THE IMPACT OF INTERNATIONAL SERVICES AND INVESTMENT AGREEMENTS ON PUBLIC POLICY AND LAW CONCERNING WATER *

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Abstract

The establishment of a binding international agreements concerning investment and services is likely to have profound implications for public policy and law concerning water. Because these treaties represent the codification of neo liberal policies that favour privatization, deregulation and free trade they undermine the sovereign authority of governments to achieve environmental, conservation, or other societal goals. At risk is the public ownership of water resources, public sector water services and the authority of governments to regulate corporate activity for environmental, conservation or public health reasons.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

A New Generation of International "Trade" Agreements

During the past decade or so, international trade agreements have been dramatically expanded to encompass areas of policy, programs and law – such as those concerning water - that had always been strictly matters of domestic concern. In addition to the General Agreement on Tariffs and Trade (GATT), which has guided international trade affairs since 1947, the framework of the World Trade Organization now includes "trade" agreements relating to investment, services, procurement, intellectual property and domestic regulation, including environmental standards.

An agenda for trade liberalization, these international agreements codify the strategic objectives of the transnational corporations that act as principal advisors to international trade negotiations: deregulation, privatization and free trade. Moreover, unlike the treaties they supersede, these international trade and investment agreements are binding and enforceable. Furthermore, under NAFTA and other investment treaties, corporations have the unilateral right to enforce, through binding international arbitration, agreements to which they are not parties and under which they have no obligations.

The result is a framework of international rules embedded in the agreements of the World Trade Organization (WTO), regional agreements such as the North American Free Trade Agreement (NAFTA), and hundreds of bi-lateral investment treaties (BITS). Together, they impose on governments at all levels broad constraints that are ignored only at the risk of retaliatory trade sanctions or damage awards by international arbitral tribunals.

These regimes are so far-reaching that, according to Renato Ruggiero, the first Director General of the WTO, neither governments nor industries appreciate the full scope or value of the guarantees provided to foreign investors and services providers.

This is the context within which issues of water stewardship must be understood. Is water to be regarded as integral to the global commons? Are use and allocation decisions to respect a public trust? Or is water to be treated as a mere commodity, with access, protection, management and allocation decisions left to the market? Is water a basic human right, guaranteed to every human being, or an economic good available only to those who can pay?

This paper describes the extent to which the answers to these questions will depend on the "success" of future international trade negotiations, and on the interpretation and enforcement of existing trade rules. It examines two aspects of this international trade agenda: foreign investment and trade in services. These in turn are examined in light of the enormous ecological and human consequences of water depletion and degradation – now reaching crisis proportions in almost every region of the globe. This assessment is also framed by an analysis of the strategic objectives of the few global corporations that dominate the business of water.

Water as Big Business

Like virtually every sector of the global economy, the water and water services industry is dominated by a decreasing number of large and growing corporations that must maximize shareholder value by increasing revenues and profit. This imperative to grow is being pursued on two broad fronts.

The first is the acquisition of water rights: transforming water from a public resource to a commodity on the open market. In many countries, public ownership of fresh-water resources are increasingly being assigned to private interests, usually through licensing and permitting schemes. In developing countries, the World Bank is promoting private water rights, in an effort to define water as an economic rather than a social good.

The second involves the acquisition of water services. Because corporate mergers and acquisitions of private utilities and water companies have consolidated much of the industry, the new frontier for corporate growth lies in privatizing public water services. To overcome resistance to the loss of public control over drinking water services, an incremental strategy, public–private partnerships (P3s), has been developed. A typical P3 involves a joint venture between a transnational water corporation and a local government in which the former contracts to design, build and operate water plants and delivery systems, usually for several decades.
In developing nations, P3s are underwritten by development agencies and financing institutions such as the World Bank, with funding often tied to the participation of the water transnationals. Thus these institutions not only underwrite global corporate expansion but also inhibit poor countries from developing public water infrastructure.

However, to achieve their goals, water corporations must overcome a number of obstacles: first among these is government as resource owner, service provider or regulator. This is where international trade and investment agreements come into play by codifying a trade liberalization agenda to constrain the exercise of these traditional and sovereign powers.

An Agenda for Deregulation

Trade officials may decry the characterization, but NAFTA and WTO rules do represent an agenda for deregulation. Indeed, trade rules concerning services and investment are not in fact about services or investment, but rather about the capacity of governments to participate in, or regulate, these economic sectors. In fact, trade agreements are little more than a catalogue of *measures* that governments are prohibited from adopting or maintaining. A "measure" is virtually any government action that even indirectly affects services or investment.

In addition, international investment and services agreements impose constraints on *non-discriminatory* domestic measures, thereby abandoning the historic justification for trade constraints on sovereign government authority, which was to level the playing field for foreign goods, investors and service providers. Now broad categories of government regulation are prohibited no matter how fairly conceived or applied.

The General Agreement on Trade in Services (GATS)

Most services, particularly water, are delivered on a local basis and have nothing to do with international trade. However, the GATS defines "trade in services" so expansively that it applies to even the most local transactions if the interests of foreign corporations are at stake. Thus the GATS defines "trade in services" to include the supply of a service "through commercial presence in the territory of another [WTO] member." By so distorting the concept of trade, the GATS extends international trade law and sanctions to matters of domestic policy and law never before the subject of international trade disciplines.

Water Services

To date, much of the debate on the impact of the GATS on water has focused on drinking-water supply. Because full GATS disciplines apply only to services to which countries have made specific commitments, the WTO disingenuously argues that as no member has yet made a commitment to *water distribution*, public

policy options concerning water remain unaffected. But this ignores European proposals to encourage such commitments and the explicit obligation of all WTO members to expand this services treaty.

Moreover, in the new round of trade negotiations launched in Doha this November, members agreed to initiate negotiations immediately on *the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.* The EU and many others define water supply as an environmental service.

The WTO's posture also obscures the broader ramifications of the GATS services classification regime, which includes hundreds of categories that specifically refer to water. These range from the construction of dams and the operation of water-treatment plants to the manufacture of soft drinks. A great many other services depend upon the supply of water, or can adversely impact water quality through polluting activities.

The WTO's glib assurance that "the WTO is not after your water" is comforting only if one imagines that water is somehow isolated from other aspects of the services economy. But as we all know, water is essential not only to life, but also to most businesses and industries.

Thus, while the WTO correctly says that no country has committed water-supply services, dozens have made commitments to other water-related services, including:

- environmental services including pollution control and waste-water and sewage treatment;
- general construction work for civil engineering, including construction for waterways, harbours, dams and other water works, for long distance and local pipelines;
- engineering and project management services for water supply and sanitation works; and
- technical testing and analysis services (e.g., water quality) including quality control and inspection (e.g., water and waste-water works).

In other words, while the supply of drinking water is not yet a committed service, virtually every aspect of designing, building and operating water supply infrastructure is the subject of services commitments made by many WTO member countries.

Services and Water

In addition, other commitments have been made covering services that depend upon water or that may pollute it, including services *incidental to forestry, logging and mining*; metal refining; nature and landscape protection services, and waste disposal and other environmental services. Forestry services, for example, include tree planting, logging, forest management and hauling logs, all of which can have serious impacts on aquatic habitat, biodiversity and conservation. Thus, stream-habitat protection measures that affect these services will be subject to the GATS where such commitments have been made.

Water Quality and Water Protection

The extent to which water is degraded and depleted depends largely upon the regulatory framework in place to protect it. But the GATS provision on *Domestic Regulation* imposes broad constraints on *non-discriminatory* measures, including those needed to protect and conserve water. By requiring that regulations be *no more burdensome than necessary,* the GATS empowers the judgement of international trade adjudicators to supersede those of accountable elected representatives.

Consider, for example, setting ambient water quality standards, given scientific uncertainty about the concentration of a toxic substance or pathogen that will compromise ecosystem or human health. We know

that pollution controls or water quality standards are often opposed by the companies that must bear the costs of compliance.

Now, foreign service providers can turn to dispute resolution under the GATS to challenge such unwanted initiatives. An international trade tribunal will then decide whether a less "burdensome" approach to protection might have been adopted: perhaps better water treatment technology could have been used; other sources of pollution controlled more assiduously; better watershed management practices adopted; or perhaps public health officials might be more vigilant in issuing "boil water" advisories. It isn't surprising that no environmental measure has ever been able to satisfy such open-ended and ill-defined criteria.

Conservation Is No Excuse

While the GATS does allow government measures to protect human, animal or plant life, if these can pass the "necessity" test, it does not allow the other critical WTO environmental exception for measures relating to the "conservation of exhaustible natural resources." Thus no government can use conservation to justify interfering with the rights of foreign services providers.

The failure of the GATS to acknowledge conservation as a legitimate exception is the clearest indication of its intent to loosen or eliminate public control of water. International investment treaties are even more problematic, typically allowing no meaningful exceptions for either conservation or environmental and human health protection.

Foreign Investment

In 1998, efforts to create a Multilateral Agreement on Investment (MAI) under the auspices of the Organization for Economic Cooperation and Development (OECD) fell apart when France withdrew from the negotiations. However, the prototype for the MAI remains integral to the *North American Free Trade Agreement* (NAFTA), and is the model for both the Free Trade Areas of the Americas initiative (FTAA) and the Agreement on Trade-Related Investment Measures of the WTO. The principles of the MAI have also been embedded in almost 2000 bilateral investment treaties (BITs) quietly negotiated over two decades, most within the past few years. More than one hundred nations are parties to such treaties.

The Right of Private Enforcement

The most remarkable feature of these regimes is the right of private enforcement they accord foreign corporations. Under NAFTA, for example, foreign investors are granted a virtually unqualified right to enforce the constraints it imposes on government policy and regulation. However, unlike the GATS and other WTO Agreements, there is no reciprocity – foreign investors have no obligations whatsoever under the treaties they may enforce.

This represents a profound departure from the norms of international trade law which allowed only nation-states to access dispute procedures. As a result, the powerful enforcement mechanisms of these international treaties have been freed from the diplomatic, strategic and practical constraints that often limit state-to-state dispute resolution.

When investor claims do arise, they are decided, not by national courts or judges, but by private tribunals operating under international law and in accordance with procedures established for resolving private commercial claims, not disputes over questions of public policy and law. The tribunals deliberate in camera, and pleadings and evidence are routinely subject to strict confidentiality orders.
Not surprisingly, these investment treaties have become weapons with which to attack government efforts to achieve health, environmental protection, and other societal goals.

They have been invoked or threatened on at least five occasions to challenge government actions concerning water or water services, including claims:

- by Canadian-based Methanex Corporation against the U.S., for US$970 million in damages because of a ban by California and other states on the fuel additive the company manufactures, because it has become a major groundwater contaminant. Among other claims, Methanex is arguing that the ban was unnecessary because less trade-restrictive measures were available;

- by U.S.-based Sun Belt Water Inc. against Canada, for US$10 billion, because a Canadian province interfered with its plans to export water to California. Even though Sun Belt had never actually exported water, it claims that the ban expropriated its future profits;

- by Compania de Aquas del Aconquija (CAA), an affiliate of Compagnie Générale des Eaux (a subsidiary of Vivendi), against Argentina, for US$300 million, arising from a water and waste-water privatization deal gone sour. The claim alleges that public-health orders, mandatory service obligations, and rate regulations all offended its investor-rights;

- threatened by Aguas del Tunari, an affiliate of U.S.-based Bechtel, against Bolivia for more than US$25 million, for breach of its contract to provide water services to the City of Cochabamba. When public anger erupted over rate increases too steep for many residents to afford, Bolivia cancelled its privatization deal with the company;

- by U.S. Metalclad Corporation, against Mexico, for more than US$15 million, because an impoverished rural municipality refused to grant it a building permit for a 650,000-ton/annum hazardous waste facility on land already so contaminated by toxic wastes that local groundwater was compromised.

Expanding the Concept of Expropriation.

Several of these claims turn on a provision of NAFTA, common to other investment treaties, that prohibits government measures that *directly or indirectly nationalize or expropriate foreign investments, or take a measure tantamount to nationalization or expropriation*. When such expropriation occurs, the investor must be compensated for the full market value of its investment. That the expropriation was for *a public purpose*, carried out *on a non-discriminatory basis*, and *in accordance with due process of law* is irrelevant.

When the Tribunal ruled in favour of Metaclad, Mexico unsuccessfully appealed to the courts, which commented that NAFTA's expropriation rule was so broad that it would *include a legitimate rezoning by a municipality or other zoning authority*. By this standard, any government action diminishing the value of foreign-investment interests could provide a basis for an investor claim.

Public–Private Partnerships and Globalization

These days, since the global consolidation of this industry, when water services are privatized bidding is usually dominated by transnational water corporations, and local competition is virtually non-existent. Because these corporations qualify as foreign investors and service providers under NAFTA, BITS and the GATS, they benefit from the exclusive rights these regimes accord. Thus, when these transnational corporations become partners in a public–private partnership (P3) relationship, what would otherwise be entirely a matter of domestic regulation and contract becomes subject to international trade regulation as well.

Viewed in light of these international obligations, a P3 contract engenders certain risks that may often not be understood by public-sector partners, including:

- the risk of a contractual dispute, such as a decision by government to terminate the P3 contract, being characterized as expropriation for the purposes of founding an investor-state claim;

- eliminating the right to insist on local purchasing preferences as a condition to the P3 contract because such requirements are prohibited "performance requirements" under investment and procurement rules; and

- exposing environmental and public-health measures – from safe drinking-water standards and water pollution controls to the remedial orders of local health officials – to trade challenges and investor claims.

Defenders of P3 arrangements are encouraging municipalities to believe that they can oust foreign investor rights through clever contract drafting, even suggesting that specific trade obligations be excluded by the agreement. But governments can no more contract out of the international obligations than they can alter those commitments by domestic legislation.

Privatization

Public services depend upon a framework of policies, laws, institutions and funding arrangements that restrict the rights of private investors and service providers, to ensure public-policy goals such as universal and affordable service. But international investment and services agreements seek to minimize the capacity of governments to regulate or otherwise intervene in the market. For example, the first principle of international trade law, *National Treatment*, obligates governments to accord "no less favourable" treatment to foreign investors and services than is provided to their domestic counterparts. However, by failing to distinguish between private- and public-sector service suppliers, the trade regimes provide little latitude for policies, programs and regulations that may explicitly or effectively favour public-sector service providers. In fact, the very existence of public-sector service monopolies may be regarded as a barrier to foreign service providers. Thus Canada, for one, has declared a reservation to its *National Treatment* obligations that:

> *The supply of a service, or its subsidization, with the public-sector is not a breach of this commitment.*

But such reservations are rare, highly qualified and likely to be given very narrow application if the WTO's record is to be a guide.

WTO attempts to quiet concern about the loss of public control over water stress that drinking water services are not yet covered by GATS disciplines. However, this argument rests upon the meaning of an ambiguous exclusion for "services delivered in the exercise of government authority" – a definition fraught with controversy and also likely to be narrowly interpreted.

Moreover, the claim of public water services' to this exemption is likely to be compromised if water services are privatized, or subject to quasi-privatization agreements such as public–private partnerships. In any event, the services disciplines of regional free trade agreements, such as NAFTA, apply to virtually all services unless explicitly exempted – and water services are not.

In the face of this uncertainty, public officials seeking to preserve public-sector service delivery, are offered the glib assurance by the WTO:

> The *status of the public component could only become an issue if some measure taken by the government concerned were to be questioned by another WTO member.*

In other words, the WTO dispute process will decide. In fact, several GATS members might relish this prospect, given the pro-liberalization bias demonstrated by WTO tribunals: the U.S., on behalf of its media corporations or health care insurance industry; or Europe, on behalf of its water service corporations. But of course, then it would be too late for members to take the actions that might have protected their public services.

Conclusion

The advent of international investment and services agreements has superimposed binding international disciplines over the exercise of sovereign authority concerning water.

Because these agreements codify an agenda of privatization, deregulation and free trade, they are fundamentally incompatible with maintaining public ownership of water, public-sector provision of water services, and public regulation for conservation and environmental purposes.

Moreover, the powerful private enforcement machinery of international investment treaties has now been invoked by several transnational corporations to assail water protection laws, water export controls, and decisions to re-establish public sector water services when privatization deals have gone sour.

Only slightly less problematic is state-to-state enforcement of the GATS and other international services agreements. While these international 'trade' regimes establish certain exceptions that may allow governments to rebuff trade challenges and investor claims, these safeguards are ambiguous, highly qualified, and limited in their application. Moreover, even the modest environmental exceptions that apply to other international trade agreements have largely been written out of international investment and services agreements.

In many ways, the establishment of truly enforceable international disciplines, crafted to serve the interests of the most powerful private institutions in the world, represents a profound challenge not only to the sovereignty of nations, but to the protection of such a basic human right – as the right to water.

If water is to remain part of the global commons, with use and allocation decisions reflecting the public trust; and if water is to be a basic human right guaranteed every human being – then international trade, investment and services agreements must be fundamentally reformed to restore the sovereign authority of governments to achieve these ecological and human imperatives.

INTRODUCTION

The following assessment examines the impact of a new generation of international trade agreements on public policy and law concerning water. It examines two particular aspects of this international trade agenda which concern foreign investment and trade in services. These issues are examined in light of the enormous ecological and human consequences of water depletion, and degradation – now growing to crisis proportions in almost every region of the globe. It is also framed by an analysis of the strategic objectives of a small number of global corporations that now dominate the business of water.

The specific focus here is on the General Agreements on Trade in Services of the World Trade Organization (GATS), and the provisions of hundreds of international investment treaties, exemplified by the investment chapter of the North America Free Trade Agreement. Our conclusion is that the trade liberalization objectives of GATS and international investment treaties are fundamentally incompatible with the ecological and human imperatives that must guide decisions about use, conservation and allocation of this non-renewable resource.

Indeed this inherent and basic conflict is acknowledged by these international treaties which allow governments a certain latitude to play their traditional roles as water stewards, service providers, and regulators – but within tight constraints. Moreover the safeguards and exceptions which shelter such government action, are highly qualified, and have consistently failed when put to the test of trade dispute resolution.

Whether you are persuaded by our conclusions or not, we believe that it is essential to understand the new rules of 'trade' which have now emerged as the most important determinants of domestic and international policy and law concerning water, internationally and in the most local context as well.

Water, Ecology and Society

Water, more than any other resource, is essential to biodiversity, social and economic development, and indeed civilization.[1] The growing scarcity and widespread misuse of water increasingly threaten the ecosystems on which human health and welfare, food security, and industrial development depend. Worldwide, water consumption has increased at twice the rate of population growth over the last century. The United Nations estimates that given current water-use patterns, by 2025 more than two-thirds of the world's population, 5.5 billion people, will experience water shortage.[2]

For much of humanity potable water is already in critically short supply; insufficient water to support food production is becoming an urgent crisis of our time. The impact of climate change on water and hydrologic cycles, and the complex inter-relationship between degraded and depleted water resources and biodiversity loss, underscore the enormity and global dimensions of these challenges.

[1] The Freshwater Resources of the World – A Comprehensive Assessment, report of the Secretary General of the United Nations, February 1997.

[2] Ibid.

According to the World Health Organization 3.6 billion people lack essential sanitation facilities and suffer the water quality consequences that often result. More than 34% of the world's population live in countries with significant water stress, and this figure is expected to almost double during the next 25 years.[3]

Even in countries, such as Canada, which are rich in water resources, serious problems exist. Scientists warn that pollution, habitat destruction and global warming may so compromise fresh-water supplies that fisheries could disappear and drinking water be put into crisis.

Thus, unless developed countries change course dramatically, fresh-water may become the foremost ecological crisis of the century for them as well.[4]

It is against this ecological backdrop, that questions about water stewardship must be understood. Is water to be regarded as integral to the global commons? Are use and allocation decisions to respect a public trust? Or is water to be treated as a mere commodity, with access, protection, management and allocation decisions left to the market? Is water a basic human right, an essential guaranteed every human being, or is it to be treated as an economic good available only to those who can pay?

As we shall see, the answer to these questions will in part depend upon the 'success' of future international trade negotiations, and on the interpretation and enforcement of existing trade rules. This is true because of the pervasive influence that trade regimes now exert on most areas of public policy and law in virtually every nation on earth.

Expanding the Rules of 'Trade'

Over the past ten years or so, the scope of international trade and investment agreements has been dramatically expanded to encompass broad areas of policy, programs and law which until now had been matters of domestic and local concern only. In addition to the General Agreement on Tariffs and Trade (GATT) which has guided international trade affairs since 1947, the framework of the World Trade Organization now includes several other "trade" agreements concerning investment, services, procurement, intellectual property, and all forms of domestic regulation, including environmental standards.

Moreover, certain regional trade Agreements such as the North American Free Trade Agreement (NAFTA), go even further by eliminating most tariffs, and establishing comprehensive disciplines concerning investment and services. These trade regimes are also now complimented by literally hundreds of bi-lateral investment treaties (BITS) established to protect foreign investor interests.

The importance of these developments is underscored by the fact that unlike the treaties they supercede, the new generation of international trade and investment agreements are binding and enforceable. Furthermore, under NAFTA and other investment treaties, corporations now have the unilateral right to invoke binding international arbitration to enforce agreements to which they are not parties and under which they have no obligations.

These new international disciplines also now apply to provincial, state and local governments, and even to certain non-governmental organizations. This too is a significant departure from historic norms of international trade law. The combined effect of these developments is to impose, on government at all levels, broad constraints backed by the threat of retaliatory trade sanctions and/or damage awards.

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[3] Stockholm Environment Institute, 1997, Comprehensive Assessment of Freshwater Resources of the World.

[4] National Water Crisis Forecast, Globe and Mail, June 7, 2000.

Despite their importance to policy, and regulatory initiatives, international trade agreements remain obscure and poorly understood. Renato Ruggiero, the first Director General of the WTO, recently described the (GATS) this way:

> the GATS provides guarantees over a much wider field of regulations and law than the GATT; the right of establishment and the obligation to treat foreign service suppliers fairly and objectively in all relevant areas of domestic regulation extend the reach of the Agreement into areas never before recognized as trade policy. I suspect that neither governments nor industries have yet appreciated the full scope of these guarantees or the full value of existing commitments.[5]

Mr. Ruggiero's candid comment confirms the unprecedented reach of the GATS, and the failure of many in government and business to yet appreciate the full implications of these binding international obligations. Moreover, while the GATS represents an ambitious expansion of the domain of international trade law, in some ways it pales in comparison with rules and remedies established by international investment treaties.

The complex and arcane world of international trade law maybe new terrain to many government officials and some business people as well, but not to the transnational water utility and energy corporations that are expanding their business empires. As these corporations are often active members of the trade advisory groups that played a key role in formulating international trade policy, we will first look at the corporate agenda so faithfully reflected in these international regimes.

Water, International Trade and Foreign Investment

In Canada, much of the debate on water and trade has centred on water exports, and whether water in "its natural state" is a product subject to "trade in goods" rules. Whether water is subject to these WTO rules may be debatable, but there is no doubt that water is subject to international rules concerning investment and services even when it may not be a "good" or "product."

For example, municipalities provide water to urban residents as a service, not as a product. Water resources used to generate power, manufacture goods, and irrigate crops are also supplied as services, not goods. While some water may be a 'product' – bottled water is the most obvious example – water as a service is more important for the purposes of international trade disciplines.

Water often also represents an investment - in water treatment and supply infrastructure for example - and is therefore subject to the rights of foreign investors under NAFTA and the BITS.[6] Moreover, the use of water is also critical to many investments - from power generation (whether hydroelectricity or nuclear power), manufacturing, primary-resource extraction, and agricultural production - to residential development. The viability of these and many other investments depends upon the availability and price of water.

When it comes to water therefore, the most important international 'trade' rules are those concerning investment and services. Accordingly, this assessment focuses on the GATS and the investment provisions

[5] Ruggiero 1998 - Towards GATS 2000, A European Strategy - Address to the Conference on Trade in Services. Brussels, June 2.

[6] See this author's opinion assessing the impact of NAFTA on Canadian public policy and law concerning water, which is available on the Council of Canadians web site at www.canadians.org

of NAFTA and other international investment treaties:[7] as these most strongly constrain public policy and law concerning water and water services.

These regimes reflect a common agenda and cover much the same terrain: for example, a transnational water corporation's contract to build a water-treatment plant is both a foreign investment and subject to the trade-in-services provisions of the GATS. International services and investments rules also share the common characteristic of having much less to do with international trade than they do with the capacity of governments to determine their own domestic policies concerning water.

[7] A more complete assessment would have also examined the trade in goods, procurement, subsidies, technical barriers to trade, and intellectual property provisions of NAFTA and the related agreements of the WTO.

PART 2: WATER AS BIG BUSINESS

Water is big business. A 1999 OECD summary of Environmental Business International statistics found that the value of the global environmental market for goods and services was US$453 billion. Environmental services accounted for roughly half the total: water-treatment services ($115.6 billion) and water utilities ($73.2 billion) were the largest environmental components.[8]

These impressive numbers nonetheless substantially underestimate the value of water in the global economy: they ignore water as an input to agriculture, mining and other industrial processes; and do not include the value of building dams, pipelines and other infrastructure associated with diversion, irrigation and power-generation schemes. (The impact of the GATS and investment treaties on water in this broader context is considered further below.)

Even focusing narrowly on conventional water supply services, water is very big business, as are the corporations that supply water and build the facilities to do so. Like virtually every sector of the global economy, water services are dominated by a decreasing number of large and growing corporations. Of these, the two largest are French-based transnationals that together control more than 50 per cent of the global water market.

More than one of these transnational corporations generated revenues from their water businesses well in excess of $10 billion last year. Given the potential for growth in this sector, it isn't surprising that these corporations regard water as an enormous strategic opportunity.

Commodification and Privatization

Like all corporations, the goal of the global water giants is to maximize shareholder value by increasing revenues and profit. These fundamental priorities are now being pursued on two broad fronts. The first concerns the acquisition of water rights – which often requires the transformation of water from its status as a public natural resource to that of a commodity subject to proprietary claims. In many countries fresh-water resources are still owned by the state; but these public rights are increasingly being assigned to private interests, usually through licensing and permitting regimes.[9] As we shall see, the World Bank is spearheading the promotion of private water rights, water licensing, and water trading in developing countries, as part of an international program to define water as an economic rather than a social good.

The second strategic growth offensive is the delivery of water services. To date, much of this growth has been accomplished by corporate mergers and acquisitions of private utilities and water companies. For example, the world's largest water corporation, Générale des Eaux, a subsidiary of Vivendi is a

[8] OECD Joint Working Party on Trade and Environment, *Future Liberalisation in Environmental Goods and Services*, Mar.3, 1999, COM/TD/ENV(98)37/FINAL.

[9] In one Canadian province for example, the International Joint Commission which has responsibility for the Great Lakes noted that the Ontario government had issued permits authorizing the withdrawal of 18 billion liters (4.8 billion gallons) of water per year for bottling purposes alone.

conglomeration of more than 3,000 companies around world.[10] Thus most local and regional water-service companies are part of global service conglomerates.

By now, much of this private sector consolidation is complete, and because most water services are still provided as public services[11] the new frontier lies in privatization schemes of one form or another.[12] To overcome public resistance, a strategy of incremental privatization of water and sewer services has been developed: public-private partnerships (P3s). A typical P3 involves a joint venture between a transnational water corporation and local or regional government in which the former contracts to design, build and operate water-treatment and filtration plants, for periods as long as 40 years, or the entire useful life of these facilities.

The other major opportunity for corporate growth exists in the area of providing water services to developing nations. These adventures in building global water markets are often underwritten by development agencies and financing institutions – such as the World Bank. Because such funding is often tied to the provision of services by the big transnationals it not only becomes the mechanism for underwriting the costs of their global expansion but also denies poorer countries the opportunity to develop their own public water infrastructure.[13]

To achieve their goals, water corporations must overcome a number of obstacles, the most important of which is government, as resource owner, service provider or regulator. As owners of water resources, governments are crucial to balancing the demands of business with the need for conservation, biodiversity protection and equitable resource allocation. As public service providers, governments mandate universal access to water, progressive rate structures and conservation measures. Finally, as regulators, governments hold a public trust to protect water quality, biodiversity and public health. In each of these capacities, governments stand in the way of corporate growth and profit.

Therefore, the realization of these corporate objectives depends upon reducing or even eliminating these traditional government roles.

Water, Development and World Bank

Strategic partnerships developed between the global water companies and international financial institutions have provided an effective strategy for achieving these goals. The two most notable, the *Global Water Partnership* and the *World Water Council* were founded in 1996. The partnerships provide an arena for negotiation and collaboration among the major water companies, multilateral banks, U.N. agencies, bilateral development agencies, and non-governmental organizations. In the context of these partnerships, the economic motives of the major water companies become rationalized as, or embedded in the facade of, broader public interest objectives.

The IMF and the World Bank claim their mission is to end poverty. The same motivation was recently declared in an open letter from the CEO of Suez.[14] Critics claim the policies of the institutions -- trade liberalization; de-regulation, fiscal austerity and privatization -- benefit major corporations and actually increase

[10] Gil Yaron, *The Final Frontier*, published by the Polaris Institute, 1999.

[11] See WTO, Environmental Services: Background Note by the Secretariat, S/C/W/46, July 6, 1998.

[12] Idem.

[13] See note 8 (OECD study) for a critical discussion of this practice at pp. 18-19.

[14] Gerard Mestrallet, CEO of Suez: *Suez is for the Human Right to Water, and Against Privatization*, published in Le Monde, Oct. 2001.

poverty and inequality in the developing world.

Whatever ones views, it is clear that the *World Water Council* and the *Global Water Partnership* have softened the image of the global water companies and provided them with international platforms from which to broadcast the rhetoric of environmental sustainability and poverty reduction while promoting an agenda that will expand their global empires. Moreover, whatever the rhetoric, the commodification and privatization objectives of the World Bank become much more apparent when one considers the substance of its agenda.

Water as an Economic Good or Basic Human Right

The *Global Water Partnership*, the *World Water Council*, and the World Bank all cite the *Dublin Principles* as the guidelines of their policies and strategies. The *Dublin Principles*, generated at the 1992 *Dublin Conference on Water and the Environment*, recognize that fresh water is a finite and valuable resource, essential to sustain life, development and the environment. But they also declare that water has an economic value in all its competing uses, and should therefore be recognized as an *economic good*.

But, the concept of water as economic good is not widely accepted, as the World Bank acknowledged in a report published in 2001:

> The policy to mainstream economic and financial aspects of pricing policy has largely been won in the Bank, but not in client countries or the international political arena.
>
> A large external constituency of stakeholders still wants to maintain social water pricing…[15]

As World Bank officials put it "work is still needed with political leaders in some national governments to move away from the concept of free water for all."[16] Thus the Bank promotes the concept of "full cost recovery" for water services, neatly marginalizing the role of the state as guarantor of universal access to water as a basic human need – as a basic human right.

Under full cost recovery regimes, the consumer must pay a market price or lose access to water services. Access to safe and affordable water is a key issue in developing countries.

More than one billion people lack potable water and, more than 2 million people, mostly children, die each year from diseases related to lack of access to safe, affordable water – most live in families too poor to pay for water, and certainly not at full cost prices.

The pro privatization agenda of the World Bank and IMF is even more explicit in the policy advice and loan conditionality attached to water project funding. A major thrust of IMF and World Bank policies and programs is euphemistically called "public-sector reform," whose central component is the privatization of state-owned

[15] World Bank, *Bridging Troubled Waters: Assessing the Water Resources Strategy Since 1993*, Operations Evaluation Department, World Bank, Washington, D.C. October 2001, p. 24.

[16] World Bank, *Sourcebook on Community-Driven Development in the Africa Region*, Africa Region, World Bank, Washington, D.C. March 17, 2000, Annex 2.

companies, including water service providers. Often the leverage is applied quite directly as structural adjustment loans from the IMF and the World Bank. In addition, water-sector restructuring loans from the World Bank or regional development banks are often conditional upon the negotiation of concessions, leases, management contracts or other forms of public-private partnerships with "international operators" in water-sector management.

Structural adjustment loans tend to be the largest, in dollar amount, of the loans offered to developing countries and thus are the most influential in leveraging the policy advice of these lending institutions which consistently favours fiscal austerity, and privatization. However, the influence of IMF policy advice is considerably greater than the actual dollar amount of its loans suggests. This is because a country's access to other capital flows – bilateral and multilateral credits and grants, debt relief and debt-restructuring and commercial capital investment – may depend upon whether it has been given the IMF's 'seal of approval.' It is significant that a recent review of 40 IMF loans granted in 2000, found 12 loans that contained conditions imposing privatization and/or full cost recovery.[17]

The World Bank currently supervises 86 water and sanitation projects, with loans and credits totaling $5.3 billion. The Inter-American Development Bank has a current portfolio in water and sanitation of $4.4 billion, in 47 projects. Many more projects are multi-sectoral and address broader issues of water resource management.

In countries where the water utility is operating in the red, the World Bank is unlikely to approve a water-sector loan without the explicit or implicit condition of water privatization, as concessions, leases, or management and service contracts. Loan conditions pushing "full cost recovery" of the market price of water are also common in structural adjustment and as conditions to water and sanitation loans. While the rationale for these privatization demands is often framed in terms of addressing budget deficits and debt, the result is obviously tailor made to the interests of the major water companies.

Paving the Way for Foreign Investment

In order to further encourage foreign investment, the World Band has several initiatives. The Multilateral Investment Guarantee Agency (MIGA) is a World Bank agency that manages the website "Privatization Link," a virtual auction block for developing-country and eastern European publicly-owned companies. It also specializes in political-risk insurance for private investors. MIGA has just signed its first such guarantee, for a water project in Guayaquil, Ecuador: a 30-year concession for International Water Services B.V. of the Netherlands. MIGA provided an $18 million guarantee and a bond, to protect the company against expropriation, war, civil disturbance, and breach of contract.

Despite such help, water corporations remain leery of making long-term investments in water infrastructure projects in poorer countries unless substantial reforms are also made to legal, regulatory and institutional structures.

[17] The 12 countries where the IMF imposed water privatization and cost recovery conditions in 2000 were primarily in Africa and included some of the smallest, poorest and most debt-ridden countries. For details of the study see: *News and Notices, Globalization Challenge Initiative*, Washington, D.C., Vol. 2, No. 4, Spring 2001 or www.challengeglobalization.org

Thus the World Bank is also promoting "behind-the border" i.e., domestic, legal, regulatory and institutional reforms for water sector restructuring. These typically include: (1) the definition and establishment of water rights and licenses; (2) legal and regulatory reform granting equal treatment to private-sector operators and public providers; (3) separation of regulatory and operator functions, and development of an independent and autonomous regulatory institutions; (4) establishment of tariff structures based on full cost recovery; (5) decentralization of rural water services, from national to local government control; and (6) separation of profitable and unprofitable water service sectors.

This is where international trade and investment agreements come into play by codifying these liberalizing reforms and imbedding them in a binding multilateral framework of comprehensive application. Moreover, once these reforms are implemented, they are very difficult if not impossible to undo.

Codifying Corporate Priorities

The GATS for example, was one element of a comprehensive round of trade negotiations that got underway in 1986 and culminated in the establishment of the WTO in 1995. But notwithstanding a dramatic expansion of trade negotiations beyond the traditional concerns about trade in goods, negotiators made no meaningful effort to consult with constituencies outside their traditional client base – corporations involved in international commerce. This indifference to other interests and perspectives precluded input from the public, but also from government departments that might have offered some balance to the trade agenda.

This failure was exacerbated by the secrecy surrounding international trade negotiations, and by the arcane and complex nature of the agreements. The result was no surprise: an agenda of privatization, de-regulation and free trade.

The link between international investment treaties and corporate interests is particularly explicit. Indeed, the rationale for such treaties is the need to protect the proprietary interests of foreign investors.
Understanding the origins of the new generation of international 'trade' agreements is important because it makes some sense of rules that otherwise seem implausible. Why would nations abandon their sovereign jurisdiction simply to accommodate the interests of foreign investors and services providers?

Given broader societal goals of environmental protection, universal access to basic services, conservation, and public health protection, such international agreements seem unfathomable. But such considerations were simply absent during negotiations. While this explanation may make the myopic preoccupation with corporate priorities less sinister, the consequences are no less problematic.

PART 3: THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

Defenders of the GATS deny that it represents an agenda for deregulation, yet their protest is impossible to square with the fact that this Agreement is not, in fact, about services per se, or regulating corporate activity in the services sector. Rather, like most WTO Agreements,[18] the focus is on limiting the activities of governments and government agencies. In simple terms, the GATS is little more than an extensive catalogue of "measures" that governments may neither adopt nor maintain. "Measure" means virtually any government action that affects the provision of services by the private sector, even indirectly.

Thus Article I provides:

> *This Agreement applies to measures by Members affecting trade in services.*

"Members" are the nearly 150 nation signatories to WTO Agreements and "Measure" is defined by Article XXVIII as:

> *any action by a Member, "whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form"*

Article I.3 of the GATS stipulates that it applies to all levels government, including local municipalities, and even to:

> *"non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities"*

However, it is in the decisions of WTO dispute bodies that the full reach of GATS disciplines and the meaning of the term "affecting trade in services," has been made clear. As explained by these tribunals, for a government measure to offend GATS constraints it need not be about services at all, but only incidentally affect them. This explains how government measures concerning the production and trade in bananas or automobiles could be found to violate GATS disciplines.[19] In fact, most if not all product-specific regulations will have at least an incidental impact on related services, such as transportation, marketing, advertising. By this interpretation, virtually any government policy, program, law or regulation might be caught by the constraints of this particular WTO Agreement.

The only general exception allowed by the GATS is for services supplied "*in the exercise of governmental authority,"* a term that Article I.3(c) defines as,

> *"any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers."*

This exception would not therefore include public-sector services such as water or sewage services if offered commercially or in competition with the private sector. Today, public services are often a mix of monopolized and competitive services, or may be delivered in partnership with for-profit companies, or offered on a cost-recovery basis. It would therefore be difficult to identify a public service clearly exempt according to this definition. (We will return to the potential scope of this exception below, under the heading 'W*ater as a*

[18] The exception to this rule is the Agreement on Trade Related Intellectual Property Rights which mandates a detailed system of domestic regulation that Members must establish in order to protect the intangible property interests of foreign investors in patents, trademarks and copyright.

[19] See WTO disputes concerning Canada's Auto Pact: *Canada – Certain Measures Affecting the Automotive Industry,* AB-2000-2; and Europe's preferential tariff treatment of bananas imported from certain former colonies under the Lome Convention: *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* AB 1997-3.

Public Service'.)

Most services, particularly water, are delivered on a local basis and therefore have nothing to do with international trade per se. However, the GATS defines trade in services so expansively that even the most local transactions may qualify when the interests of foreign corporations are involved. By doing so, the GATS constrains sovereign authority, even in local and domestic matters.

Thus Article I:2, defines "trade in services" to mean the supply of a service:

a) from the territory of one Member into the territory of any other Member [cross – border supply];
b) in the territory of one Member to the service consumer of any other Member [to consumers abroad];
c) by a service supplier of one Member, through commercial presence in the territory of any other Member [commercial presence]; and
d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member [presence of natural persons].

Obviously, only one of these modes of service supply actually involves cross-border trade in services.

In fact, subsection (c) is really an investment measure, entitling foreign service suppliers to establish local service businesses, which is why the WTO touts the GATS as the first multilateral agreement on investment.[20]

By virtue of this fundamental distortion of the concept of trade, the GATS becomes a means of achieving a basic corporate objective - the right to establish a presence in any market, anywhere, and to do so on terms that, as we shall see, fundamentally limit the authority of governments to foster local economic development, conserve water resources or ensure universal service. While the GATS should be regarded as having much more to do with domestic policy and programs than international trade, GATS rules concerning the cross border supply of services may undermine the capacity of governments to control water exports (see discussion in Part IV).

A Work In Progress

While the ultimate ambition of the GATS is to establish a comprehensive code applying to all services, several of its more onerous provisions apply only to services voluntarily submitted to GATS disciplines.[21] Thus only certain GATS provisions apply to all services except, as noted, those delivered *in the exercise of governmental authority:*

Article II: ***Most Favoured Nation Treatment:*** Each member must provide all WTO members the most favourable treatment provided to a service provider from any WTO member.

Article III ***Transparency:*** All nations must *publish promptly ... all relevant measures of general*

[20] Unless this boast has been removed, it can be found on the GATS homepage on the WTO Internet site – www.wto.org/english/thewto_e/whatis_e/tif_e/agrm5_e.htm

[21] This is not the case under the Services provisions of NAFTA, which apply to all services unless explicitly exempt or subject to reservation. For water, the most important reservation is one for non-conforming provincial measures that were in place on Jan. 1, 1994, and which have been maintained or promptly renewed since that time.

application which pertain to or affect ... services, and provide *inquiry points* for those seeking more information. This provision will alert foreign services providers to initiatives they may wish to lobby against, or if this fails, persuade a sympathetic government to challenge.

Article VI *Domestic Regulation*: applies *to all measures of general application affecting trade in services* whether these are discriminatory or not. By doing so, this provision abandons the traditional justification for international sanctions that constrain sovereignty, which was to level the playing field for foreign goods, services and investors. But Article VI applies to all government measures even those that treat foreign and domestic service providers in exactly the same way. Only certain subsections of this Article apply to all services but these include the obligation to provide *judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services*. (The provisions that apply to listed services are noted below).

However, the most severe constraints imposed by the GATS only apply where specific sectoral commitments have been made. When this occurs, the following disciplines also apply:

Article XVII *National Treatment*: Governments must provide foreign service providers with the most favourable treatment accorded domestic providers. This provision makes no distinction between public non-profit service delivery and private for-profit suppliers.

Article VI *Domestic Regulation*: Even when inherently fair, non-discriminatory domestic regulations are prohibited unless they are objective and transparent, no more "burdensome than necessary", and administered in a reasonable, objective, and impartial manner.

As we shall see, the test of "necessity" allows international tribunals to force governments to prove the need for any regulatory measure that might interfere with the ambition or profits of international service corporations.

Article XVI *Market Access*: prohibits six different categories of non-discriminatory regulatory controls. These include limitations on the number of service suppliers or service operations; the total value of service transactions; the types of legal entity or joint ventures through which a service supplier may supply a service; and limits or aggregate foreign investment.

Article VIII *Monopolies*: requires that publicly owned or controlled monopolies, such as municipal water utilities, and others licensed to provide exclusive services – comply with the constraints imposed by the GATS and *not abuse [their] monopoly position.*

Therefore the extent to which government prerogatives may be subject to GATS constraints depends on which services have been listed to that country's *Schedule of Specific Commitments*.[22] The listing process allows a country to specify which GATS disciplines it is willing to embrace for a particular sector. Commitments can be of three types: *Market Access*, *National Treatment* and *Additional Commitments*.

A country may limit each commitment to: certain modes of supply (e.g., cross-border); a certain time frame; or to particular regulatory elements (i.e., controls on the number of service suppliers).

[22] Canada's commitments are listed in Schedules to the GATS (GATS/SC/16; 15 April 1994) and can be found at the following Web site: http://strategis.ic.gc.ca/SSG/sk00079e.html.

While the complexity of this regime provides ample opportunity for missteps, correcting an error is difficult and likely to be costly.[23] In making and qualifying such commitments a country is to be guided by GATS classification schedules that characterize services as belonging to particular sectors or sub-sectors.

Accordingly, the extent to which water policy and law is constrained or simply prohibited by GATS rules depends upon whether a country has listed services that may be affected by governmental measures concerning water. Before examining the extent to which water-related commitments have already been made, it is important to recognize the uncharted nature of the seas that we will be navigating.

We must bear in mind that no other WTO agreement has sought to apply international trade disciplines so extensively to non-discriminatory domestic policy, law and programs. Nor does any other WTO agreement approach the complexity of GATS disciplines or the byzantine classification systems it relies upon. Moreover, the GATS fails to define many of the broad concepts it establishes as binding disciplines. Furthermore, in the two WTO disputes that have required an interpretation of GATS rules, the tribunals have given them very broad application.[24]

It is therefore impossible to know the full impact of the GATS on public policy and law concerning water. All we can do for certain, is identify the risks presented by these international disciplines to the integrity of government authority concerning water, and water services. For while no country has made a commitment of water supply services, many have made commitments likely to undermine their capacity to steward this vital resource. Moreover, government options will become even more constrained, if service-sector liberalization continues.

Water and Services

Much of the debate about the impact of the GATS on water has been focused on water supply for human consumption. The WTO disingenuously argues that as no member has made GATS commitments on *water distribution*, their policy options remain unaffected by the GATS.[25] This posture both ignores the current push for commitments of water-supply services, and obscures the broader ramifications of this services agreement for public policy and law concerning water. For a great many service sectors utilize water, exist to establish water infrastructure, or pollute or degrade water resources if not effectively regulated.

To understand the pervasive relationship between water and services, one must delve in the arcane classification system that many countries have relied upon in listing their commitments under the GATS. These can be found in the Central Products Classifications Code (CPC Code) kept by the United Nations Statistics Division. While this code is specific to products, not services, it has been adopted as a way to describe the sectors for which commitments are being made.

The code classifies products under 10 headings.

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[23] For example, the creation of monopoly rights with respect to services subject to specific commitments requires that compensation be paid to foreign service providers who may be affected. See Articles VIII and XXI. Also note that a minor listing error by Canada played an important role in a successful challenge to the Auto Pact, see note 19.

[24] See note 19.

[25] WTO: GATS Fact and Fiction. Misunderstandings and Scare Stories. www.wto.org/english/tratop_e/serv_e/gats ....

0. Agriculture, forestry and fishery products;
1. Ores and minerals; electricity, gas and **water;**
2. Food products, beverages and tobacco; textiles, apparel and leather products;
3. Other transportable goods, except metal products, machinery and equipment;
4. Metal products, machinery and equipment;
5. Construction work and constructions; land;
6. Trade services; hotel and restaurant services;
7. Transport, storage and communications services;
8. Business services; agricultural, mining and manufacturing services; and
9. Community, social and personal services.

Water Supply and Wastewater Treatment

A search of the CPC code using "water" reveals hundreds of sub-classifications that relate to water– from bottled water to dam construction. In terms of water supply, the most important product category is the first: ores and minerals; electricity, gas and *water* - which is further defined to include *water*, and *natural water*.

Category 1 also references another UN statistical code - ISICRev.3,[26] which includes a classification for the "Collection, purification and distribution of water."[27]

Further exploration reveals the nature of the services captured by the simple reference to water set out in item 1 of the CPC code:

- Filtration plant, water, municipal;
- Municipal water system operation;
- Water board, local government;
- Water collection, treatment and distribution systems;
- Water commission, local government;
- Water distribution, government;
- Water distribution, non-government (except irrigation);
- Water filtration plant, operation;
- Water supply service, local government;
- Water supply service, non-government (except irrigation);
- Water supply systems, operation;
- Water system (except irrigation);
- Water, electricity and gas (primarily water); and
- Waterworks operation.

As yet, no commitments have been made by GATS Members under this critical code. However, another major service-sector classification is also particularly relevant to water: "Community, social and personal

[26] ISIC Rev.3, which is specific to activities, rather than products.

[27] The following explanatory note is attended to this schedule: *This class includes collection; purification and distribution of water to household, industrial, commercial or other users. Exclusions: Irrigation system operation for agricultural purposes is classified in class 0140 (Agricultural and animal husbandry service activities, except veterinary activities). Treatment of waste water in order to prevent pollution is classified in class 9000 (Sewage and refuse disposal, sanitation and similar activities*).

services," under which environmental services, including sewage treatment services are grouped. Here several countries have made virtually unqualified commitments. [28]

Water for Human Use

While the WTO is correct that no country has yet committed water supply services it is also obviously aware of proposals by the European Communities that encourage such commitments. The EC has proposed a new classification relating to environmental services, the classification of *Water for Human Use and Wastewater Management*. This would include "potable water treatment, purification and distribution, including monitoring."[29]

Currently environmental services include sewage services but not those related to water supply. Given the dominance of global water markets by European-based corporations such as Vivendi, RWE and Suez Lyonnaise, it isn't surprising that this push would come from Europe. It is surprising, however, that in countering concerns about the impact of the GATS on water, the WTO sidesteps these important EU proposals, and also fails to note the explicit obligation set out by Article XIX for Members to engage in successive rounds of negotiations to achieve progressively higher levels of liberalization.

Moreover in launching a new round of trade negotiations in Doha this November, Members agreed to immediately initiate negotiations on three environmental issue-areas including *the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.* What remains to be seen, is how EU proposals to reclassify water supply as an environmental service will play out in this new context.

Water and Other Services

As noted, the fact that water supply isn't yet the subject of specific GATS commitments does not however mean that water policy and law is unaffected by the GATS. Indeed, this is far from the truth because many water related services fall outside the parametres of water supply.

In fact, a search of UN product and activity classification codes for water-related categories reveals literally hundreds of references. For example, a search of CPC indexes using water as a key word produces no less than 594 references: the following box offers a small sample.

16 of 594 references to water found in CPC indexes

- conduits, water supply, except pipelines;
- harbours, waterways and related facilities;
- general construction of water-purification plants;
- general construction of water-works plants;
- general construction of water drilling services;
- primary water piping systems;
- digging water wells;
- tankers, coastal water
- transport services, bulk liquid freight by tankers;
- transoceanic water transport services;
- bulk liquid freight by;
- engineering services for the construction of waterworks;
- groundwater assessment for the construction of harbours;
- development of water-supply regulations;
- water supply regulations, administrative services related to;
- water transport, administrative services related to; and
- groundwater, geophysical consulting services relating to the location of

[28] See the European Commissions web site, http://gats-info.eu.int/gats-info/swtosvc.pl?&SECCODE=06.A, which lists more than 25 Members that have made such commitments including the European Community.

[29] *Communication from the European Communities and Their Member States*, Classification Issues in the Environmental Sector. S/CSC/W/25, 28 September, 1999 *and Communications from the European Communities and their Member States*, *GATS 2000, Environmental Services* S/CSS/W/38, 22 December 2000.

These are followed by a further sampling of more than a 100 water-related services that a search by classification, rather than by index, reveals

These schedules illustrate the highly redundant and complex classification system that countries must master in order to avoid false steps in listing their commitments under the GATS. Moreover, given the expansive reading that WTO tribunals have given the GATS, it is easy to see how commitments of seemingly unrelated service sectors may become a tool for undermining public control and regulation of water. Indeed, the result may be as damaging to sovereign control over water as a listing of water supply services would be.

It is the inchoate confusion in these classifications systems that is the ostensible focus of recent EU proposals to group water supply within an environmental cluster of services. While its proposal may improve upon current complexities, it would also dramatically accelerate the expansion and application of GATS disciplines.

This is how the European Commission describes the opportunities presented by liberalization of water distribution services:

> *Further liberalization of this sector would offer new business opportunities to European Companies, as the expansion and acquisitions abroad by a number of European water companies show.*[30]

Many countries have made commitments in several areas that either depend upon the availability of water and water-taking permits, or may have adverse impacts on water.

11 of 100 water services listed by classification

- water;
- natural water;
- hydraulic turbines and water wheels;
- construction of long distance pipelines;
- irrigation and flood control works;
- harbours, rivers, canals, and related facilities;
- dams;
- water transport services;
- soft drinks, bottled mineral waters;

These include:

- Engineering services;
- Integrated engineering and project management services for water supply and sanitation works turnkey projects;
- Urban planning and landscape architectural services;
- Technical testing and analysis services including quality control and inspection;
- **Services incidental to forestry and logging, including forest management;**
- **Services incidental to mining**, including drilling and field services and rental equipment;
- Site preparation for mining;
- Toll refining services;
- Geological, geophysical and other scientific prospecting services;
- Packaging services;
- General construction work for civil engineering which **includes construction for waterways, harbours, dams and other water works**, for long distance and local pipelines;
- Wholesale trade services;

[30] European Commission, *Opening World Markets for Services, A Guide to the GATS*, note 28.

- **Sewage services**;
- Refuse disposal services;
- Sanitation and similar services;
- Cleaning services of exhaust gases;
- Noise abatement services;
- Nature and landscape protection services; and
- Other environmental services.

Water and the Economy

The only way to take any comfort from the WTO's glib assurance that "The WTO is not after your water" is to imagine that somehow water related policies have no bearing on other aspects of the services economy. But of course water is not only essential to life in all of its diversity, but is also the life blood of most economies.

The accompanying descriptions of the importance of water to manufacturing, mining, waste disposal, and agricultural sectors are taken from material prepared by the government of Canada. The key question is how water use by these sectors is likely to be treated under the GATS. As we have seen, the answer depends at least in part upon whether specific commitments have been made with respect to these sectors. In this way GATS disciplines that apply to agriculture, mining or manufacturing related services, may impact water associated with these services. Conversely, government measures that affect water are likely to be subject to disciplines that apply to the services that rely upon that water. Consider the case of water and mining, for example.

Under the heading "Engineering services," several countries have made commitments that include "integrated engineering and project management services for water supply and sanitation works turnkey

Manufacturing

Water is the lifeblood of industry. It is used as a raw material, a coolant, a solvent, a transport agent and a source of energy. An automobile coming off the assembly line, for example, will have used at least 120,000 litres of water — 80,000 to produce its tonne of steel and 40,000 more for the actual fabrication process. Many thousands more litres of water are involved in the manufacture of its plastic, glass and fabric components. Manufacturing accounted for 16% of water withdrawals in 1991. Paper and allied products, chemicals, and primary metals were the three main industrial users.

Mining

This category includes metal mining, non-metal mining, and the extraction of coal. Water is used by the mining industry to separate ore from the rock, to cool drills, to wash the ore during production and to carry away unwanted material…the mining industry had a gross use almost as great as agriculture…

projects."[31] Similar commitments have been made with respect to "services incidental to mining, including drilling and field services." We can only speculate about how water as an input to mining production would be treated under GATS rules, but given the WTO's track record it is only reasonable to expect the full brunt of GATS disciplines to apply.

Thus water taking permits necessary to support mining activities would be subject to GATS disciplines concerning national treatment and market access. This may elevate the *privilege* of accessing this public resource to the status an *enforceable legal right* for foreign service providers. As well, *Market Access* provisions would constrain non-discriminatory measures to limit water-resource demands by the industry. As we shall see, water rights cannot be denied simply for conservation purposes.

Several countries have made commitments under the heading "Environmental services," including "refuse disposal, sanitation, nature and landscape protection services." These services are key to dealing with one the most severe impacts on water associated with the mining industry, mismanagement of mine tailings. Catastrophic tailing-pond failures have resulted in disastrous environmental consequences on several continents.

As well, tailing wastes often leach for decades even centuries after mine sites are closed, presenting an enormous challenge for regulators.

Unfortunately many governments have failed to establish adequate environmental controls for this sector. Now such initiatives will have to satisfy the ill-defined but expansive constraints imposed by the GATS. For example, Article VI: *Domestic Regulation,* requires Members to demonstrate that measures to protect water from mining activities must be "no more burdensome than necessary" and not constitute an unnecessary barrier to trade. To the uninitiated, these tests may seem reasonable. However, as applied by trade dispute bodies with no expertise in or apparent concern for environmental management, these tests have proven fatal to every single conservation and environmental measure ever put to the challenge.

These examples of the broader implications of commitments made under the heading *Mining* illustrate how GATS rules may have far reaching impacts on water.

Commitments made concerning services related to logging, forest management, metal refining, transportation and construction could as readily have been used to make the point that this vital input to resource extraction, manufacturing and agriculture, is one of the first casualties of unsustainable development.

Water is also the object of such services as landscape design, project engineering and waste-water treatment, and, of course, the supply of water and sewage services. As noted, to run afoul of GATS disciplines, government measures need only indirectly affect the listed service. In the Auto Pact case,[32] a peripheral impact on retail sales tainted an international agreement on the manufacture and trade of cars and car parts, not the supply of services.

[31] Under the heading *Business Services - Professional Services - Integrated Engineering Services*, more than two dozen Members have made such commitments – see http://gats-info.eu.int/gats-info/swtosvc.pl?&SECCODE=01.A.f

[32] See note 19.

The same fate befell the Lome convention, which provided preferential tariff treatment to bananas exported to Europe from certain former colonies. Yet both the Lome convention and the Autopact were supposed to be exempt under WTO rules.

Water export controls may even be seen as violating commitments concerning construction services for dams, pipelines and other water diversion infrastructure. The argument would go this way: by making commitments concerning the construction of water diversion infrastructure, a country had implied its consent that these dams and pipelines can be used, including for the purpose of exporting water. No doubt the WTO secretariat would dismiss these concerns as far-fetched. Admittedly some mental gymnastics are required to reach this conclusion. However compared to the convoluted logic and aggressive reading of GATS disciplines that has already been demonstrated by the WTO in both the Banana and Auto Pact cases, it would be difficult to dismiss this risk.

Agriculture

Farmers depend on water for livestock and crop production. Although 99 per cent of the farms in Canada depend on natural precipitation, agriculture was still the fourth largest use in 1991, accounting for 8.9 per cent of total withdrawals. Water is withdrawn mainly for irrigation (85% of total withdrawal) and livestock watering (15%). Since so much of the water intake evaporates, only a small fraction is returned to its source. This is a highly consumptive use.

Waste disposal

It has long been convenient to use lakes, rivers and oceans as receiving bodies for human and industrial wastes. While water is capable of diluting and "digesting" society's wastes to some degree, there are limits to what even the largest body of water can absorb. The extent to which in-stream processes can absorb contaminants depends on factors such as the nature of the contaminant, how much of it there is compared to the volume of water, how long the contaminant stays in the water, the temperature of the water and the rate of flow. Many of our waterways are now overloaded with wastes. This problem can best be resolved by increased regulation and/or monitoring.

Water and Habitat Conservation

Other sector commitments may significantly undermine public policy and regulatory options intended to protect water resources. For example, the commitment of *services incidental to forestry and logging* includes the following activities:

> *Growing of standing timber: planting, replanting, transplanting, thinning and conserving of forests and timber tracts; operation of tree nurseries; logging, logging camps and logging contractors; forestry service activities; forest management including afforestation and reforestation; and, the transport of logs in association with logging chiefly within the forest.*[33]

Logging activities and logging-road construction have had devastating impacts on the biodiversity and conservation of forest resources. For example, logging's destruction of vital stream habitat has been a critical

[33] UN Statistical Division, Classification Registry for ICSID Rev. Code 0200 - http://esa.un.org/unsd/cr/registry/regcs.asp?Cl=2&Lg=1&Co=0200

factor in undermining the viability of wild salmon stocks. This explains why environmentalists and forest companies battle over the extent to which such activities will be regulated to protect species. Yet, when a commitment services incidental to logging and forestry services is made, stream habitat protection measures that interfere with logging, logging-road construction etc. may be subject to trade dispute resolution and constraints imposed on domestic regulation.

While such measures might be defensible under an exception for measures that are *necessary to protect human, animal or plant life or health*, as noted, these provisions have yet to be successfully invoked in any trade dispute that has challenged an environmental initiative.

Water Quality and Water Protection

The extent to which water is degraded and depleted largely depends upon the strengths and deficiencies of the regulatory framework to protect it. When laws are weak or non-existent, consequences range from stream habitat destruction to human tragedy. But despite WTO protests, the GATS is clearly an instrument for deregulation.

Because commitments have not yet been made with respect to water supply, the question of safe drinking water standards is unlikely to arise in the GATS context. However, we know that it is more effective to prevent pollution than to remove an ever-growing burden of contaminants at the water treatment plant. Thus, even in the absence of commitments to water supply, water pollution control and prevention measures may be subject to GATS disciplines if they affect services that may be polluting or degrading water.

Where such commitments have been made, the requirements of Article VI: *Domestic Regulation* come into play. These subject measures affecting such services to potential scrutiny under two independent procedures.[34] These reviews examine the governmental measures to ensure that they do not offend GATS constraints. The first relates to all administrative decisions affecting services. The second, which applies only where specific commitments have been made, invokes formal trade dispute resolution under the WTO.

To comply with these requirements, a government decision must be:

- rendered within a reasonable period of time [Art. VI.3];
- based on objective and transparent criteria [Art. VI. 4(a)];
- be no more burdensome than necessary to ensure the quality of the service [Art. VI.4(b)];
- in the case of licensing procedures, no more restrictive than necessary of the supply of the service [Art. VI.4(c)] and,
- must be made with due deference to relevant international standards [Art. VI. 5(b)].

These tests are subjective and redundant, making the task of steering clear of these constraints all the more difficult. Take for example the challenge of demonstrating that an environmental or public health measure is not more "burdensome than necessary to ensure the quality of the service." According to international trade law, the test of "necessity" requires a nation to adopt the least trade-restrictive method of achieving its objective.

Consider the problem of setting ambient water quality standards in light of scientific uncertainty about the particular concentration of a toxic substance or pathogen that may compromise ecosystem or human health.

[34]If commitments to water supply are made, these concerns would apply to safe drinking water regulations as well. But as we have seen if the principle of pollution prevention are to adopted, it will be more effective to deal with the problem at it source, rather than try to remove a growing volume of contaminants in water treatment plants.

The need for particular pollution controls or water quality standards are often hotly debated by the companies that must bear these costs. Now, foreign service providers can turn to dispute resolution under the GATS to challenge unwanted water protection measures.[35]

When this occurs, an international trade tribunal is invited to second guess the judgment of elected officials about whether some other and less "burdensome" approach might have been adopted to protect public health or the environment. Perhaps better water treatment technology might be used, other sources of pollution controlled more assiduously, better watershed management practices adopted; or perhaps, public health officials could be more vigilant in issuing "boil water" advisories.

Conversely, a government seeking to defend such health protection measures would have to demonstrate that it (1) canvassed all conceivable ways in which water quality problems might have been addressed, (2) assessed the impact of each on international trade in services, and (3) putting many other considerations aside, opted for the approach that was least restrictive of the rights of foreign service providers.

Even assuming unlimited funding, these requirements are, self-evidently, absurd. Nevertheless, trade tribunals; unencumbered by experience with, or apparent understanding of, environmental law and policy have been applying these tests strictly.[36] Most often, trade adjudicators will simply disregard the economic and political pressures that have always made the standard setting process one of compromise.

Notwithstanding these disabilities, trade panels have been quite ready to substitute their views for those of public officials and lawmakers on every occasion that have had to determine whether an environmental or conservation measure is really *necessary*. Thus, US clean air regulation, marine mammal protection laws, and European food safety standards have all failed the necessity test when administered in the rarified and secretive atmosphere of WTO dispute resolution.

In simple terms, the imposition of Article VI disciplines concerning non-discriminatory domestic regulation represents a new and formidable challenge to the public trust governments must honour when it come to water.

Also problematic are the *Market Access* provisions of the GATS, which proscribe whole categories of domestic regulatory and policy measures even when these satisfy the onerous obligations of *National Treatment.* Again these constraints apply to non-discriminatory measures, even of the most local application. Proscribed measures include: limits on the number of service suppliers, service operations or on the total value of service transactions. Article VI also bans measures "which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service" or impose limits on foreign investment or ownership.

As noted, by prohibiting non-discriminatory measures of general application, the GATS represents a fundamental departure from the basic precepts of international trade regulation. These appealed to notions of fairness, and justified constraints on sovereign power to level the playing field for foreign goods, services and investment. But the constraints imposed by the GATS, and by international investment rules, apply to broad areas of policy and law, no matter how even handed their design or application.

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[35] Unlike NAFTA investment rules, corporations have no unilateral right to invoke dispute resolution under the GATS; rather, they must persuade a WTO member state to do so on their behalf.

[36] The members of international trade tribunals are drawn from a roster of trade lawyers, academics and other experts in the area of international trade.

Conservation Is No Excuse

One might imagine that the impact of GATS disciplines on environmental and conservation goals was unintended; but any such thought is laid to rest by another of the GATS departures from the basic framework of other WTO agreements.

Under the General Agreement on Tariffs and Trade (GATT), governments may use certain listed exceptions to justify departing from its broad constraints. These are set out in Article XX. Two of these exceptions, which are particularly important for environmental, public health and conservation purposes, concern measures that violate the GATT but:

- [are] *necessary to protect human, animal or plant life or health,* [GATT Article XX(b)] or;
- *[relate] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption* [GATT Article XX(g)]

Several GATT Article XX exceptions are imported to the GATS by Article XIV; noticeably absent, however, is the conservation exception.

While this exception has yet to be successfully invoked, the WTO has been willing to at least accord it theoretical support. Moreover, without the benefit of this exception, a host of conservation measures, from stream habitat protection to water export controls, have no safeguard whatsoever.

The failure of the GATS to acknowledge conservation as a legitimate exception must be seen as a deliberate action to subsume conservation goals to those of trade liberalization. The implications of this omission for measures to limit demands on water resources is obvious. No matter how compelling the need for conservation, no government can deny foreign-service providers their rights under the GATS for that purpose. The failure of this services treaty to allow conservation as an exception is the clearest indication of its intent to loosen, if not eliminate, public control of water use and resource allocation.

Water Exports as Cross Border Services

The possibility that the GATS might obligate countries to allow bulk-water exports is another serious risk presented by this trade regime. Three provisions of the GATS are relevant. The first is Article I.2, which stipulates that trade in services includes the provision of a service "from the territory of one member into the territory of any other member..."

The other relevant provisions concern *Market Access* and *National Treatment.* The former guarantees the right of foreign service providers to establish operations in Canada, and prohibits various licensing and regulatory measures relevant to water-taking permits. The latter requires cross border services to be accorded the same treatment as those delivered domestically.

As we have seen, it is difficult to ascertain the extent to which water services are subject to *Market Access* and *National Treatment* disciplines.

But we also know that many countries have made commitments of services that depend upon access to water resources, or that design, engineer and build dams, pipelines and other water diversion infrastructure. As noted, this raises the specter of foreign corporations claiming the right to use the water infrastructure the GATS entitles them to build. While environmental assessment and other approvals processes may remain,

these would have to satisfy *necessity* and other GATS tests. Keep in mind, that conservation is not a justifiable basis for such regulatory controls.

It might however be argued that a blanket prohibition on water exports would be consistent with *National Treatment* obligations, as it would treat domestic and foreign companies in precisely the same way, i.e., neither could provide water as a cross-border service. Indeed, Canada made this argument – unsuccessfully – to defend a ban on hazardous-waste exports.[37]

The challenge to that export ban was made by a U.S.-based hazardous-waste disposal company, S.D. Myers, under the investor-state suit provisions of NAFTA. In banning hazardous waste exports, Canada was acting in accordance with Basel Convention, which discourages nations from exporting their waste-management problems. Moreover, the Basel Convention is explicitly listed as an exception to NAFTA disciplines, including those concerning services and investments. Nevertheless, these arguments got Canada nowhere with the NAFTA tribunal deciding the case.

In dismissing the argument that Canada's ban treated foreign and domestic investors equally, the tribunal held that *National Treatment* required that Canada treat domestic and foreign companies involved in the same sector equally. The challenge for water-export controls is obvious. U.S. industries and other water users would, by this reasoning, be entitled to assert the same claim to Canadian water as their sectoral counterparts in Canada.

If applied in this manner, *National Treatment* requirements would effectively negate a fundamental principle of international law recognizing the sovereign authority of nations over their natural resources. Under the GATS, the market would determine a nation's policy and laws concerning water use and allocation. If it is worthwhile for corporations to invoke investment treaties to gain access to hazardous wastes, imagine the lure when the prize is fresh water. This was precisely the impetus for another investor claim against Canada by US- based Sun Belt Water Inc.[38] This then, brings us to the subject of international investment treaties.

[37] *S.D. Myers, Inc. vs. Government of Canada*, Partial award, released November 12, which is now appealing by Canada to the Federal Court.

[38] Sun Belt Water Inc., a U.S.-based company, has invoked investor-state dispute procedures under NAFTA to claim $10 billion in damages from Canada, arising from decisions made by British Columbia to turn off the tap on water exports. See discussion under Part IV, see a joint study published by the International Institute for Sustainable Development and the World Wildlife Fund: *Private Rights, Public Problems*, 2001.

PART 4: INVESTMENT

In 1998, efforts to create a Multilateral Agreement on Investment (MAI) under the auspices of the Organization for Economic Cooperation and Development (OECD) fell apart when France withdrew from the negotiations. However, the prototype for the MAI, remains an integral element of the *North American Free Trade Agreement* (NAFTA), and is the model for the Free Trade of America's initiative (FTAA) and ultimately for the Trade Related Investment Measures Agreement of the WTO.[39]

The principles of the MAI have also been imbedded in almost 2000 bi-lateral investment treaties (BITS) quietly negotiated over two decades, most within the past few years. More than one hundred nations are a party to such treaties: France, to 65; Argentina to 38; Thailand to 17, and Ghana - 8.[40] Most have been negotiated under the auspices of the International Center for Settlement of Investment Disputes (ICSID), established by the World Bank in 1966.

Recently these investment treaties have emerged as weapons for attacking government efforts to achieve health, environmental protection, and other societal goals. They have been now been invoked on at least five occasions, to challenge government actions concerning water or water services. (We discuss these cases below.)

In certain ways these investment treaties are built on the same framework that is common to most "trade" agreements, which includes an obligation to provide foreign investors *National Treatment* – in other words, the right to establish businesses and operate them on the most favourable terms allowed any domestic enterprise, including those in the public sector.

However, like the GATS, investment treaties go well beyond the conventions of international trade law by prohibiting domestic policy and regulatory measures, which are entirely non-discriminatory in both design and application (See discussion below).

The Right of Private Enforcement

The most remarkable feature of these regimes is the right of private enforcement they accord foreign corporations. Under NAFTA for example, foreign investors have been granted a virtually unqualified right to claim damages for violations of its broadly-worded constraints on government policy and regulation.[41]

However, unlike the GATS and other WTO Agreements, there is no reciprocity – foreign investors have no obligations under the treaty they can directly enforce. For this reason, NAFTA and similar investment treaties represent a dramatic departure from the norms of international law under which only nation states have

[39] The WTO Trade Related Investment Measures Agreement is little more than a framework without much content.

[40] A catalogue of BITs can be found on the web site of the International Centre for Settlement of Investment Disputes (ICSID) at http://www.worldbank.org/icsid/treaties/treaties.htm

[41] Under Article 1122, all three NAFTA parties have unilaterally consented to international arbitration of claims arising under the Chapter, notwithstanding the absence of any contractual relationship with the foreign investor. While foreign investors must waive their rights to pursue similar claims in domestic courts, they need not exhaust domestic remedies before resorting to international dispute resolution, which is the case under many of the BITS.

access to the enforcement machinery established by trade agreements.[42] The result has unleashed the enforcement mechanisms of NAFTA from the diplomatic, strategic and practical constraints that often limit state-to-state dispute resolution. It would be difficult to overstate the broader implications of this development.

Moreover, such disputes are decided, not by national courts or judges, but by private tribunals. These operate under international law and in accordance with procedures established for resolving private commercial claims, not disputes involving broad questions of public policy and law.

These tribunals deliberate in camera; the pleadings and evidence routinely subject to confidentiality agreements so strict that national governments may be limited in sharing the details with state, provincial and/or local governments, even when the authority of sub-national governments is at stake.[43]

Environmental Regulation as Expropriation

Investor-state procedures have been invoked to challenge environmental laws in all three NAFTA countries; three such claims have succeeded. In one case, an impoverished Mexican municipality was found to have expropriated the investment of a US hazardous-waste company by refusing it a permit to build a hazardous waste facility on land already so polluted with toxic waste that local groundwater was seriously contaminated.

The NAFTA expropriation rule is common to most BITS; it prohibits government measures that *directly or indirectly nationalize or expropriate foreign investments, or take a measure tantamount to nationalization or expropriation.*[44] When expropriation, so-defined, occurs, the investor must be compensated for the full market value of its investment – that the expropriation was for *a public purpose*; carried out *on a non-discriminatory basis*; and *in accordance with due process of law* has no bearing whether or how much damages must be paid.[45]

The expansive scope of NAFTA's expropriation rule was recently hi-lighted by the Supreme Court of British Columbia which described the concept as *sufficiently broad to include a legitimate rezoning by a municipality or other zoning authority*.[46]

By this standard any government action which diminishes the value of foreign investment interests could be provide a basis for claiming damages under this rule. Water conservation and protection measures are obvious targets for such claims. Indeed, NAFTA investment rules have been invoked to challenge a ban by California and other states on a fuel additive established to prevent groundwater contamination.

In that case, the Canadian manufacturer of the additive is suing for $970 million alleging that the ban

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[42] Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 3rd edition. p.65.

[43] Pope and Talbot v. Canada, Decision of Feb. 14, 2000, at para 6, and S.D. Myers and the Government of Canada, Procedural Order No. 16, May 13, 2000, at para. 14.

[44] NAFTA Article 1110.

[45] Idem.

[46] The United Mexican States vs. Metalclad Corporation, 2001 BCSC 664, reasons for judgement of the Honourable Mr. Justice Tysoe, released May 22, 2001 at para. 99.

'expropriated' its investment.[47]

A growing number of corporations are lining up to exercise NAFTA's private-enforcement machinery; among them is Sun Belt Water Inc. of Santa Barbara California, which is claiming $10 billion in damages from Canada because of a ban on water exports by one Canadian province.[48]

Even though Sun Belt had never exported a drop of water from Canada, it is arguing that the ban expropriated the profits it would have made from exporting water to southern California.

Community Economic Development as Discrimination

Under the heading *Performance Requirements*, NAFTA and other investment treaties prohibit governments from requiring that, as a condition of the right to establish investments such as water treatment facilities, foreign corporations:

- achieve a given level or percentage of domestic content;
- purchase, use or accord a preference to providers, goods produced and services provided in its territory;
- transfer technology, a production process or proprietary knowledge …[49]

Unless exempt,[50] these rules make it impossible for a government to stipulate as a term to a public-private partnership agreement (P3), that its private partner give preference to local goods or services to ensure that economic benefits accrue to the local economy.

Public-Private Partnerships as Foreign Investment Agreements

International investment agreements are likely to play an important role in resolving disputes under public-private partnerships or other privatization arrangements concerning water and waste-water services. In the jargon of international commerce, P3s are usually described as 'concession agreements.' When water services are privatized these days, bidding is usually dominated by transnational water corporations - local competition is virtually non-existent in the wake of the recent global consolidation of this industry. Thus the private partner's interest in a P3 will almost always qualify as a foreign investment under most investment treaties.

For this reason, P3 agreements are governed not only by the rules of domestic contract law, but by international investment and services treaties as well, and in a conflict, the latter prevails. This means that when a government enters into a typical P3 contract, it will also be entering into a foreign-investment

[47] Howard Mann; *Private Rights, Public Problems*, see note 38.

[48] Idem.

[49] NAFTA Article 1106. Similar prohibitions against stipulating local preferences are also a feature of international procurement agreements.

[50] There is an argument that water concessions are procurement contracts and therefore exempt from certain provisions of NAFTA and the GATS. However, procurement is generally defined the acquisition of goods and services for the direct use of government, not third parties. Nevertheless this question might be seen as an open one. However, as noted, procurement treaties often include the same general prohibitions. See discussion following under Part V.

relationship, whether it appreciates that fact or not.[51]

While local government officials may not understand the international implications of such P3 arrangements, their corporate partner is likely to, and may well have been involved in writing these international rules.

Moreover, when privatization relationships break down, these corporations have already demonstrated a willingness to invoke these powerful international regimes rather than take their chances before domestic courts, as the following two examples illustrate.

Cochabamba, Bolivia

In 1999 and under pressure from the World Bank, the Bolivian government sold off Cochabamba's public water system to a pool of investors including a Bechtel subsidiary, Aguas del Tunari.

Promises were made to pour millions of new dollars into expansion and improvement. It didn't take long however, for the consortium to raise prices sometimes by more than 100%. For a Bolivian family earning $100 month, even a $20 water bill is a catastrophe.

Public anger erupted over the rate increases. Protests and general strike that brought the city to a halt for four days, followed. Ultimately the Bolivian government was persuaded to cancel its privatization deal with Bechtel. The company protested, claiming that factors other than increased water rates were responsible for the civil unrest. It reaffirmed its commitment to meeting the area's water service needs.

However, according to newspaper accounts Aguas de Tunari has now invoked a bilateral investment treaty between Bolivia and the Netherlands to claim more the US$25 million in damages for breach of its contract to supply water to the City of Cochabamba. In doing so, this Bechtel corporate affiliate, has decided to follow the lead of an even larger transnational water corporation, Vivendi, concerning another water privatization deal gone sour.

Générale des Eaux v. Argentine Republic

In late 1996, Compagnie Générale des Eaux (CGE), a subsidiary of Vivendi, through its Argentinian affiliate Compañía de Aguas del Aconquija (CAA), brought a claim for more than U.S. $300 million against Argentina under a BIT between Argentina and France.[52] The dispute concerned a concession contract that CAA had made with the provincial government of Tucumán to privatize the province's water and sewage systems.

A dispute between CGE and the province concerning the company's rights and obligations under the concession contract soon erupted and became so messy that the governments of France and Argentina were drawn in to resolve matters. When those efforts failed, the French-based conglomerate sued under the investment treaty. The company cited a long list of grievances, which included allegations that:

- health authorities had improperly issued orders and imposed fines as a result of the company's alleged failure to install proper water-testing equipment, and conduct proper water testing;
- an Ombudsman had improperly intervened to prevent CGE from cutting off service to non-paying customers, and;

[51] Unless exempt, such a contract would also be subject to the GATS, even where carried out entirely in that local jurisdiction.

[52] Compañía de Aguas del Aconquija, S.A.& Claimants v. Argentine Republic, Respondent, ICSID (Case No. ARB/97/3)

- the province had failed to allow adequate increases to the rates it could charge.

The Tribunal had to first decide whether it had jurisdiction to consider the claim given the terms of the concession contract, which assigned such disputes to local administrative tribunals. Notwithstanding this proviso, the Tribunal found that it had jurisdiction to hear the CGE claim, and held that:

> Neither the forum-selection provision of the Concession Contract nor the provisions of the ICSID Convention and the BIT on which the Argentine Republic relies preclude CGE's recourse to this Tribunal on the facts presented.

The Tribunal also confirmed that under international law:

> it is well established that actions of a political subdivision of a federal state, such as the Province of Tucumán in the federal state of the Argentine Republic, are attributable to the central government. It is equally clear that the internal constitutional structure of a country can not alter these obligations.

Having given itself the authority to consider the complaint, the Tribunal then found that, given the complexity of the 111-page contract, it could not determine violations of the investment treaty without interpreting the provisions of the contract. It also found that, without a clear breach of the investment treaty by Argentina, the claimants had to go before the domestic tribunals referred to in the concession contract before seeking international arbitration. The company is now trying to annul of the tribunal's findings rather than take its chances in an Argentine court.

The company's use of a BIT to enforce corporate interests in a water-privatization scheme is important for several reasons. First, when push comes to shove, companies such as Vivendi, the typical partner in a public-private partnership, will not hesitate to invoke their rights under international investment agreements.

Second, the case reveals the inter-relationship between a typical P3 contract, and international investment treaties. Clearly, the terms of a partnership agreement will not prevent a private partner from seeking recourse to international arbitration under these treaties. Yet promoters of the P3 agenda are encouraging municipalities to believe that they have the power to oust the rights foreign investors enjoy under these treaties through clever contract drafting.[53]

It is also important to note that the BIT Vivendi relied upon was more limited in its application than is the case for NAFTA investment rules, which explicitly binds sub-national governments. If the same dispute arises in a NAFTA country, it will not be necessary for the disputing investor to establish a breach by the federal governments in order to succeed with a claim.

Finally the case is important because it illustrates precisely the types of disputes that are most likely to arise from water privatization initiatives - namely those about water quality testing, universal service guarantees and rate regulation.

Aboriginal Title and National Treatment

Finally on this topic is the question of the rights of indigenous peoples. To a limited extend aboriginal rights have been accorded constitutional and statutory protection by various nations.[54] In other cases the courts have acknowledged first nation entitlements, rights and interests that are broader than any given legislative recognition. For example the Supreme Court of Canada has established the following hierarchy when it comes

[53] See brief to the Ontario Walkerton Inquiry prepared by Peter Kirby of Fasken, Martineau, Dumoulin on behalf of the Canadian Council for Public-Private Partnerships (CCCPP), Sept. 20,2001. Also see remarks of Paul Lalonde at the CCCPP annual conference convened in Toronto on Nov. 26, 2001.

[54] See for example, S. 35 of Canada's Constitution Act, 1982.

to natural resource allocations: environment; indigenous use and access rights; and only then, commercial-industrial use.[55] In reality this hierarchy is still inverted in most jurisdictions, with commercial-industrial use taking precedent or environmental concerns and first nations claims.

Yet other aboriginal rights have not been acknowledged and indeed fit poorly if at all within a framework that conceives of the natural world entirely in terms of proprietary interests.

However, whether based in constitutional law, judicial rulings or broader notions of stewardship –Aboriginal Title and other inherent and unalienable indigenous rights are impossible to reconcile with such trade liberalization principles as *National Treatment, Most Favoured Nations Treatment,* and the *Expropriation* provisions of international investment agreements. Take for example the relatively simple matter of a statutory preference in favour of indigenous peoples in allocating forest harvesting or fisheries licenses. But under the GATS and international investment treaties, such a preference would establish a new benchmark for National Treatment.

Now the most favourable treatment accorded by government is that given to indigenous peoples. However absurd, a refusal to accord the same treatment to foreign investors or service providers would then be a breach of *National Treatment.*

In fact this and other conflicts have been acknowledged and Canada, for one, has declared reservations under both NAFTA and the GATS to protect measures that acknowledge, at least to a limited extent, some aboriginal entitlements.

For example under NAFTA, Canada's reservation is framed this way:

> *Canada reserves the right to adopt or maintain any measure denying investors … or service providers or another Party any rights or preferences provided to aboriginal peoples.*[56]

Similar reservations have been declared in Canada's schedule of commitments under the GATS.

While these safeguards provide some recognition that Aboriginal Title should not just more grist for the free trade mill, they are piece meal, and ad hoc in their application.

Indeed we suspect that Canada is the exception in declaring such safeguards.

Even if applied liberally, such safeguards do little to preserve broader stewardship rights concerning water. In effect they establish a double standard: if indigenous peoples want to engage in mainstream commercial activities their special interests may be recognized, at least if properly reserved under investment and service treaties; but if they want to maintain traditional uses of their lands and waters - their rights don't count.

At a recent international conference, several indigenous peoples groups responded to this agenda in these terms:

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[55] See R. v. Sparrow [1990] 1 S.C.R., 1075 and Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010

[56] See Canada' reservation under Annex II of NAFTA. Also see Canada: Schedule of Specific Commitments – GATS/SC/16, 15 April 1994, horizontal limitations on National Treatment.

As Indigenous Peoples, we raise our voices in solidarity to speak for the protection of Water. The Creator placed us on this earth, each in our own sacred and traditional lands, to care for all of creation. We have always governed ourselves as Peoples to ensure the protection and purity of Water.

We stand united to follow and implement our knowledge, laws and self-determination to preserve Water, to preserve life. Our message is clear: Protect Water Now!

We seek support and solidarity for the opposition to any free trade agreements that purport to privatize Water and trade Water as a commodity, including the North American Free Trade Agreement, the proposed Free Trade Area of the Americas and the General Agreement on Trade in Services (GATS) of the World Trade Organization.[57]

[57] *Water for People and Nature, an International Forum on Conservation and Human Rights*, Vancouver, Canada, July 2001.

PART 5: WATER AS A PUBLIC SERVICE

The fact that most water services are provided by the public-sector is an impediment to the ambitions of private for-profit water service companies that are seeking to expand their businesses (see discussion Part II). Even in the United States, water and waste- water services are predominantly public, as they are in Europe, outside of England and France. While some developing countries have privatized water services (on occasion after arm-twisting by the World Bank), many others maintain public-sector monopolies.

We have seen how World Bank policies encourage governments to privatize public services, sometimes by imposing such requirements as conditions of loan agreements. We have also considered how international investment treaties can be invoked to consolidate and entrench privatization schemes, once a foot-hold has been established in the domestic water market. The other question is whether the GATS similarly exerts pro-privatization pressures, and/or lock in the interests of private service providers once established. We turn to that issue now.

International investment and services agreements seek to minimize the capacity of governments to regulate or otherwise intervene in the market. On the other hand, public services depend upon a framework of policies, laws, institutions and funding arrangements that restrict the rights of private investors and service providers, in order to insure such broad public-policy goals as universal and affordable service.

In light of this fundamental conflict, full application of GATS disciplines is incompatible with maintaining public-sector services in a given sector, unless they are sustainable in a market environment. Moreover, the very existence of public-sector service monopolies may be regarded as a barrier to the rights of foreign service providers.

This explains why Canada, for one, has declared a reservation to its *National Treatment* obligations that:

> *The supply of a service, or its subsidization, with the public-sector is not a breach of this commitment.*

However, the most important safeguard of the right of governments to maintain public sector water services, is the non-listed status of such services. This explains why the WTO had made such a point of noting that no commitments of drinking water services has yet been made.

... In The Exercise of Government Authority

However, even when no specific GATS commitments have been made, water-supply for human consumption, may be subject to certain GATS disciplines unless exempt as services *supplied in the exercise of government authority*.

This is defined by Article I.3(c) as:

> *… any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.* [emphasis added]

The GATS provides no definition of the terms "commercial basis" and "in competition with one or more service providers."[58] In fact, a 1998 WTO paper on environmental services acknowledges the ambiguity of

[58] An interpretive note responding to questions concerning the ambit of this exclusion form GATS disciplines simply skirts these fundamental questions, see memo from David Hartridge, Director of Trade Service Division (

"commercial basis" and offers different views of what this term might mean.[59] Even the WTO secretariat is unclear about the meaning of a term that is fundamental to determining the scope of application of the GATS.

As noted, drinking water services are predominantly provided by the public-sector in most countries. But even in these countries, private water companies may participate, sometimes in partnership with government, in supplying water.

A key question then is whether a public-private partnership for water treatment and supply is sufficient to define such services as 'commercial?'

Even where water services are provided exclusively by a municipality, for example, pricing arrangements may introduce a commercial aspect to service delivery. Water supply and treatment services in many countries are a mix of public, private, and hybrid approaches sometimes co-existing in one jurisdiction. In many smaller communities, water services receive significant subsidies from general tax revenues; in other communities services are funded out of the municipal tax base; in yet others, water metering and user fees generate revenues to fund service delivery.

Water supply for manufacturing, agriculture, power generation, resource extraction and other commercial purposes comprises a similar mix of approaches. Many businesses rely upon municipal water services; others take water directly from ground or surface sources.

In deciding whether public water service is being delivered "in competition with one or more service providers," what would be the frame of reference: local, regional, provincial or national? Would the presence of a private-sector water-services provider, or partner, introduce competition to all water services, or just those of the affected jurisdiction? Do competing public, and private sector proposals to rebuild water infrastructure imply competition in water services in that jurisdiction?

International efforts to establish a full-cost pricing model for all water-service economies, may also commercialize drinking water services sufficiently to bring them under GATS disciplines.

Senior WTO officials shrug off questions as to how nations may preserve public-sector service delivery in light of these questions and uncertainties.

After offering glib assurances, they note:

> *The status of the public component could only become an issue if some measure taken by government concerned were to be questioned by another WTO member.*[60]

In other words, their proposal is to have the WTO dispute process will sort out the answers. Of course, once that happens, it will be too late for Members to take the proactive steps that might have protected their public services.

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david.hartridge@wto.org) to Mr. Mike Waghorne, Public Services International, May 31, 2000.

[59] WTO Council for Trade in Services, *Environmental Services, Background Note by the Secretariat*, S/C/W/46, at. p.14, the secretariat has this to say "(I)t does not seem to be completely clear how much falls within the scope of Article I:3 (services supplied in the exercise of governmental authority) and Article XIII (government procurement), and how much is subject to the main GATS disciplines."

[60] See note 58.

While it is impossible to be certain how a WTO dispute panel would answer these questions, WTO dispute bodies have consistently given GATS disciplines very expansive reading. However, even a straightforward interpretation of these services rules would support the conclusion that any participation by private-sector water companies would bring this sector under the GATS. Moreover, at least four other factors suggest that water supply and water treatment will be regarded as services subject to GATS disciplines. First, as we have seen, water supply is specifically listed in the service-sector classification schedules. Part III of this paper listed more than a dozen CPC designations, including several that explicitly refer to water supply and distribution by local and other governments.

Second, European Community proposals specifically include "potable water treatment, purification and distribution, including monitoring" among the classes of services that it believes would benefit from a 'cluster' approach to negotiations.[61] Evidently, the EC is in no doubt that the GATS should apply to drinking water services.

Third, several countries have listed waste-water treatment and sewage services, suggesting that these services - predominantly delivered as public services - are subject to GATS rules.

It would be very difficult to distinguish between municipal sewer systems and water systems in most communities as both services are provided by the same department, commission or public utility, and on very similar terms.

Finally, Canada among others, has listed a number of general limitations in its schedule of commitments, including three that specifically identify public-sector service delivery of such services as welfare, health care and education. But if any service is delivered *in the exercise of government authority*, surely welfare would qualify. Therefore, if it was necessary to explicitly identify welfare as an exception to GATS rules, the inclusion of public water services under the GATS seems inescapable.

Given uncertainty about the ambit of the exemption for services delivered *in the exercise of government authority*, it would be reckless to assume that public water supply services are excluded under the GATS.

Privatization, not Trade

The rationale for public-sector service delivery varies from context to context. Public infrastructure, such as water and sewer systems, has often simply been beyond the capacity of the private sector. In other instances, the need to provide universal access to public "goods" has mandated public delivery of such services as health care and environmental protection. In the case of natural resources such as water and public forest land, public ownership may be essential to maintaining the integrity of the global commons. In yet other cases such as waste management, public management and control is seen as the best way to ensure accountability.[62]

The privatization "pro competitive" bias of the WTO is apparent throughout its discussion papers and background notes.

[61] Communication from the European Communities and Their Member States, *Classification Issues in the Environmental Sector.* S/CSC/W/25, 28 September, 1999.

[62] This is one reason why environmental assessment laws often apply disproportionately to public-sector undertakings.

For example, in listing explicit barriers to trade in environmental services, the WTO secretariat begins by identifying public-service monopolies. Then, noting with approval a trend towards privatization, the secretariat lists a number of barriers to foreign participation in new markets created when public-sector service delivery is abandoned. These include limitations: on foreign investment and the extent of foreign ownership; on the type of legal entity required to provide the service; on the scope of operations; and that require forming joint ventures or local hiring.[63] Government procurement practices, domestic regulation, and spill-over effects from the trade-in-goods rules are also identified as potential barriers.[64]

Typically, the WTO paper on environmental services makes a deliberate effort to identify all impediments to privatizing environmental services. Fully a third of the paper's analysis is devoted to the *Trade Restrictions and Regulatory Structure*.[65] Yet, not one paragraph offers guidance to WTO Members wishing to maintain public-sector environmental services. Nevertheless WTO officials continue to decry characterizations of the GATS agenda as pro-competitive and pro-privatization.[66]

The privatization goal of the GATS is woven into this trade regime in a manner that is subtle and indirect. With one exception,[67] no provision of the GATS squarely challenges the right of governments to choose or maintain public services. Rather, the GATS assaults the underlying policies, programs, regulatory and funding arrangements upon which such services depend.

The key GATS provisions that will, if left unchecked, ultimately lead to the privatization of water supply services, are:

> **Article VIII - Monopolies *and Exclusive Service Suppliers*:** This provision imposes many of the same constraints on public-sector service providers that limit the options of government. Public-sector service providers cannot "abuse [their] monopoly position to act .... in a manner inconsistent with [their] commitments."[68] Subsection 4 of this Article effectively requires that private-sector service providers be compensated when monopolies are "granted" with respect services they provided. It is unclear whether this provision would apply where a government wishes to return a service to the public sector when an experiment with privatization fails.
>
> **Article XVI - Market *Access*:** Maintaining certain public services as local, provincial or national monopolies directly impedes market access by foreign service providers. If these provisions are deemed to require no more than *National Treatment*, such monopolies may be acceptable as they discriminate no more against foreign service providers than against their domestic private sector counterparts. However, this Article clearly indicates that *Market Access* obligations require more than *National Treatment*. This raises serious questions about the entire framework within which water services exist.

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[63] WTO Council for Trade in Services Environmental Services, *Environmental Services*, Background Note by the Secretariat, S/C/W/46, July 6, 1998, at pp.8-9.

[64] Idem pp. 8-12.

[65] Idem.

[66] See note 25, *GATS: Fact and Fiction*

[67] See Article XVI.2(e), noted below.

[68] A similar provision of NAFTA is being used by UPS, the U.S. courier company, to support a $160 million investor-state claim against Canada concerning Canadian postal services. UPS argues that Canada Post is taking advantage of its monopoly mail delivery infrastructure to support competitive parcel and courier services. The same challenge might just as readily be made with respect to the use of public sewer, water, waste, and energy infrastructure.

Moreover, where *Market Access* commitments have been made, subsection (e) of this Article prohibits "measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service." This would apparently preclude specification that services by provided by governments or public agencies.

Article XVII - *National Treatment*: This provision requires that foreign service providers be accorded treatment "no less favourable than is accorded to domestic services and service suppliers." By not distinguishing between private- and public-sector services suppliers, the GATS provides little latitude for policies, programs and regulations explicitly or effectively favouring public-sector service providers. Canada, for one, has acknowledged this potential conflict and qualified its commitments accordingly. [69]

Admittedly, one can interpret these requirements to allow the preservation of public services. Indeed, a WTO dispute body might do so, should it have both a clear direction and a willingness to question the overwhelming orientation of GATS disciplines in favour or liberalization. However, no hint of either is apparent.

The Special Problem of NAFTA and FTAA Services Regimes

The Free Trade of the America's (FTAA) initiative would expand the application of NAFTA throughout the western hemisphere. Draft texts entrench the same investment and services disciplines of NAFTA, whose implications we have examined earlier. Here we consider how these can work in tandem to dismantle public control of water and water services.

There are two important differences between the GATS and NAFTA services rules. First, the rights of foreign service providers under NAFTA are effectively coterminous with their rights as foreign investors, including the right of private enforcement under investor-state dispute resolution.

Second, unlike the GATS, NAFTA services rules apply to all services unless explicitly exempt or reserved. There is no general exclusion for services *delivered in the exercise of government authority*. Moreover, unless reserved, services are subject to all NAFTA services disciplines. Therefore, much of the tortured debate on the application of GATS services is simply moot under NAFTA.

If the FTAA replicates NAFTA, it will include exemptions for non-conforming measures and certain social services provided they are *maintained or promptly renewed*.[70] Moreover, no amendment can decrease the conformity of the measure with NAFTA disciplines. Therefore once public-sector services are privatized or delivered through public-private partnerships, there is to be no retreat. Any such privatization initiatives may also undo the application of any exemption for social services.

For example, Canada, Mexico and the US all declared reservations for certain social services under NAFTA. Canada has reserved:

> *… the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social*

[69] The only significant qualification for public services is listed as a horizontal reservation by Canada to its schedule from National Treatment as this obligation to services supplied through commercial presence as follows: The supply of a service, or its subsidization, within the public-sector is not a breach of this commitment, see note 22.

[70] See NAFTA articles 1108 and 1206.

security or insurance, social welfare, public education, public training,health, and child care. [emphasis added][71]

Do public water services fall within the parametres of this reservation? This would appear unlikely, as the reservation fails to mention water, sewage, waste and other environmental services - and the wording of this reservation suggests that it was intended to be exhaustive.

However, even if inclusion of water supply can be implied, contracting with the private sector to provide a "social service" is likely to remove that service from the reservation. The US view on this point was summed up by the United States Trade Representative this way:

> *The reservation in Annex II U-5* [the US equivalent to Canada's] *is intended to cover services which are similar to those provided by a government, such as child care or drug treatment programs. If those services are supplied by a private firm, on a profit or not-for-profit basis, Chapter Eleven and Chapter Twelve apply*.[72] [emphasis added]

Thus the US holds that the participation of a private partner would negate the reservation even if the service was provided on a not-for-profit, i.e., non-commercial, basis. Accordingly, when it comes to the question of water supply, NAFTA and proposals for the FTAA are more problematic than the GATS, for two reasons. First, the reservation for public services under NAFTA is much narrower. Second, unless reserved, all NAFTA services disciplines apply without further qualification.

The Question of Procurement

The question of government procurement is also important to the viability of public-sector services, as procurement relationships are exempt from certain services and investment disciplines.

Unfortunately, neither the WTO nor NAFTA agreements define the term "procurement", which is usually understood as meaning the purchase of products and services by governments and government agencies for their own consumption, direct benefit, or use.

Thus, contracts with governments for provide goods or services to be used outside government is not, by such definition, "procurement." This view is supported by the NAFTA stipulation that *procurement does not include: (a) ... government provision of goods and services to persons or state, provincial and regional governments.*[73] Rather such arrangements are likely to be considered concession agreements, defined as:

> *agreements where public authorities entrust a third party with the overall or partial management of works or services which are normally the authority's responsibility and for which the third party in essence assumes the operating risk.* [74]

Indeed this is the characterization given contracts to supply waste management and water services respectively, in two recent investor-state claims.[75] Neither case raises the issue of procurement.

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[71] NAFTA Annex II Reservations.

[72] Correspondence from the USTR, Michael Kantor to the Attorney General for the State of Oregon, Mar. 1996.

[73] Article 1001.5 of NAFTA

[74] This European Commission definition can be found at http://europa.eu.int/comm/internal_market/en/publproc/general/concen.htm

[75] See the preceding discussion of the CGE/CCA claim against Argentina, and an claim under NAFTA investment rules by Robert Azinian against the government of Mexico, note 53.

Concessions involve the transfer of responsibility for the provision of goods or services to the public, from government to a third party. Procurement refers to the acquisition by the government of "economic" goods or services from a third party for the government's consumption. Water privatization schemes are obviously much more akin to the former.

Nevertheless, concession arrangements could be considered to be government procurement - indeed the WTO secretariat may be of this view.

However, it is unclear where procurement ends, and privatization begins. Would a public-private partnership to provide goods and services qualify as government procurement? There are several reasons to suspect that it would not.

First, the nature of a partnership fits poorly with the arms length character of the typical purchase and sale procurement contract. Second, public-private partnerships to design, build and operated water treatment facilities often extend for the life of the facilities. The longer the term of the contract, the more likely it is to be characterized as privatization rather than procurement.

Such a partnership may also be viewed as a hybrid between an outright sale and a procurement arrangement. Should a trade challenge or foreign-investor claim arise in this context, an international tribunal will determine how such a contract should be characterized for the purposes of international investment or services disciplines. Given the decisions of such tribunals to date, it is unlikely**,** that the rights of foreign investors or services providers would be denied because of the ill-defined boundaries of government procurement relationships.

For all these reasons, it would very unwise to assume that P3 arrangements to provide water services would be considered procurement agreements under NAFTA, the WTO or the BITS. Moreover, leaving the outcome to the vagaries of international trade or investment tribunals would be reckless given the need to preserve public control over the delivery of such services.

It is also important to acknowledge that trade liberalization objectives for procurement continue to be pursued, under NAFTA, the WTO**,** and as part of its FTAA project. If established, constraints imposed by multilateral procurement rules will be much like those imposed by investment and services disciplines.

Finally, debates on the merits of public ownership have been taking place for years, and certainly public-sector service delivery is no panacea for guaranteeing accountability and sound environmental practice. However, in the face of the growing number of privatization initiatives that have failed,[76] GATS disciplines embody an overwhelming and undeniable bias in favour or pro-competitive and privatization objectives.

While a formal right to preserve the public-sector character of water supply services may remain, nations must be vigilant to preserve this policy option, in the face of great pressure to relinquish it. They must guard against proposals, such as the EC's that would explicitly extend the application of GATS disciplines to water services, but they must also defend against the assault on their role as water stewards and service providers in services negotiation concerning sectors that may either deplete or pollute water resources or that are in the business of building, dams, pipelines, irrigation and other water infrastructure.

Conclusion

[76] See note 10.

The advent of international investment and services agreements has superimposed binding international disciplines over the exercise of sovereign authority concerning water. As we have seen, these agreements codify an agenda of privatization, deregulation and free trade, which is fundamentally incompatible with maintaining public ownership of water, public-sector provision of water services, and public regulation for conservation and environmental purposes.

Moreover, the powerful private enforcement machinery of international investment treaties has now been invoked by several transnational corporations to assail water protection laws, water export controls, and decisions to re-establish public sector water services when privatization deals have gone sour. Only slightly less problematic is state-to-state enforcement of the GATS and other international services agreements. In fact, it is important to understand that international such services agreements are also about the rights of foreign investors – i.e. transnational corporations - to operate free from many forms of government control, even in the most local context.

While these international 'trade' regimes establish certain exceptions that may allow governments to rebuff trade challenges and investor claims, these safeguards are ambiguous, highly qualified, and limited in their application.

Moreover, even the modest environmental exceptions that apply to other international trade agreements have largely been written out of international investment and services agreements.

In many ways, the establishment of truly enforceable international disciplines, crafted to serve the interests of the most powerful private institutions in the world, represents a profound challenge not only to the sovereignty of nations, but to the protection of such fundamental human rights – as the right to water.

If water is to remain part of the global commons, with use and allocation decisions reflecting the public trust; and if water is to be a basic human right guaranteed every human being – then international trade, investment and services agreements must be fundamentally reformed to restore the sovereign authority of governments to achieve these ecological and human imperatives.

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