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Statement of Lori Wallach
Director, Public Citizen's Global Trade Watch division

U.S. Foreign Economic Policy in the Global Crisis

Subcommittee on Terrorism,
Nonproliferation and Trade
COMMITTEE ON FOREIGN AFFAIRS
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On behalf of Public Citizen's 100,000 members, I thank the Chairman and the Committee for the opportunity to share my organization's views on U.S. foreign economic policy in the global crisis. Public Citizen is a nonprofit citizen research, lobbying and litigation group based in Washington, D.C. Public Citizen, founded in 1971, accepts no government or corporate funds. Global Trade Watch is the division of Public Citizen founded in 1995 that focuses on government and corporate accountability in the globalization and trade arena.

The devastation being caused by the global economic crisis to the lives and livelihoods of hundreds of millions of people around the world is not merely the result of bad practices by certain mega financial service firms, but the foreseeable outcome of one system of global economic governance – or more accurately anti-governance – that has been put into place and now must be replaced.

Over the last several decades, the U.S. foreign economic policy has been the implementation worldwide of a package of deregulation, liberalization, privatization, new property rights and new limits on government policy space, often dubbed the Washington Consensus or the neoliberal agenda. "Trade" agreements, such as those enforced by the World Trade Organization (WTO), and international agencies, such as the International Monetary Fund and the World Bank, have been the delivery mechanism for this radical global experiment.

Congress is increasingly witnessing the WTO's overreach as they are told that auto bailouts, Buy American and certain climate policies are inconsistent with U.S. international trade obligations. Some of this is unfortunately true, while some has been exaggerated. In the body of this testimony, I go into some detail on one little-known aspect of the current failed economic governance system: the radical deregulation requirements contained in the WTO's Financial Service Agreement (FSA). This aspect of the WTO operates to export worldwide the extreme financial service deregulation that has triggered this crisis. Agreeing to review and renegotiate these WTO financial service deregulation terms must be a key element of the G-20 process aimed at addressing the crisis.

Yet, even as national legislatures, the G-20 and other international configurations struggled to create new financial service regulation, many of the same people and governments are currently pushing for *expansion* of the current WTO financial services deregulatory agenda. For instance, President Bush's November 15, 2008 G-20 Summit was supposedly convened to lay out a coordinated regulatory response to the crisis. Instead, the November G-20 summit's communiqué called for completion of an on-going WTO Doha Round negotiation which has as one of its three main planks further financial service deregulation.

Whether such calls by the Bush administration were based on cynicism or ignorance is a matter for the history books. However, to date it appears that the new administration is unaware of the conflict between the Doha Round proposals and its stated re-regulation goals. In late January, President Obama also called for the speedy conclusion of the Doha Round as a step towards remedying the current economic crisis. Obama's statement highlights the need for the work of this Committee in exploring the broad framework of U.S. international economic policy.

While Bush may have been deeply ambivalent about the call for financial service re-regulation, Obama and his economic advisors are not. Thus, the Obama administration must revisit the requests and offers made regarding further financial service deregulation and liberalization made by the Bush administration that now comprise the Doha Round agenda. The continuing G-20 process must take these matters into consideration and undertake as part of its re-regulation agenda the rollback of the WTO's *outrageous usurpation of* domestic non-trade policy space essential to rebuilding our economy and regulatory system to serve the public interest.

Few policymakers at home or abroad are aware of the myriad ways in which today's "trade" pacts constrain their policy space on various non-trade matters. In part, this is because of the relative "newness" of this backdoor channel for domestic deregulation. Prior to the establishment of North American Free Trade Agreement (NAFTA) in 1994 and WTO in 1995, the scope of trade agreements was limited to setting the terms of exchange of goods across borders, namely cutting tariffs and lifting quotas. Proponents of the new expansive model of international commercial agreements branded WTO and NAFTA as "trade agreements" and attacked as protectionist all those criticizing these pacts' overreach into non-trade matters. This rhetorical sleight of hand obscured the fact that these pacts were delivery mechanisms for a much broader economic package, of which trade liberalization per se is only one limited aspect.

And now we are living with the consequences of leaving our nation's economic wellbeing to be determined by private interests, who legally must focus on quarterly profit statements while operating under a system they helped devise that removes all obligations and responsibilities to the rest of us.

Remedying the current crisis, avoiding future such crises and achieving economic justice and stability at home and abroad will require a new system of global economic governance that harnesses the benefits of trade while removing the many non-trade policy constraints that are obstacles to ensuring markets operate in a stable and productive manner.

This is a practical matter, not an ideological assertion.

For instance, the WTO's Financial Service Agreement explicitly limits domestic regulation of banks, securities and insurance firms by the United States and over 100 other nations. While foreign

banks operating here insisted that they have access to the TARP bailout funds, few realize that the WTO's FSA sets an array of limits on Congress' regulatory authority over foreign banks operating here. More on that below.

The WTO's procurement agreement and those of the FTAs into which the United States has entered limit how Congress may expend our tax dollars. Given the recent brouhaha attacking Buy American rules in the stimulus package as 'protectionist,' it is worth noting that the terms in question had nothing to do with tariffs or trade or the functioning of private markets. Rather at issue was Congress' right to decide how to best spend U.S. tax dollars in a manner that could stimulate our economy. Yet, "trade" pacts such as WTO and the FTAs set limits on Congress' decisions regarding use of our tax dollars in a manner that provides preferences for U.S.-made goods or U.S. firms.

Thus Congress' stimulus spending of our tax dollars will not fully cycle through the U.S. economy, even though studies show that doing so provides important economic gains. For instance, the $20 billion in funding for electronic medical record keeping in the 2009 Economic Recovery Plan is probably more likely to be spent offshore rather than to employ Americans. Meanwhile, despite the hysteria regarding the Buy American rules relating to infrastructure projects, only a small share of that money can be directed into the U.S. economy, thanks to the limits set in trade-agreement procurement rules. This is the case even though the final stimulus package that was passed included the version of Buy America rules that originated in the Senate which were considerably broader than the House language. For instance, firms operating in 39 countries (including all of Europe) that were willing to sign the highly controversial WTO procurement agreement, and firms in the additional 13 countries who are signatories to U.S FTAs, must be treated as if they were U.S. firms as regards some of the stimulus spending subject to Buy American rules._While there are some important exceptions listed in the U.S. schedule of commitments in these agreements that safeguard the right to use domestic preferences for some categories of goods and projects, the United States altogether gave up its rights to provide preferences to U.S. firms regarding construction and other service procurement contracts.

That would be galling enough, but to make matters worse, the U.S. commitments to these constraints on domestic procurement policy demonstrate a consistent trend: the United States made its "trade" agreement commitments based on ideology rather than economic or other national interests. That is to say that U.S. officials were so intent on selling the expansive model delivered by the WTO and NAFTA to other countries – many of which were wisely opposed to such an overreach – that our commitments are much more expansive than theirs. This sorry reality provides a different perspective on the hollering by Canada and the European Union (EU) against the stimulus bill's Buy American provisions. Both the EU and Canada wisely excluded considerably broader swaths of their procurement activity from WTO rules and, in the case of Canada, also from NAFTA. Because of this, the EU and Canada have no obligation to provide U.S. firms with access to a wide array of their government contracts**.** For instance, while the United States safeguards its preferences (only) for domestic iron and steel used in federally funded state transportation projects, Canada carved out steel, motor vehicles and coal altogether (for all provinces, for all sectors), and also carved out all construction contracts issued by the Departments of Transport. The EU carved out of its WTO procurement obligations contracts awarded by federal governments and sub-federal governments in connection with activities in the areas of drinking water, energy, transport or telecommunications.

The United States also made the broadest commitments to comply with the non-trade regulatory strictures of the WTO service-sector agreement regarding non-financial services. These broad obligations pose possible conflicts with President Obama's health-care, affordable pharmaceutical and climate policies. The Clinton administration signed up health insurance, pharmaceutical distribution and hospitals to conform with the strict policy constraints established by the WTO's General Agreement on Trade in Services (GATS). These rules simply ban certain commonly-used policy tools even if applied to foreign firms on a non-discriminatory basis.

Many of the specific proposals being discussed now in Congress and in legislatures in numerous countries to counter the current economic crisis and avoid future meltdowns violate the WTO's expansive constraints on *domestic* non-trade regulation. These are not "protectionist" measures, but rather are reasonable non-trade policies needed to address the crisis and rebuild the U.S. and world economies to promote productive, not speculative investment.

For years, a brave few economists have reviewed the massive persistent U.S. trade deficits that have exceeded five percent of GDP, warned that such imbalances were not sustainable and called for an array of urgent policy actions before a foreseeably devastating "market correction" occurred. Over the past 15 years of WTO and NAFTA, as 4.3 million U.S. manufacturing jobs were lost – 1 in 4 of the entire sector – and U.S. real median wages sat at scarcely above 1973 levels, and income inequality rose to levels not seen since the Robber Baron era, those same economists and a growing number of policymakers warned about the hollowing out of the U.S. economy and the need for new policies. As the United States became a net importer of food and saw its total agriculture trade surplus plummet and overall our major exports shifted to raw materials rather than value-added goods, a growing number have come to question the global economic system that could result in such outcomes.

Yet, even as the evidence of systemic failure has become overwhelming with the current crisis thoroughly indicting the so-called neoliberal model that wrought these outcomes, a version of global cognitive dissonance seems to have taken hold. That is to say that, while the cries for re-regulation are now issuing forth from many previously unimaginable quarters, many policymakers and scholars have not come to terms with the systemic nature of the needed changes. Thus, many very smart people are clinging to totally inconsistent views: for instance, we must dramatically re-regulate finance to save the world, but we must also finish the WTO Doha Round (which would impose further financial deregulation) to save the world because "free trade" is good.

In part this situation is based on the lack of attention to the systemic manner in which the United States created the current model of economic non-governance. Many people seem to have started to believe the public relations mantra pitched by the beneficiaries of the status quo that the current system is inevitable or some force of nature. In fact, it is an intentional construct. In the 1970s, policymakers dismantled the Bretton Woods system, which was created after the Great Depression to govern capital-flow and exchange-rate policy. Later, starting in the late 1980s, the deregulation drive involved the weakening and eventual repeal of the U.S. "New Deal" system of prudential and pro-consumer banking regulation. In an elegantly effective strategy, the same U.S. corporate interests, "free-market" think tanks and U.S. government officials behind this experiment exported this system of extreme financial service deregulation, constraints on an array of government regulatory policies and new rights and privileges for foreign investors and transnational firms through various international agencies and negotiations. They found a hospitable venue for this

offensive in the obscure Uruguay Round negotiations of the General Agreement on Tariffs and Trade (GATT) which established the WTO.

The WTO, and regional pacts such as NAFTA, the Central America Free Trade Agreement (CAFTA) and various other FTAs based on the NAFTA-CAFTA model exploded the past boundaries of trade agreements. Rather than focusing on traditional matters such as tariff cuts and opening quotas, these pacts require signatory countries to adopt an array of non-trade policies. These include limiting service-sector regulation including financial services, providing new foreign investor rights and privileges that incentivize and protect the relocation of production to low-wage venues, constraining domestic import safety and the inspection standards that may be applied, and even limiting how domestic tax dollars may be spent in procurement. Rather than trade agreements, these pacts were a global governance system that dramatically shifted the balance of power away from government oversight of the economy for the public interest.

For instance, the WTO enforces 17 agreements, only several of which have anything to do with trade per se, including the 1947 GATT, which until 1995 was the multilateral trade system. The WTO requires that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."[1] Nations that fail to comply are subject to challenge in foreign tribunals, outside the jurisdiction and due process safeguards of domestic courts. These tribunals are empowered to authorize significant trade sanctions unless and until countries bring their laws into conformity with WTO constraints. The combination of over-reaching, retrograde global rules constraining normal government regulatory activity, and their strong enforcement, poses a very real threat. With nearly 150 WTO challenges to domestic law completed, the laws in question have been ruled against 90 percent of the time, and countries have repealed or altered their laws to comply. The only exception is the EU's refusal to remove its ban on beef treated with artificial growth hormones after being ordered to do so by the WTO. In order to maintain this policy, the EU has made an *annual* payment of the equivalent of $150 million in trade sanctions for the past decade. Given the record of WTO tribunals systematically ruling against domestic laws – many having nothing to do with trade – now the mere threat of a WTO challenge often suffices to derail a proposal before it is ever approved or implemented.

The conflict posed between global calls for re-regulation and the WTO's existing financial service deregulation rules – and the additional deregulation on the Doha Round negotiating table- provides a stark example. Deregulation of the financial service sector – including banking, insurance, asset-management, pension-fund, securities, financial-information, and financial advisory services – has been among the most important, but least discussed, aspects of the WTO's agenda. Few researchers and policymakers now engaged in the debate about the crisis and its remedies are even aware of the WTO's Financial Service Agreement.

How did such expansive non-trade policy constraints end up in a "trade" agreement? The answer is that giant financial service firms – including some now receiving tax-payer bailout funds spent most of the 1990s pushing for an FSA that explicitly limited financial service regulation worldwide. In effect, they locked in domestically and exported worldwide the extreme deregulation model that is a significant cause of the current crisis. This agreement was never even put to a vote in Congress.

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[1] WTO, Agreement Establishing the World Trade Organization, Article XVI-4.

Rather, under the leadership of then-Treasury Secretary Robert Rubin, the executive branch simply signed the pact and put it into effect.

In recent months, there has been an abundance of violations of the spirit, if not the letter, of the current globalization model and the agreements implementing it. Indeed, governments around the world have discussed – and in some cases, implemented – various measures to counter the crisis that contradict the fundamental precepts of the WTO and other trade pacts. A select few have noticed, as when a foreign bankers association insisted in late 2008 that the U.S. taxpayer funds committed to the "Troubled Assets Recovery Plan" be available for them. But these outcries have been the exception: in the throes of the crisis, with more horrifying economic data emerging daily, the WTO incompatibility of domestic emergency measures has been a muted concern.

This situation will not last. While the outcomes of this model and public and government responses to the resulting crisis have led to press reports declaring the end of the neoliberal era, in fact the very policies that contributed to the crisis remain in place through the WTO, as do 100-plus countries' obligations to comply with them. As more detailed proposals emerge, the financial service firms who helped write the WTO rules will increasingly raise the trade-pact constraints to fight re-regulation at the domestic and international levels.[2] Policymakers and advocates must be ready with a meaningful and factually informed response and proposals to reform the countervailing WTO rules and avoid *further* expand WTO financial service sector deregulation through the current Doha Round agenda.

The WTO Radical Financial Service Deregulation Regime

Few in Congress read the 1994 legislation that implemented the WTO, much less reviewed the actual 900-page trade-pact text or the thousands of additional pages of specific country commitments to comply with these new rules. Various WTO provisions set constraints on how signatory governments may regulate their service sectors. The WTO's General Agreement on Trade in Services, for instance, applies not only to trade in services *between* countries, but also sets limits on how governments may regulate foreign services operating *within* their countries, thus constraining domestic regulation of foreign service-sector firms.

The WTO Secretariat was unusually direct in describing the operation of the GATS: *"Governments are free in principle to pursue any national policy objectives provided the relevant measures are compatible with the GATS*."[3] The regulatory limits imposed by GATS rules cover not only all actions taken by all levels of government – "central, regional, or local governments or authorities" – but also actions of "non-governmental bodies in the exercise of powers delegated by" any level of government.[4] Thus GATS regulatory constraints cover private-sector bodies that have a role

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[2] Indeed, the WTO's FSA was the result of a massive push by U.S. and European corporations, who were eager to eliminate the consumer protection and economic stability regulations that constrained their most rapacious behavior. "The sector was truly unique in that respect, and there is little doubt within the trade policy community that financial sector support in the European Union and the United States was a determining force in concluding the FSA," noted scholars Pierre Sauvé and Karsten Steinfatt in "Financial Services and the WTO: What Next?" a study featured on the WTO's own website.

[3] WTO Secretariat. Trade in Services Div, "Everything You Wanted to Know about GATS but Where Afraid to Ask," October 1999, p. 5.

[4] WTO GATS Article I-3-a-i.

delegated or approved by government, such as professional associations or industry bodies whose professional qualifications or voluntary "code of conduct" rules are recognized by government.

As part of its original 1995 WTO commitments, the United States agreed to conform a broad array of financial services, including banking, insurance and others, to comply with GATS' regulatory limits rules and those contained in special GATS annexes on financial services. Some of the U.S. WTO GATS commitments simply locked into place existing policies, given that U.S. financial corporations had already been successful in rolling back much U.S. domestic regulation. In other cases, the WTO was used to push for domestic revocation of existing laws, such as the "firewall" policies established in the 1933 Glass-Steagall Act that forbade bank holding companies from operating other financial services. (More on that below.)

Although the U.S. Congress gave the GATS little scrutiny, it was very controversial in other nations. Developing countries that had suffered financial turmoil – and seen the need to develop new government policies in response – already had experienced the perils posed by such constraints on policy space imposed by the International Monetary Fund and the World Bank. For this reason, while the United States originally sought for GATS rules to apply to all service sectors of all WTO signatory countries, in the end GATS was designed so that it applies only to those service sectors which countries specifically agreed to bind to the rules through country-specific "schedules of commitments."

The United States conditioned its Uruguay Round GATS commitments on other countries subjecting their financial service sectors to similar deregulation and liberalization. Many countries initially rejected the extreme banking and insurance deregulation agenda pushed by U.S. and European governments and corporations and the original WTO included only limited GATS commitments in financial services by most countries. The United States also obtained a commitment, explicitly included in the GATS text, for talks on further financial service liberalization to be automatically continued under the newly-established WTO.

The subsequent negotiations on financial services continued for three years after initial WTO talks ended, and culminated in 1997 with the announcement of an additional WTO Financial Service Agreement. This agreement went into effect in 1999 after 105 WTO countries had signed on. Thus, the WTO's limits on domestic financial service regulation are contained not only in the original GATS and its financial service annexes, but in the post-Uruguay Round FSA, its country-specific schedules of commitments, and in an Understanding on Commitments in Financial Services that the Organisation for Economic Co-operation and Development (OECD) countries additionally signed.

The WTO Financial Service Agreement is premised on simultaneous liberalization and deregulation. The agreement functions both to open new markets for foreign financial service firms to establish new operations or acquire existing domestic firms and to ensure that resulting operations will occur in a deregulated environment. The global financial service firms that pushed these WTO talks identified several specific impediments to their globalized operations as unacceptable. First, there were the requirements that foreign financial service firms' market entry be subject to governmental review (and in some instances, constraints). Second, there was the lack of conformity in (and indeed, even existence of) the laws and regulations of WTO signatory countries. They sought both elimination of regulatory constraints, and harmonization (i.e. standardization) of laws, regulations and administrative procedures governing banking, insurance, securities and accounting.

There is a common misunderstanding that the WTO only affects domestic policies that discriminate against foreign service-sector firms. In fact, the rules do much more than curb *discriminatory* laws, such as citizenship and residency requirements. The "market access" rules create certain *absolute* rights for foreign investors who acquire, invest in or establish service-sector operations within a country in sectors covered by that country's GATS commitments. These market-access requirements are extraordinary, as they simply ban certain types of policies – unless a country originally listed them as exceptions in their GATS schedules in the 1990s – even when they are applied equally to foreign and domestic services or suppliers. The following are forbidden:

- *"limits on the number of service suppliers, including through quotas, monopolies, economic needs tests or exclusive service supplier contracts;*
- *limits on the total value of service transactions or assets, including by quotas or economic needs tests;*
- *limits on the total number of service operations or the total quantity of a service;*
- *limits on the total number of natural persons that may be employed in a particular service sector;*
- *policies which restrict or require specific types of legal entity or joint venture through which a service supplier may provide a service."*[5]

There is nothing quite like the GATS market-access rules in any other international commercial treaty. These market-access rules are framed in absolute, rather than relative terms, pre-judging certain types of public policies and practices as WTO-illegal whether they are discriminatory or not.

One cannot overstate the limiting implications of the GATS market-access rules for vital domestic regulatory space. For example, these obligations limit the ability of countries to require "firewalls" between different aspects of financial service businesses, for instance by forbidding consumer banks to gamble with our savings by simultaneously operating investment banking or securities businesses. By making market-access commitments in various banking services, the Clinton administration created a conflict between U.S. WTO obligations and existing U.S. law – namely the Glass-Steagall Act of 1933, which forbid bank-holding companies from operating other financial services. The law had been created so that trouble in one sector would not contaminate the entire system and trigger the sort of financial collapse that occurred during the Great Depression. This firewall policy, which applied to both domestic and foreign banks, had the effect of preventing foreign banks that combined commercial and investment banking services from entering the U.S. market. The administration recognized this conflict and indeed made a formal commitment listed in the U.S. GATS schedule to support changes to Glass-Steagall.[6]

Further, under the GATS National Treatment rules, forms of regulation not outright banned by the market-access requirements must not inadvertently "modify the conditions of competition in favor of [domestic] services or service suppliers," even if they apply identically to foreign and domestic firms. Yet, aspects of the recent U.S. Wall Street bailout and similar programs in other countries may well eventually "change the conditions of competition," and may do so in ways that unintentionally favor domestic firms. Yet, devising the most effective policies – not worrying about

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[5] WTO GATS Article XVI(2)(a-f).
[6] WTO, *United States of America Schedule of Specific Commitments Supplement 3*, Additional Commitments Paper II, WTO document GATS/SC/90/Suppl.3.

how a future WTO tribunal might find their unforeseeable effects to disfavor a foreign bank or insurance firm – should be the goal of policymakers.

GATS contains a "carve-out" provision that supposedly ensures that the agreement will not undermine domestic laws or regulations – such as those designed to protect investors, depositors, and policyholders, or to ensure the safety and integrity of the financial system.[7] However, several significant loopholes largely eviscerate this ostensible guarantee. First, the putative carve-out contains a classic WTO circumvention clause that negates the ability of countries to actually safeguard a domestic policy that conflicts with WTO obligations. The clause starts by noting that countries shall not be prevented from establishing financial service regulatory policies for "prudential reasons," but then continues by stating: "Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement." That is to say that even if regulatory measures are taken for prudential reasons, they are subject to challenge if they *in effect* undermine the regulatory constraints otherwise established in the agreement.

Moreover, the definition of "prudential" is left undefined in the GATS. Thus the question of what constitutes a "prudential" regulation is subject to interpretation by WTO dispute resolution panels when a domestic law is challenged. Are consumer protections that outlaw unfair and deceptive marketing practices by securities dealers (or insurance companies) "prudential" measures? Are banking laws that cap interest rates or outlaw predatory lending practices "prudential" regulations? Arguably not. The lack of clarity means that an array of laws are subject to WTO threats, which often have a chilling effect on policy initiatives even in the absence of a formal challenge. The financial service industry has been lobbying in the context of ongoing GATS negotiations for a narrow interpretation that would limit "prudential" measures to regulations concerning solvency and financial disclosure.[8]

The United States and other rich countries also committed to *even greater* deregulation and liberalization by signing an additional WTO agreement, called the "Understanding on Commitments in Financial Services." When all was said and done, the United States and the OECD countries were largely bound to extremely broad WTO obligations to stay out of the regulation of "banking," "insurance," and "other financial services." The United States and OECD countries also agreed to a "standstill provision" which requires that "[a]ny conditions, limitations and qualifications to the commitments [made]… shall be limited to existing non-conforming measures." That is to say that these countries have agreed not to create new regulations (or reverse liberalization) for the list of financial services each signatory bound to comply with WTO rules. Translated out of GATSese, this means that, in the countries responsible for regulating many of the world's largest economies, legislators and regulators face specific limits on what they and scholars deem necessary: the creation of new financial service regulations.

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[7] *Annex on Financial Services,* paragraph 2(a) states that "Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owned by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement."

[8] The Commission on the Future of Health Care in Canada, summary report on Globalization and Health, *Putting Health First: Canadian Health Care Reform, Trade Treaties and Foreign Policy* (prepared by the Canadian Centre for Policy Alternatives), October 2002. Available at http://www:healthcarecommission.ca

The GATS' philosophy runs directly counter to the prevailing call for regulation. For instance, one provision calls for signatories to agree to eliminate domestic financial service regulatory policies that meet GATS rules, but that may still "*adversely affect the ability of financial service suppliers of any other (WTO) Member to operate, compete, or enter*" the market. Further, these countries agreed to ensure that foreign financial service suppliers are permitted "to offer in its territory any new financial service," a direct conflict with the various proposals to limit various risky investment instruments, such as certain types of derivatives.

In addition, GATS empowers the WTO to develop "disciplines" (rules) to ensure that domestic licensing, qualification and technical standards are "not more burdensome than necessary to ensure the quality of the service."[9] The financial services sector is affected because regulation of banks, insurance companies and capital markets depends heavily on technical standards such as capital adequacy and financial disclosure rules, and on qualification and licensing requirements for brokers, agents, and dealers. U.S. laws may eventually be subjected to "necessity tests" under GATS disciplines that would put the burden on the United States to ensure that our domestic standards are not unnecessarily trade-restrictive. Such GATS disciplines have already been drafted for the accountancy sector, which indeed mandate that licensing, qualification and technical standards governing accounting and auditing may not be "more trade restrictive than necessary."[10]

For instance, the Sarbanes-Oxley Act of 2002, which limits the type of consulting activities in which auditing firms can engage, could conceivably be challenged within the WTO as an unnecessary barrier to trade.[11] Indeed, various foreign financial service firms have hurled charges of WTO incompatibility at the law. Even without a formal legal challenge, GATS could have a chilling effect on U.S. efforts to regulate financial markets. For instance, foreign companies that list stock on U.S. exchanges have sought exemption from Sarbanes-Oxley on the grounds that the act discourages international trade in securities and violates international treaties.[12] Exemptions for foreign firms would give U.S. firms additional incentives to move offshore, and further undermine U.S. attempts to regulate its capital markets in the wake of the recent accounting and securities scandals.

GATS and the FSA provide powerful incentives for global harmonization of banking, insurance, securities and accounting standards. Harmonization is not as benign as the term implies. International standard-setting moves decision-making out of the hands of state and federal government and into international arenas that are less accessible, accountable, or responsive to the citizens of various nations who will live with the results. Rather than raising standards, international harmonization can precipitate a "rush to the bottom," resulting in lower oversight standards and

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[9] *GATS,* Article VI:4(b).

[10] WTO, *Disciplines on Domestic Regulation in the Accountancy Sector,* 14 December 1998, WTO document PRESS/118. The accountancy disciplines will become effective at the conclusion of the current GATS round in 2005. The WTO adopted a standstill provision that prevents WTO members from enacting new legislation in the interim that is inconsistent with the disciplines (WTO Council for Trade in Services, *Decision on Disciplines Relating to the Accountancy Sector,* 14 December 1998).

[11] When the accountancy disciplines were being drafted, the issue of whether it is overly burdensome or restrictive to limit the activities or combinations of services performed by accounting firms was raised by the United States (WTO, Working Party of Professional Services, "*Elements to be Addressed in Developing Disciplines for Professional Services: Accountancy Sector",* 20 June 1997, WTO document S/WPPS/W/15).

[12] "Corporate Cleanup Stings Foreigners," *The Wall Street Journal",* Aug. 12, 2002. The *WSJ* reports that the President of the Japanese Institute of Certified Public Accountants, in a letter to his U.S. counterpart, argued that Sarbanes-Oxley "clearly violate international treaties."

weaker prudential and investor safeguards. **Rather than creating a minimum threshold that all countries must meet, the WTO deems its international standards to be a ceiling that countries may not exceed**. GATS also empowers private-sector international banking, insurance, securities, and accounting standards to be the yardstick that WTO dispute-resolution panels will use to judge whether a nation's domestic standards are more trade restrictive than necessary.[13] Since it is difficult to defend domestic standards that exceed international standards, the GATS and FSA policy-harmonization requirements often serve as a downward ratchet.

Today, the push for further deregulation of financial services at the WTO continues, despite the calls emerging from all quarters for re-regulation of the sector. The WTO Doha Round negotiations – initiated in 2001 – included GATS talks that are aimed at further liberalizing financial services, among other service sectors. Indeed, further service-sector deregulation and liberalization are one of three central pillars of the Doha Round talks, even though the agriculture and industrial-tariff negotiations have attracted far more media attention.

The Bush administration and EU negotiators led a push to *expand* financial deregulation in the ongoing Doha Round. This is the agenda that remains on the table, although the specifics remain shrouded by the secrecy that permeates WTO processes. This opacity has resulted in widespread ignorance about the Doha Round's agenda of further financial sector deregulation. And, thus the communiqué issuing from the November Washington G-20 Summit convened to establish new financial sector regulation called for the speedy completion of the Doha Round. The G-20 communiqué also committed countries to "refrain from … implementing WTO inconsistent measures" for 12 months. Given the massive overreach of existing WTO rules into domestic financial regulatory matters, the proper response would have been a pledge to alter existing WTO terms to create the needed policy space to implement re-regulation, not to complete the Doha Round's further deregulation.

In the final analysis, the WTO agreements have more to do with governance than with trade. Effectively, the U.S. push for WTO coverage of financial services was a means to export the U.S. deregulatory model worldwide, harmonizing other countries' regulatory systems to the U.S. model. At the time of the WTO Financial Service Agreement negotiations, major EU financial service firms were pushing for similar deregulatory policies in Europe, making the pact a tool to simultaneously accomplish the domestic and global policy changes that the industry sought in order to facilitate worldwide operations unhindered by government regulatory constraints and even differences. Their success in establishing the FSA has facilitated concentration of control of the financial sector in the hands of relatively few players operating worldwide.

Over the past century, U.S. financial regulation has shifted from strict financial controls over banking and capital markets following the Great Depression to periods of deregulation in the 1980s and 1990s. The WTO GATS locks in the U.S. status quo at a time of unprecedented financial liberalization, and exports this model worldwide. Whether this extreme deregulatory model is beneficial to most people – or sustainable – is no longer a contested question. Yet, absent changes to these international commercial agreements, governments worldwide could face daunting difficulties if they seek to reverse the trend toward financial service deregulation.

[13] *GATS,* Article VI:5(b).