

GATS, Water Services and Policy Options

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Ensuring Access to Water and Sanitation The Trade Dimension

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GATS, Water Services, and Policy Options

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The current negotiations of the General Agreement on Trade in Services, and the stated goal of the EU and other WTO members to lock in liberalization of water services, raise important questions of water governance and the public interest. I wish to discuss five factors in the GATS and current talks which may affect the crucial role of government involvement in the provision of this essential service.

1. Does GATS apply to government services?

In an analysis of implications of GATS for governmental services, the Government of British Columbia in Canada noted:

In Canada, as in most other WTO countries, "public services" are rarely delivered exclusively by government. Instead, vital public services (including water) are delivered to the population through a mixed system that is funded and regulated by governments (and)...consist of a complex, continually shifting mix of governmental and private funding and governmental, private not-for-profit and private for-profit delivery. An effective exclusion for "public services" must therefore be broad enough to protect governments' ability to deliver services through the mix that they deem appropriate and to preserve their regulatory authority over all aspects of these mixed systems¹.

As we have found:

Although the GATS contains an exemption for government services, (the exemption) only applies to those services that are "neither supplied on a commercial basis nor in competition with private suppliers." (GATS I 3(c)) The WTO concedes that the meaning of "commercial basis" is unclear,² noting that services provided on a commercial basis are covered by GATS, whether the owner of the business is a public or private entity.

...

Since many municipal services are provided by a mix of public and private operators (...including water and wastewater in many countries...), it seems unlikely that they could be classified as both non-commercial and non-competitive.³

In a comprehensive examination of the uncertainties surrounding this exemption, officials of the Government of British Columbia identified numerous uncertainties regarding its application⁴:

- The exclusion is very narrow, given that both excluding criteria must apply; the service must be supplied on a non-commercial basis **and** not in competition with another supplier;
- Ordinary dictionary definitions of the terms of both criteria are broad;
- A similar exclusion in the European communities treaty has been interpreted very narrowly;
- WTO statements about the GATS coverage are not reassuring; some merely reiterate the text, others use a narrow definition of public services; others suggest that the exclusions are very limited; others (such as the Secretariat paper) confirm the uncertainties.

In summary, the purported GATS exemption for services provided by government authorities is at best uncertain and unreliable, and given the common fee-for-service delivery of water and wastewater services, a WTO dispute panel may well find that the GATS rules apply to these services.

2. Water and the services classification system.

The GATS is based on the complex classification of thousands of services, including a specific one for water services⁵. Some government officials argue that if a country does not list that classification in its commitment schedule, it has made no commitment to liberalize water.

However, the provision of water services actually requires elements of many other services, and if portions of those services are committed, the door is open to foreign service suppliers, including water corporations, to contest measures that may exclude or limit their rights to provide water services.

These related services include (amongst others):

- engineering and project management services for water supply and sanitation work,
- sewage services,
- sanitation and similar services,
- business services,
- construction services,
- technical testing and analysis services including quality control and inspection,
- urban planning and landscape architectural services,
- architectural services,
- nature and landscape protection services,
- Other environmental services.

The myriad problems of services classifications bedevil negotiators and governments. To maintain full governmental authority over water services, decision-makers need to consider all the different services that are part of

providing water when determining what effect commitments of them might have on water.

3. The overlap of GATS and GATT obligations

As the Government of British Columbia has noted:

WTO trade panels have recently ruled that government measures which cover goods, but which "affect" trade in services, are also covered by the GATS rules. WTO trade panels also ruled that measures designed to cover services, but which affect trade in goods, are covered by the General Agreement on Tariffs and Trade (GATT). This adds another layer of complexity for governments and their citizens when attempting to assess whether or not new measures will be trade consistent⁶.

The EC banana case concerned EU measures for preferential access of bananas from its former colonies. The measures were WTO -inconsistent but protected by a waiver. The US successfully challenged their impact on US multinationals as service providers in wholesale trade and distribution in Europe⁷.

The Canadian magazine case concerned a Canadian prohibition on "split-run" magazines which included advertisements aimed at the Canadian audience with editorial content that differed little from the US editions. This allowed lower costs for advertisers. Canada applied an 80% excise tax on advertising in split-run magazines, together with lower postal rates and postal subsidies. All these measures were found WTO-inconsistent, although Canada had not made commitments on advertising under GATS. The panel found that rules on goods and services are "overlapping," and that the US products, despite different editorial content from Canadian magazines were "like products" or, as the Appellate Body found, "directly competitive and substitutable products" entitled to equal treatment.

This overlap of WTO goods and services provisions adds another element of uncertainty for government negotiators, and provides another reason to avoid commitments which may have unintended consequences.

4. The Working Party on Domestic Regulations: implications of negotiations under GATS VI(4)⁸

Governments are currently negotiating under GATS Article VI(4) which requires the development of "disciplines" on countries' domestic regulations over services. Specifically, the article seeks to prevent "unnecessary barriers to trade" in regulations regarding "qualification requirements and procedures, technical standards and licensing requirements" and to ensure that regulations are "not more burdensome than necessary to ensure the quality of the service."

In our view, this entire exercise is unjustified. There should be no role for the WTO in over-seeing non-discriminatory domestic regulations (those which do not discriminate in standards and qualifications based on nationality.) This exercise represents a wholly unwarranted intrusion of trade law into important domestic public safety laws.

We are concerned with discussions of instituting a “necessity” test for domestic regulations over services, as the “necessity defence” has been rejected by GATT and WTO decision panels in all but one case (the *Asbestos* case). In our view, the “necessity” test will not provide a defence to the challenge of services regulations, including those necessary to ensure the safety of water systems.

Further, the GATS term “not more burdensome than necessary “ is vague, uncertain, and inappropriate as a criterion of measurement of public protections. It invites decision-making in favour of strictly economic interests. What is the standard for measuring “burdensome?” Does it include measures that add mere inconvenience to potential exporters, or must it entail significant costs or even serious disadvantage?

The concept of regulations being burdensome conflicts with the increasing relevance of precaution in regulation-making for the environment and human health. Application of a precautionary principle or approach involves taking steps to prevent or minimize harm when a risk has become apparent, even though scientific uncertainty exists regarding some elements of the risk and the cause-effect relationships that produce it. Technical standards implemented on a precautionary basis are likely to be particularly vulnerable to a finding that they are unnecessarily burdensome.

With regard to water services, a broad range of regulations for the construction and operation of water systems and the quality of water are implicated in these discussions. The attached Annex provides examples from Ontario legislation of the breadth and detail of regulations deemed necessary to ensure safe water. These include technical standards and professional accreditation and training requirements, the types of regulations which could become vulnerable to challenges under GATS and are the subject of current discussions.

Further, GATS XIV, a “General Exception” similar to the GATT Article XX, does not include protection of measures for the conservation of resources, so measures for the conservation of water, land or energy (related to water service provisions) could be vulnerable to challenge.

Water services may require regulations regarding:

- land use planning to protect water sources,
- development controls on business establishment,
- environmental assessment regarding siting of facilities
- measures to promote water efficiency and reduction of use,

- measures for energy conservation in water management,
- subsidies (GATS covers subsidies, so that private water companies may seek access to the subsidies now paid to public water providers)
- operators' and engineers' training and qualifications.

The Federation of Canadian Municipalities has emphasized the need for flexibility in designing water systems. The potential of GATS-based challenges to domestic regulations reduces governments' flexibility in regulating water services for the benefit of the public, and is an important reason to resist any move toward a necessity test or other WTO disciplines on non-discriminatory domestic regulations.

5. GATS commitments are effectively irrevocable.

GATS Article XXI gives governments the option to modify or withdraw any commitment in its schedule. To do so, however, a government must be prepared to negotiate "compensatory adjustments," in the form of reciprocal trade concessions, with the governments of foreign service providers who are affected by this withdrawal. If the government withdrawing commitments does not make the agreed compensatory adjustments it may face trade sanctions, which can occur in any sector.

However, the extent of the compensation necessary to successfully invoke Article XXI makes this an unrealistic and probably unworkable option for governments.

Since countries may permit the establishment of foreign service providers (including for water services) without making a GATS commitment to do so (autonomous liberalization), that option is preferable. It does not prevent subsequent changes in policy, while a GATS commitment makes the decision effectively irrevocable, and permits challenges to a range of public water services and regulations.

Conclusion

Water is an essential of life and a human right to safe water is increasingly recognized. The Millennium Development Goals and various UN processes and strategies are directed to ensuring access to water for those who lack it. The negative legacy of privatized water services in numerous countries means that governments need to maintain control and oversight over this resource to ensure that people have adequate, safe water.

As GATS commitments can undermine these goals, it is preferable that countries not agree to list water services or related services during these negotiations.

Annex

Example of regulation of services related to water quality

A representative example of necessary health and environmental regulations pertaining to water exists in *Ontario Regulation 459/00, Regulation Made Under the Ontario Water Resources Act* entitled *Drinking Water Protection*. The regulation is considered necessary in the wake of the Walkerton, Ontario tragedy, where seven people died and two thousand became ill due to contaminated water

The regulation prescribes the minimum acceptable level of treatment of water, whether from surface or ground water source, and provides standards (parameters) for sampling and analysis, (Sec.7 and Schedule 2)) and for experience , education and /or training of those who do the sampling (7c ii A and B) ie. provide these services.

Schedule 2, Sampling and Analysis Requirements includes extensive details regarding how samples are to be taken for testing for various factors (microbiological, turbidity, chlorine residual, fluoride, volatile organics, inorganics, nitrates/nitrites, pesticides and PCBs)

Schedule 6 includes “Indicators of Adverse Water Quality” together with required corrective actions and notifications to relevant authorities.

The Regulation requires immediate reporting of test results that exceed specific parameters to the Ministry of Health and Ministry of Environment verbally and in writing and prescribes corrective actions for exceedences including re-sampling and warning notices. There are also requirements for public information, and quarterly reports to the Ministry of Environment. (Sections 11 and 12)

Section 13 refers to the professional accreditation of the writers of the reports; the writer: must be a professional engineer “as defined in the *Professional Engineers Act* who has experience in sanitary engineering related to drinking water supplies and who is not an employee of the owner.” (Section 13 (2) There are differing and specific reporting requirements depending on the category of water treatment or distribution system.

In summary, Canada has domestic technical regulations regarding services related to water that cover both the method of sampling and inspection, reporting to the government and the public, and who may perform certain functions (engineers with accreditation and experience.)

Regulations pertaining to water and sewage works construction and maintenance

The *Ontario Water Resources Act* (RSO 1990, chapter O.40, Section 75 authorizes Cabinet to make regulations regarding all aspects of construction and

maintenance of water and sewage works. Twenty-three different subject matters are regulated for each type of system.

Regulations exist concerning “the location, construction, repair, removal or alteration of mains, service pipes, valves, hydrants and all other works in or upon public property that form part of or are connected with water works” and “the location, construction, repair, removal or alternation of sewers, drain pipes, manholes, gully traps and all other works in or upon public property that form part of or are connected with sewage works.” (Section 75, (a and d))

Requirements for licensing or operators of water and sewage works are also regulated, together with the classification and qualifications of persons who may obtain licences. (Section 75 h) as well as operating standards for the works. Similar complex detailed requirements pertain to construction, maintenance, notices, records and abandonment of water wells and the requirements and standards of qualifications for well contractor and well technician licenses. (Section 75 2).

In summary, the various services required for the construction and maintenance of water and sewage works are subject to detailed regulatory standards.

¹ Ministry of Employment and Investment, Government of British Columbia, “GATS and Public Service Systems,” April 2001, and sources cited in it, originally posted at www.ei.gov.bc.ca/Trade&Export/FTAA-WTO/WTO/governmentalauth.htm, now available at http://members.iinet.net.au/~jenks/GATS_BC2001.html

² WTO Council for Trade in Services, Environmental Services, Background Note by the Secretariat, S/C/W/46/ 6July 1998 (98-2690), Paragraph 53

³ Michelle Swenarchuk, *From Global to Local: GATS Impacts on Canadian Municipalities*, 2002, Canadian Environmental Law Association and the Canadian Centre for Policy Alternatives, www.cela.ca .

⁴ Ministry of Employment and Investment, Government of British Columbia, Op.Cit

⁵ CPC 69210, “Water, except steam and hot water, distribution services through mains.”

⁶ Government of British Columbia, Op Cit.

⁷ Scott Sinclair, *GATS:—How the World Trade Organization’s new “services” negotiations threaten democracy*, Canadian Centre for Policy Alternatives, Ottawa, 2000. See the discussion of GATS disputes at pp. 42-55.

⁸ This discussion is based on; Michelle Swenarchuk, “General Agreement on Trade in Services: Negotiations concerning Domestic Regulations under GATS Article VI(4) , submitted to the Department of Foreign Affairs and International Trade and to Industry Canada, November 24, 2000”, at www.cela.ca.