirements be adopted across all sectors, and negotiations are currently underway that would do just that. The adoption of a “necessity test” across-the-board, as the European Union has proposed, would have a significant and chilling impact on domestic regulatory efforts.

While the United States has so far stated that it is not yet clear that a necessity test is needed across-the-board, the U.S. has offered a proposal that would impose new, stringent “transparency” disciplines on domestic regulation. The GATS already requires that countries provide transparency by publishing already adopted laws and regulations. The U.S. proposal would go much farther by requiring that, for all sectors, a country alert other countries to proposed laws and regulations and consult with those countries about the content of these proposed environmental or other protections. For many governments, especially local governments, such a consultation process would likely place a chilling effect on improved regulation. A country or sub-federal government would have to clear significant procedural hurdles for its policies to be considered acceptable.

## **Public Provision of Services**

Extension of the GATS to sectors in which public services play a critical role

is likely to require that countries open their markets to foreign service suppliers in those areas. In its plain language, the GATS states that it applies to any service “except services supplied in the exercise of governmental authority.” However, governmental authority is defined in an extremely narrow and ambiguous fashion as “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.” By implication, then, the GATS applies in any situation in which a service is supplied commercially or by more than one provider, a fairly broad set of circumstances.

In other words, if a sector has been opened in part to private suppliers, or government has contracted with private service operators, a country may be required to open its entire market in that service to private service suppliers. Those market opening requirements could apply even to cities or states where a public service such as water has been provided by a single public supplier. Such market opening could lead to environmental harm in certain sectors, including water, energy, and environmental services. For instance, if cities and states are required to allow private water suppliers to operate on an unlimited basis, water resources could be exploited beyond a sustainable point.

### **Most Favored Nation (MFN) treatment**

The Most Favored Nation (MFN) obligation basically requires WTO members to provide the same or equal regulatory treatment to all foreign services and service suppliers regardless of the country of origin. Unlike the National Treatment requirement of the GATS, it applies to all service sectors whether or not a specific commitment has been made. But many of the same kind of difficulties that arise in a limited number of sectors due to the National Treatment requirement would thus arise across all sectors with MFN.

For example, neutral environmental regulations that are not intended to discriminate could be found illegal under the GATS if they create *de facto* distinctions in some fashion among different countries. If a country, for instance, decided to require ocean-going ships to meet certain emissions criteria, and some countries were disadvantaged by this policy compared to other countries, the regulatory action could be found WTO illegal. In addition, the MFN standard makes it illegal to make distinctions among countries based even on egregious human rights or environmental actions. For instance, the United States is prohibited from restricting the presence of service operators from Burma in the U.S. market.

## **V. The Lack of Sufficient Environmental Exceptions**

Like the General Agreement on Tariffs and Trade (GATT), the WTO predecessor agreement which addresses trade in goods, the GATS incorporate a provision that is intended to provide an exception to GATS rules for environmental and health purposes. In theory, the aim of such an exception is to ensure that extremely important public policy goals are not reversed by specific commitment or general obligation commitments.

Unfortunately, however, the GATS environment exception fails to ensure that this aim will be achieved.

The GATS exception for environmental and human health purposes is a narrowly constructed one, found in Article XIV(b):

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

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(b) necessary to protect human, animal or plant life or health;

The article in the GATS that includes this exception is structured after the exceptions article in the 1994 GATT. However, the GATS completely lacks any provision analogous to another provision in the GATT, Article XX(g), which provides an exception for the adoption of measures “relating to the conservation of exhaustible natural resources ... made effective in conjunction with restrictions on domestic production or consumption.”

This absence is notable for two central reasons. First, it means that the GATS exceptions only address environmental protections when life or health is at risk, but not when a non-living natural resource is endangered. For example, measures to address beach or land erosion would not fall within under the GATS exception. Second, and perhaps more important, the absence of Article XX(g) is notable because its particular language – “relating to . . . conservation” – is open to broader and more environmentally sensitive interpretation than is the case with the environmental exception currently in the GATS.

The only environmental exception that remains in the GATS, Article XIV(b), has been interpreted in an extremely narrow fashion. The article requires that a measure to protect human, animal or plant life or health be “necessary,” a standard that has been interpreted in quite strict ways by WTO bodies. The 1990 GATT Panel Report in the Thai Cigarettes case defined the term “necessary” in the GATT as meaning that the government must be sure that there is no other reasonable regulatory alternative that is less restrictive of trade. The approach taken by this pre-WTO GATT panel has been generally adopted by the WTO Appellate Body, and it is logical to assume that the jurisprudence that has evolved around GATT Article XX(b) would also be applied in most cases by the WTO Appellate Body to disputes involving the application of the similar GATS language.

In other words, the present language leaves environmental protection without a clear exception in the GATS. As with the domestic regulation “necessity” requirement, governments are not permitted simply to adopt reasonable laws and regulations. Instead, they must identify all conceivable alternatives and their impact on foreign service

operators before choosing the measure that will impair the foreign service operators least. Such a regulatory hurdle will likely place a chill on future efforts to protect the environment and may lead to environmental laws and regulations being overturned by WTO bodies.

## **VI. Current GATS Sectoral Proposals and Potential Impacts**

WTO members, through the Special Session of the WTO Council on Trade in Services, are currently engaged in submitting proposals for liberalization in a number of key environmentally-relevant sectors, including energy services, environmental services (including water), tourism services, and transport services.

### **Energy Services**

Broadly defined, as the United States has proposed in the GATS negotiations, the energy services sector encompasses services involved in the exploration, development, extraction, production, generation, transportation, transmission, distribution, marketing, consumption, management, and efficiency of energy, energy products, and fuels. The combined economic size of these service sectors on a global scale is enormous, as indicated in part by the nearly US\$100 billion in U.S. foreign direct investment in the petroleum sector.

Moreover, the environmental impacts of the sector are wide-ranging – including the substantial impacts of oil exploration and extraction, pipeline construction and transport, fuel refining operations, and electrical power generation. The expansion of energy service operations protections will worsen these impacts, and GATS rules will make it increasingly difficult to adopt and enforce environmental and natural resource protections. In addition, energy service expansion involving fossil fuels will clearly increase the use of those fuels and hence contribute to the worsening climate crisis. Meanwhile, the Bush administration's recently released energy plan includes a section that emphasizes the adoption of services agreements in the energy sector as a way to spur fossil fuel development.

Currently, the GATS classification system only covers transmission and distribution of electricity, natural gas, steam and hot water, and pipeline transport services for petroleum and natural gas. The U.S. has introduced a proposal on energy services that would substantially expand the coverage of the GATS and its obligations to cover essentially all aspects of the energy services sector. The new cluster would include some cross-cutting sectors, such as construction and pipeline transport, that are already covered under the GATS. However, the cluster would also include many activities that have previously not been subject to the GATS, such as services involved in exploration and extraction. The EU has introduced a proposal on energy services, which is similarly broad in scope, but its proposal also specifically mentions the inclusion of nuclear energy in the negotiations.

In the area of extraction, the GATS rules do not necessarily provide access to the actual physical petroleum or other fuels themselves. Yet the U.S. Trade Representative's office has indicated that, with the possible exception of actually taking the fuel from the ground, all of the operations involved in the extraction process would be subject to the agreement's disciplines. Moreover, regulation of extraction itself could be subject to GATS under the ruling in the EC-Bananas case, which established that any government measure that affects a service is subject to GATS rules. Restrictions on access to petroleum resources – for instance, a limitation on the amount of oil extracted or on the number of extraction facilities constructed – could be viewed as interfering with extraction-related services and therefore be deemed a measure covered by the GATS.

The U.S. has proposed that countries make the “broadest possible” market access and national treatment commitments for the supply of energy services, including commitments to provide market access without regard for the technology used. The U.S. also states that its negotiating stance acknowledges the role of governments in addressing non-trade public policy goals with respect to energy resources such as environmental protection, natural resources conservation, and sustainable development. However, the proposal does not specify in any way how these environmental aims would be achieved in the GATS negotiations.

Liberalized market access commitments and the extension of market treatment will restrict the domestic regulatory action that governments can take regarding foreign energy corporations. If extraction and extraction-related services are in fact included in the energy sector classification, GATS disciplines could restrict governments' ability to regulate, including the use of quantitative restrictions on exploration, construction of extraction facilities, and drilling for fuels. The GATS disciplines already apply to the transport of fuels through pipelines, but only three countries have made specific commitments in this sector. If additional countries make specific commitments in this sector during the current negotiations, however, the ability of countries to regulate petroleum pipelines, including their length and volume of fuel transported, could be greatly reduced.

Energy distribution, which includes distribution of electricity and fuels, is another sector already subject to the GATS, but only six countries have taken commitments in the limited category of “services incidental to energy distribution.” Additional countries could make commitments in this sector during the current negotiations, and any commitments could be expanded to cover the full scope of energy distribution services. Application of the GATS in the electricity distribution sector could have environmental impacts as countries become less able to regulate their electricity systems. For instance, a country could be required to open its market to cross-border electricity produced in a manner that causes environmental damage, including transboundary environmental impacts in the country importing the electricity. The potential inclusion of nuclear energy in particular raises many environmental concerns.

The GATS will also make it extremely difficult, if not entirely impossible, for governments such as California's to reregulate its electricity or natural gas distribution

sectors after a failed deregulation scheme. The lack of any clear carve-out for government services in the GATS means that, even in a situation where an electricity or gas deregulation scheme has proven to be environmentally harmful, a government would face significant challenges in implementing a reregulation plan once any foreign service operators had entered the market.

## **Environmental Services**

Environmental services has been described as a potential win-win opportunity for both trade expansion and environmental protection. The U.S., for instance, argues that removing or lowering barriers to the cross-border provision of environmental services will result in cheaper but better quality environmental services. As it is currently defined in the GATS, however, the environmental services sector is essentially a misnomer that describes sizeable industries involved in waste disposal and treatment. The current classifications under the rubric of environmental services are sewage services, refuse disposal services, sanitation and other services, and other environmental services. According to WTO data, the dominant activities in this sector were solid waste management, estimated to be a US\$102 billion global market, and water treatment services, estimated to be a US\$65 billion market. The core services in this sector are thus end-of-pipe disposal services, not environmental services that provide prevention or remediation of environmental damage.

The U.S. and EU have both put forth negotiating proposals concerning environmental services in which they urge countries to expand and liberalize their specific commitments to the provision of “end-of-pipe” core environmental services (i.e. those currently classified as “environmental services” in the WTO services classification list), as well as to the provision of related services sectors such as professional and business services (i.e. construction, engineering, consulting, advertising). Both the U.S. and the EU also suggest that services involving the prevention and remediation of pollution might be included in new environmental services negotiations. However, the dominant services in this sector remain end-of-pipe operations. The likely outcome of expanded commitments thus is most likely to lead to expansion of multinational operations in such environmentally harmful activities as waste incineration. Such commitments will also lessen the ability of the host country to develop its own technologies in ways that benefit the country’s environment.

## **Water**

The EU environmental services proposal also includes a major new area to be subject to GATS disciplines – water. Water supply is rapidly becoming a privatized sector, with large multinational companies increasingly collecting, extracting and distributing bulk and retail water. Estimates place the worldwide water and wastewater industry at between US\$300 and \$800 billion annually. The EU proposal would expand the access of these water supply corporations by bringing water collection, purification and distribution under GATS disciplines.

Given increasing water scarcity in many countries, both in developing and developed countries, the inclusion of water collection in particular raises troubling concerns. Market access commitments, which prohibit quantitative restrictions, could limit the right to governments to restrict the quantities of water collected from lakes, rivers and groundwater sources by private service operators. The resulting increased pressure on water sources could lead to sustained environmental damage. In addition, the lack of clarity surrounding the GATS rules on public provision of services means that local governments may be required to open their water collection and distribution systems to private firms. For instance, if some localities within a country have privatized their water services systems, other localities may be required to permit private water operators to enter their local market. Given the restraints that market access commitments could pose for effective regulation of water extraction, increased private service provision could pose significant environmental problems.

### **Tourism Services**

Tourism, when defined broadly to include travel services and passenger transportation, is regarded as the world's largest and fastest growing industry and, in addition then, the world's largest service sector. In 1999, it accounted for over 10% of world GNP, totaling US\$440 billion. The sector's effects on the environment are also substantial. Tourism often has destructive effects on biodiversity and pristine environments, and can result in the misuse of natural resources such as coastal areas, freshwater, forests, and coral reefs. In a number of geographic areas, hotel and resort development has harmed coastal areas and forests; tourism development has resulted in serious water shortages; forests have been depleted; and coral reefs have been damaged by sewage, sedimentation, divers, snorklers, and boats. The expansion of tourism services without increased attention to sustainable development and environmental protection will exacerbate these trends. Moreover, the GATS rules could impede efforts to protect natural resources from tourism development.

The United States proposal for the GATS is focused primarily on the establishment and operation of hotels and other tourist lodging places by foreign service suppliers. In essence, the U.S. negotiating proposal on tourism hotels and lodging places would have countries remove all market access and national treatment restriction in this tourism sub-sector. Such commitments in the hotel sector could make it difficult to limit the size or numbers of hotels or other tourism construction in environmentally sensitive areas. In fact, the U.S. proposal cites limits on real estate purchase or rentals as one of the market obstacles they intend to address in negotiation, an approach which could increase the potential for harmful environmental impacts from hotel and resort construction.

The EU submission on tourism proposes that "eliminating all remaining restrictions should be a very high priority." In particular, the EU suggests that the current classification framework for tourism is too narrow and that all tourism related services should be grouped together in a cluster approach. Such an approach would expand the restrictions that GATS would place on environmental protection regulation. In particular,

the adoption of broad market access commitments across many tourism related sectors could prohibit countries from adopting environmental measures in sensitive areas. For instance, limitations on the number of tourist excursions or the number of boats allowed in a sensitive zone could be found GATS illegal. In addition, disciplines on domestic regulation could impede the increasing efforts to develop certification and licensing programs for eco-tourism. Adopting national treatment commitments could also make it difficult to pursue many eco-tourism policies, such as those that mandate local community participation in projects.

## **Transport**

International transport – including land, air, and maritime transport – is among the world’s largest service sectors, totaling US\$330 billion in 1999. The environmental impact of transport due to pollutant emissions is substantial. For example, maritime transport is the means for transporting 95% of the world’s traded goods and causes as much as one-sixth of global carbon, nitrogen and sulfur emissions from petroleum sources. Liberalizing transport services, particularly in conjunction with increased trade flows in goods, will lead to increases in transport operations and resulting negative environmental impacts. At the same, GATS rules may increasingly constrain efforts to ensure environmental protection in transport sectors.

The EU has submitted a wide-ranging proposal covering air transport, maritime transport, and land transport, including road and rail transport, and is seeking “substantial commitments – by a critical mass of members . . . “ The expansion proposed by the EU for commitments in maritime and land transport raises particular concerns. For example, market access commitments in maritime transport could force unlimited access to ports for ships, possibly resulting in environmental damage due to increased coastal pollution and port dredging. In addition, such market access obligations will likely increase the overall level of global shipping emissions. National treatment obligations could require countries to provide access to cross-border road transport even when such access opens the border to vehicles that produce greater emissions than vehicles following domestic requirements.

## **VI. Recommendations**

GATS will threaten the environment unless significant changes are made to the existing agreement and proposed negotiating positions, to ensure that environmental protection and sustainability are not undermined in the ways described in this paper. Therefore, the current GATS negotiations should be discontinued and the following fully achieved instead:

- conduct a meaningful and thorough assessment that will examine both the actual environmental and social impacts thus far and the potential future impacts of the GATS, including impacts on local communities and developing countries in all sectors;

- ensure full public participation at all levels of governance in the assessment and use the assessment as the basis for correcting the social and environmental failures of the GATS;
- reexamine any commitments already made under the provisions of the GATS that are in fact multinational investment disciplines (Mode 3 - “commercial presence”) and explicitly reject any further such commitments;
- provide clear, strong and across-the-board exceptions ensuring that no reasonable environmental laws and regulations will be undermined or challenged by GATS rules, including an environmental exception for measures relating to the conservation of exhaustible natural resources and an explicit rejection of any “least trade restrictive” test;
- remove Article VI provisions, including any “necessity” provision, that restrict the right of governments to adopt laws and regulations protecting the public interest and the environment, and explicitly reject any new transparency disciplines;
- clearly exclude from any GATS disciplines any services related to the extraction or collection of energy fuels, minerals and ore, water, timber, and other natural resources; and
- clearly exclude from any GATS disciplines all publicly provided services.<sup>2</sup>