

IS THE WTO AFTER YOUR WATER?

THE GENERAL AGREEMENT ON TRADE AND SERVICES (GATS) AND THE BASIC RIGHT TO WATER

Lyla Mehta
Birgit La Cour Madsen

Institute of Development Studies
University of Sussex

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ABSTRACT

This paper investigates controversies surrounding efforts to liberalise domestic water-related services under the auspices of the World Trade Organization's (WTO) GATS (General Agreement on Trade in Services) framework. In particular, it examines the potential implications for poor people's rights to water. By examining WTO/GATS provisions against the backdrop of debates around water privatization and the linkages between trade and rights, the paper asks whether it is contradictory to see water both as a commodity in international trade and as a basic right of people. It demonstrates that while extending the coverage of GATS to water-related services may not necessarily undermine, *de jure*, the ability of member-states to introduce the kind of legislative measures that are necessary to safeguard the interests of the poor, there are a number of reasons to think that, *de facto*, the exercise of policy autonomy might be substantially curtailed. These constraints on the capacity of member-states to protect the poor stem from (a) inherent ambiguities in treaty interpretation; (b) power asymmetries and a lack of transparency in multilateral processes of negotiation, policy review and dispute settlement; and (c) institutional and other deficiencies in the domestic politics of WTO member-states. These and other factors can potentially lead to conflicting aims and contradictory outcomes around issues of trade, water provision, equity and rights.

I. Introduction

Water, considered increasingly scarce, is essential for human existence. In most parts of the developing world, water technology development and service delivery have conventionally fallen under the jurisdiction of the state and the provision of water is often considered to be a basic entitlement of citizenship. However recent international debates concerning poor people's access to water are increasingly evoking the liberalisation of water services as (a) an answer to developing countries' financial difficulties and (b) as a way to 'improve' the efficiency of water services. In this context the potential role of the World Trade Organisation (WTO) has been particularly controversial. During the Uruguay Round of 1995 the scope of multilateral negotiations were extended to include the trade in services. The outcome was the General Agreement of Trade in Services (GATS) which was established on January 1, 1995. It was agreed that negotiations on services would recommence in 2000. Also known as GATS 2000, this was initiated in order to strengthen the GATS framework and enhance world trade in services. Under the auspices of GATS, member countries are currently negotiating the liberalization of a wide range of services from education to tourism to rubbish collection and environmental services which hitherto largely fell under the jurisdiction of state control.

Since the late 1990s, the WTO and GATS have come under severe attack by a high profile world-wide campaign mobilised by organizations such as the World Development Movement, Friends of the Earth, Save the Children, Focus on the Global South and Equations in both the North and the South. The WTO has been accused of displaying a severe democratic deficit in the way its agenda has been hijacked by corporate interests, thus having a detrimental impact on the lives and livelihoods of the poor in developing countries. GATS 2000 is seen to be a 'frontal attack on the fundamental social rights' enshrined in several UN declarations and accompanying charters and covenants, in particular due to its potential to promote the commodification of life giving resources such as water and apply market-based mechanisms on sensitive sectors such as health and education. The controversies around the GATS/WTO have also raised questions concerning developing country governments' ability to utilise policy mechanisms that can regulate services in such a way as to achieve the universal delivery of basic services and safeguard the interests of poor people.

This paper investigates controversies surrounding efforts to liberalise domestic water-related services under the auspices of the World Trade Organization's (WTO) GATS (General Agreement on Trade in Services) framework. In particular, it examines the potential implications for poor people's rights to water. By examining WTO/GATS provisions against the backdrop of debates around water privatization and the linkages between trade and rights, the paper asks whether it is contradictory to see water both as a commodity in international trade and as a basic right of people. It demonstrates that

while extending the coverage of GATS to water-related services may not necessarily undermine, *de jure*, the ability of member-states to introduce the kind of legislative measures that are necessary to safeguard the interests of the poor, there are a number of reasons to think that, *de facto*, the exercise of policy autonomy might be substantially curtailed. These constraints on the capacity of member-states to protect the poor stem from (a) inherent ambiguities in treaty interpretation; (b) power asymmetries and a lack of transparency in multilateral processes of negotiation, policy review and dispute settlement; and (c) institutional and other deficiencies in the domestic politics of WTO member-states. These and other factors can potentially lead to conflicting aims and contradictory outcomes around issues of trade, water provision, equity and rights.²

It must however be borne in mind that the analysis is inherently speculative due to the ongoing nature of the negotiations and due to the fact that domestic water service delivery is not officially one of the GATS sectors. No country has so far liberalised its domestic water services under the auspices of the GATS. However 41 countries have recently offered commitments on wastewater treatment and it is now widely acknowledged that the European Commission (EC) is interested in including water service delivery in the definition of environmental services under GATS. Thus, the debate around water privatisation, the GATS and poor people's access to water is clearly already a controversial one that warrants discursive, conceptual and empirical analysis. The analysis is conducted both conceptually and empirically on the basis of desk-based research of the growing literature on WTO / GATS negotiations, NGO statements and the general literature on water privatisation experiences and it is complemented by semi-structured interviews with negotiators, campaigners, journalists and bureaucrats. One caveat is in order: We are aware that rights discourses are often highly contested due to their universalist assumptions, which disregard local variations and ambiguities. While these hold more for negative rights, positive rights also have problems around universalist standard settings, gaps between rights talk and rights implementation and the role of power-brokers in making rights real for the marginalized. Still, we believe that it is worth exploring relationships between rights and trade / markets, not least because the institutionalization of basic rights could serve to protect people's access to basic services and counter-veil the negative impacts of commodification and marketisation on poor people's lives and livelihoods.

The paper begins by examining the multifaceted nature of water and what this means for privatizing water service delivery. It then goes on to review non-GATS privatization experiences and their special characteristics with respect for universal access. After examining the controversies around the GATS, the paper investigates whether GATS provisions could undermine a government's freedom to regulate in a manner consistent with equity and social considerations. The paper concludes by arguing that such safeguard provisions would exist in an ideal world. However, in practice the politics of

² This paper cannot handle the highly fascinating politics of activism around the GATS and its potential institutional change which raises questions around the impacts of the campaign on negotiators' positions, ongoing negotiations and agreements and alliances between northern and southern NGOs and between NGOs and bureaucrats. These issues will be addressed in another paper currently under preparation by Lyla Mehta.

process, ambiguity and power politics at the multilateral and domestic level leave many doubts regarding poor people's rights to basic services under GATS.

II. The multifaceted nature of water

Water is uniquely and fundamentally essential for all aspects of life, well being and productivity. It is also the lifeblood of ecosystems, essential for many eco-hydrological functions. For poor people, access to clean and affordable water is a pre-requisite to achieving a minimum standard of health and to undertake productive activities. People across the globe value water for both its non-economic and economic roles. In addition, water has deep cultural, symbolic and spiritual significance in many cultures ranging from the holy significance of the Rivers Ganga and Narmada in Indian cosmology to the role of the Balinese water temples in irrigation management in Indonesia.³ It is estimated that 1.1 billion people lack access to safe water and almost 2.5 billion people—40 percent of the world's population—lack access to adequate sanitation (Neto and Tropp 2000, p. 227). Moreover, it has been argued that increasing global consumption of water coupled with population growth will lead to severe water shortages, with profound effects on food security, health, and human well-being (Postel 1992, 1996).

Is water a right or a commodity? There is no consensus. Water is a contested resource: though it is often considered to be a common pool resource, it is rival in consumption. Access to water reflects power asymmetries, socioeconomic inequalities, and other distribution factors. Many current donor discourses are seeking to turn water, essentially an impure public good, which is highly localised, into a globalised private good (see Mehta 2003). Since the Dublin Declaration of 1992 (<http://www.wmo.ch/web/homs/icwedecce.html>), water is increasingly seen as having economic value in all its competing uses. By implication it is being argued that the basic human need for safe drinking water can no longer be regarded as a sufficient criterion for providing an engineered supply free of charge (Black 1998, p. 55). Because water is scarce, goes the logic, it must be used judiciously and its demand managed. Free water is considered wasted. Accordingly, efficient resource management is equated with water having a price. The price signal is thus evoked as a way to solve water scarcity problems. However, the declaration of water as an economic good often robs water of its multiple meanings and roles, especially in the socio-cultural and symbolic realms.

More recently, a growing number of analysts have argued eloquently that access to safe and adequate water is a human right.⁴ Advocacy for positive rights—such as access to water, food, and shelter—marks a sharp change from the negative or liberal understanding of rights that underpins notions of liberal democracy. Over the past

³ Specifically see Mehta and Punja (Forthcoming) and Lansing (1987) for a discussion of the symbolic and cultural value of water.

⁴ See for example, the NGO statement at the Bonn Conference on Freshwater (NGO major group 2001); Vision 21 of the Water Supply and Sanitation Collaborative Council (WSSCC 2000); Petrella (2001); Gleick (2000); Jolly (1998), and right-to-water@iatp.org.

century, however, citizenship has increasingly been seen as encompassing social and economic rights. In fact, the distinction between negative and positive rights is highly problematic because both involve state intervention and commitments for their protection and there is now a growing recognition that both are inter-related and indivisible.⁵

Supporters argue that water and sanitation are not just basic needs but fundamental human rights based on the criteria established in international declarations that protect the right to livelihood and wellbeing.⁶ Curiously enough the right to water was not explicitly endorsed in the 1948 Universal Declaration of Human Rights (UNDHR). Gleick noted in 2001 that amongst most of the major references and bibliographies related to human rights there were no citations around water (Gleick 2001). The right to water is implicitly mentioned in the 1948 Universal Declaration of Human rights and it is explicitly mentioned only in the Convention of the Rights of the Child (1989). The lack of explicit references makes Gleick ask: ‘ Is water so fundamental a resource, like air, that it was thought unnecessary to explicitly include it at the time when these agreements were forged? Or could the Framers of these agreements have actually intended to exclude access to water as a right, while including access to food and other conditions of qualities of life? (Gleick 2001: 4-5). After reviewing several of the documents, Gleick concludes that the drafters implicitly considered water to be a fundamental right , not least because most other basic rights explicitly protected by international rights (around food, health and development) require access to a minimum amount of safe and adequate water.⁷

In 2002, a comment by the United Nations Committee on Social and Economic Rights explicitly recognised the right to water as a human right and stressed its importance in realising other human rights.⁸ It also stressed the role of states in progressively realising the right to water which is determined to entail the provision of sufficient, safe, affordable water to everyone. Still, current orthodoxies in the water domain tend to focus on the need to view water as an economic good. There is also the underlying assumption in most discourses—especially those originating in donor countries— that there is a

⁵ For a discussion of citizenship and the right to water see Mehta (2003a). For wider debates on citizenship and social and economic rights see Plant (1992 and 1998).

⁶ For example, ‘ the right to an adequate standard of living for the well-being of individuals and their families, including food, clothing, housing and medical care (Universal Declaration of Human Rights, Article 25.1 1948; International Covenant on Economic, Social and Cultural Rights (ICESCR) 11; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 14.2h; International Convention on the Elimination of all forms of Racial Discrimination, 1965 (ICERD) 5e; CRC 27.1). The Copenhagen Programme for Action sets out the commitment to ensuring universal access to basic social services with particular efforts to enhance the access of vulnerable groups (World Summit on Sustainable Development, WSSD commitment 6).

⁷ For example, The now Article 25 of the 1948 UNDHR states: ‘Everybody has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing and housing’ (United National General Assembly 1948).

⁸ General comment E/C.12/2002/11, dated 26 November 2002, accessed 29 December 2002 at: http://www.waterobservatory.org/library/uploadedfiles/right_to_water_Articles_11_and_12_of_the_Inter.pdf

congruity between viewing water as a right and as an economic good. For example, the United Nations Children's Fund (UNICEF) and the World Water Council mention economic efficiency arguments and rights-based arguments in the same breath (see Nigam and Rasheed 1998, pp. 3–7). It is argued that even if something is a right, there is no denying the need to pay for it, as with food. These struggles in conceptualising water, its characteristics and different approaches concerning its distribution and allocation play a significant role in framing international debates of water, trade and rights to which we return in subsequent sections of the paper.

III. Water privatization and poor people's rights to water

In general, water services have traditionally fallen under the jurisdiction of the state in both industrialised and developing countries and water distribution has been the responsibility of state-owned enterprises. Governments in both the North and the South are, however, increasingly responding to the demand for large network expansions and quality improvements by promoting the privatisation of water services. This is because greater use of the market mechanism in basic social service delivery is believed to be more cost-effective and lead to improvements in the 'efficiency' of the service. However as Rayner (2003) has argued the notion of 'efficiency' in justifying technology and technology provision needs to be questioned since it draws on Bentham's notion of the greatest happiness for the greatest number which has led to a preference for a 'stocks and flows kind of analysis' which does not disaggregate societies by analysing the differential impacts of technological change or put equity issues upfront.

The trend towards water privatisation has been most visible in developing countries. This has been less a reflection of these countries' domestic policy priorities, and more due to World Bank and International Monetary Fund (IMF) loan conditionalities and adjustment programmes. A random review of IMF loan policies in forty countries, which was carried out in 2000, for example showed that IMF loan agreements with 12 borrowing countries included conditions imposing water privatisation or cost recovery requirements (Grosky, 2001). The large majority of these countries were African, although a few Latin American countries, such as Honduras and Nicaragua, were also represented. With respect to the World Bank, its support for water privatisation in developing countries has been manifest since its publication of the 1994 'World Development Report' on infrastructure and has recently been restated in its controversial 'Water Resources Sector Strategy' (World Bank, 2003).

The water sector, along with other utilities, has certain specific characteristics, which have clear implications for the way water is managed. Firstly, very few elements of the water sector are natural competitive, in other words it is characterised by a high level of natural monopoly (Rees, 1998). This obviously limits the efficiency of water markets and typically requires interventions, in the form of a price ceiling, in order to protect consumers from monopoly power abuses (Barr, 1998). Secondly, the water sector is characterised by high capital intensity and the presence of sunk costs, which implies that the investments undertaken in the infrastructure needed to provide a service are neither

transferable or redeployed for other purposes (Rees, 1998; Ugaz, 2001b). This invariably increases the risk attached to investment in the sector.

Taken together the above characteristics have often been used to argue for the public provision of water services. In most parts of Europe, public provision has traditionally been considered to be the best way of guaranteeing the principle of universalism, based on its ability to pool risk and make use of cross subsidies to provide low income households, or those who live in high provision cost areas, with affordable services (Finger and Allouche, 2002). The importance of public services in Europe may explain why GATS campaigners have succeeded in mobilizing so much support in Europe and why many OECD countries are hesitant to liberalise water service sectors.⁹

Despite being in public control, developing countries have often failed to universalise access to water services. This is due to various reasons which include inadequate financial resources to undertake the investments needed for adequate provision of these services (World Bank, 1994; Ugaz, 2001a), mismanagement and poor institutional arrangements. Consequently, privatisation has been promoted as the appropriate remedy. Often this has taken place through World Bank and IMF induced conditionalities. There is also a growing coming together of the WTO, IMF and the World Bank in mainstreaming the role of trade liberalization in international development, which are enforced through conditionalities in return for multilateral lending. For example, between 1997-2001 at least 36 countries have agreed to comply with WTO accession requirements or have committed to accelerate the implementation of WTO rules either as stated commitments in their formal IMF Poverty Reduction Strategy Programmes (PRSPs) or as an actual condition of IMF lending (Rowden in Kwa 2002). Seen in this light, GATS-driven liberalization is merely a continuation of liberalization experiences that developing countries have already encountered, over which they often have not been able to exercise much control.

'Privatisation' refers to "the transfer of majority ownership of state-owned companies (SOEs) to the private sector by the sale of ongoing concerns or of assets following liquidation" (Kikeri, Nellis and Shirley, 1994: 242). In the water sector this transfer of ownership takes place in a variety of different ways. As table 1 shows private involvement in the water sector can either be organised as: a service contract, a management contract, a lease contract, a build-operate-transfer contract (BOT), a build-operate-own contract (BOO), a concession contract or a divestiture, which each has different characteristics.

Table 1. Forms of private sector participation in the water sector

Contract Type	Service contract	Management contract	Lease	BOT/BOO	Concession contract	Divestiture
Asset				Public and		Private or

⁹ Interviews with John Hilary, ActionAid UK (28/6/03) and Mireille Cossy, WTO Secretariat (18/6/03).

ownership	Public	Public	Public	private	Public	public and private
Capital investment	Public	Public	Public	Private	Private	Private
Commercial risk	Public	Public	Shared	Private	Private	Private
Operations and maintenance	Public and private	Private	Private	Private	Private	Private
Tariff collection	Public	Public/private	Private	Public	Private	Private
Duration	1-2 years	3-5 years	8-15 years	20-30 years	25-30 years	Indefinite (may be limited by license)

Source: Bakker (2002)

Past experience of the last two decades suggests that concession contracts are the most widely adopted privatisation arrangement in the water sector (Nickson, 1996). While open competition among competitors *in* the market is not possible, because of the water sector's status as a natural monopoly, the use of such contracts allow states to create competition *for* the market (contestability). Thus private utilities are seen to allow market-based mechanisms to discipline the companies and assure higher efficiency levels and investments. Of course, such a situation also creates a parallel opportunity for rent-seeking behaviour on the part of both local politicians and companies (cf. Petrella 2001 and Cecilia Ugaz, personal communication).

The extent to which the widespread use of concession contracts in the water sector has had a positive or a negative impact on poor people's access to water is difficult to determine on the basis of existing evidence. In accordance with the typical arguments presented in support of private involvement in water distribution services, research on the impact of privatisation has so far tended to focus on competition, incentives and investments. Very little effort has gone into systematic assessment of the consequences of privatisation for poor people's access to water and their ability to pay for it. The polarized state-market debates often seem to miss a crucial point. If it is agreed that enhancing poor people's water security is the goal of water technology interventions, then increasing access and addressing equity concerns emerge as high priorities. The critical question thus is: does privatization promote a more equitable access to water? The evidence, which is available and publicly accessible, however indicates that we have no real reason to be sanguine.

Bayliss (2001) reviews the outcome of water privatisation schemes in three African countries: Guinea, Senegal and Cote d'Ivoire. While the nature of the contractual

arrangements that govern the involvement of private actors in the three countries' water sectors vary from medium term lease contracts to long term concession contracts, the outcome of the privatisation process is similar across all three cases. Connection rates have increased, sometimes significantly, and clear improvements are documented in core aspects of revenue rising, as a consequence of better tariffs, billing and collection rates. High prices have however, made public water supplies unaffordable for many of the poorest segments of society, which because of inability to pay have been hit by widespread disconnections. Moreover, it is highly unlikely that the poorest of the poor have benefited from the expansion of network connections, which has taken place in all three countries as a consequence of privatisation. As Rivera (1996) argues, experience shows that the poorest sections of a concession area tend to remain outside the extension perimeter of the privatised services, because they generally are perceived to be high-risk low return area among private operators of water services. As such it remains unclear whether and how available privatisation models can be applied in rural areas where people make and sustain livelihoods in a diverse and holistic manner and where reliance on the state, donor agencies and NGOs is also greater (Mehta, 2003).

The outcome of the 1993 privatisation of water and sanitation services in greater Buenos Aires in Argentina is somewhat similar to that of Guinea, Senegal and Cote d'Ivoire. While marked improvements in the access to water services took place in the period 1993-1999, where the number of households connected to the water distribution network improved by 30 percent, the price of water increased by 11 percent from 1993 to 1999. While it is difficult to determine to what extent this increase in the price of water is a reflection of the real costs involved in service provision, Ugaz (2001) argues, on the basis of calculations of consumer surplus changes, that welfare losses have been incurred by the privatisation of water services in Buenos Aires, and that these are affecting both rich and poor households.¹⁰

Consequently, price increases that place formal water supplies outside the reach of poor people appear to be a frequent outcome of water privatisation. Prices are often raised beyond agreed levels within a few years of privatisation and people who cannot pay are cut off (Bayliss, 2001; Petrella, 2001). One further example is Manila, where 'International Water', a UK/US consortium, doubled its prices within two years, despite the fact that the initial contract included specified price levels. Likewise, in the highly controversial and now well-known plan to privatise water services in Cochabamba in Bolivia, prices would have increased 35 percent. So, while it is true, as Nickson (2001) argues that 'efficiency' in terms of e.g. reduced leakages and improved billing and collection is enhanced in many cases by the involvement of private sector actors in water distribution services, experience shows that water privatisation is not always poor-friendly.

In sum, there is little evidence that the private sector is more efficient and cost effective in terms of impact on welfare when one considers questions related to access and affordability of water services. The changes introduced by the private sector are more

¹⁰ Please see Ugaz (2001:20) for an explanation of the methodology applied.

likely to be in the interest of profit rather than social development, since there is an inherent conflict between capital markets (which are looking for quick returns) and the need for long-term investment to improve water services in developing countries. As Donnelly (1999: p. 628) says ‘markets are social institutions designed to produce efficiency’. At times, though, markets can lead to compromising social and economic rights since markets ‘can systematically deprive some individuals in order to achieve the collective benefits of efficiency’ (ibid). The impacts of structural adjustment programmes are a good example of how the social and economic rights of poor people have suffered as a result of market-led growth strategies. While structural adjustment may have led to increased efficiency, they have had high social costs (see Social Watch 2003).

Domestically, as well as internationally, the liberalisation of public services makes the use of cross-subsidies, as a means to secure universal access to affordable services, rather difficult since firms may not want to compromise on the goal of profit maximisation. As the World Bank admits ‘(...) it is no longer possible for firms to make extra normal profits in certain market segments’ (World Bank, 2001: 80). Moreover, privatisation by concession typically results in the creation of a private monopoly and opens up possibilities for abuse of monopoly power, to the detriment of all consumers.¹¹ Therefore, it is essential that all countries have strong regulatory bodies in place prior to privatisation that can subject commercial providers to tariff regulations, quality standards, and other performance requirements, which are renegotiable in order to allow for adjustment to changing economic circumstances (Ugaz, 2001a; Rees, 1998). Still, in practice apparently neat public administration accountability checks in the form of regulators rarely function in a satisfactory manner. For example, in Buenos Aires, an independent regulatory agency was established to monitor the quality of service, represent consumers and ensure the fair implementation of the contract. However, critics have claimed that it was co-opted or even bribed by the private sector and overlooked crucial elements of Aguas Argentinas’ (the Suez Lyonnaise des Eaux-led private consortium) contractual obligations (Loftus and McDonald 2001: 16). By contrast, representatives from Aguas Argentinas felt that the regulator was an obstacle to service delivery and it is also claimed that the government did not respect the decisions made by the regulator, especially if they threatened corporate interests. This resulted in a weak regulator that subsequently was not consulted when the contract was re-written (ibid).

Even an apparently pro-poor concession agreement and the establishment of a legislative and regulatory framework was not sufficient to guarantee universal and affordable water and sanitation services for all sections of the population when water services were privatised in the Bolivian cities: La Paz and El Alto in 1997. As Carrasco (2002) argues, Bolivia's 'Law on Water Supply and Sanitation' and the establishment of the 'Superintendencia de Saneamiento Básico' as an independent regulatory body constitute key steps in the right direction, but have so far been unsuccessful in terms of extending improvements with respect to access to water and sewerage services to the poorest sectors of the population. These two examples call to question the assertion that

¹¹ Competitive bidding for the contract is however, believed to secure efficiency gains.

regulatory frameworks and institutions can work in the interests of the poor. Instead, they often either get captured by powerful interests or end up being too weak to resist them.

Thus, the universal provision of water services continues to require explicit state involvement with respect to safety-net regulation, based on the provision of direct subsidies to poor consumers (Rees, 1998; Ugaz, 2001; Finger and Allouche, 2002). The extent to which the ability of states to regulate private actors in the water sector and to explicitly support poor people's water consumption is likely to be circumscribed in cases where future water privatisations are undertaken under the General Agreement on Trade in Services (GATS) is the question to which we now turn.

IV. The controversies around GATS

The General Agreement on Trade and Services (GATS) was originally agreed in 1995 after being negotiated in the Uruguay Round of 1994. It is the first and only set of multilateral rules covering international trade in services. A new round of negotiations began in 2000 that aimed at extending the scope of the agreement. The agreement covers all services, except those provided in the exercise of governmental authority and those related to air traffic rights (WTO, 2002)¹². More specifically the agreement covers four different “modes of supply”, which define trade in services under the GATS (WTO, 1998:21):

Mode 1: *cross border supply*; does not require the physical movement of consumer or supplier, e.g. international telephone calls.

Mode 2: *consumption abroad*; requires movement of the consumer to the country of the supplier, e.g. tourism.

Mode 3: *commercial presence*; requires a foreign company to set up a branch to provide services in another country, e.g. banks.

Mode 4: *presence of natural persons*; requires the movement of individuals from their own country to supply services in another, e.g. construction.

With respect to future liberalisation of trade in water under the GATS mode 3 is likely to be the one of most relevance. However, cross border trade in water (mode 1) is also possible. One example is the export of fresh water from Canada to the USA.

The key principle of the GATS, which applies to trade in all service modes, is *non-discrimination* (WTO, 2002). This implies that all member states are required to extend

¹² Services provided in the exercise in governmental authority are defined as “those supplied neither on a commercial basis nor in competition with other suppliers” (WTO, 2002:1). The extent to which this implies that essential social services are not potentially subject to the GATS is widely debated see Krawieski, M., (2001) for a detailed discussion of this.

'*most-favoured nation*' treatment to all other members, i.e. to treat all trading partners equally¹³. This is less onerous than the principle of *national treatment*, which requires a country to give the same treatment to others as it does to its own nationals, although only in service sectors and modes of supply that are listed in the country's *schedule of commitments* (Ibid.). As the name implies 'schedules of commitments' lists individual countries' commitments to open markets in specific sectors. While a country, in its schedule, can limit the degree of *national treatment* it is willing to accord to foreign competitors in certain sectors, it can also specify the level of *market access* that it is prepared to grant (Ibid.). Limiting the degree of national treatment in a certain sector may imply that foreign service providers are allowed to operate only one branch within the country, while domestic companies face no restrictions.

Liberalisation under the GATS follows a 'requests/ offers' process. Countries make requests to other countries to have market access to certain sectors. Subsequently, members respond with offers and commitments where in principle they have the freedom to impose limitations or specify conditions under which commitments are made. In the Uruguay Round a total of 96 countries made commitments in services with rich countries scheduling about 45% of their service sectors, while low and middle income countries scheduled about 12% of their service sectors (Chanda 2003: 156). Sensitive sectors such as environmental and health services have subjected to the least commitments whereas higher commitments have been made in financial and tourism sectors (ibid).

The stated aim of the GATS (article 19) is to progressively liberalise trade in services, i.e. open up service sectors that are currently closed to trade and promote the elimination of restrictions considered barriers to trade in sectors that are already open. This, coupled with the coverage of all service sectors, except those provided in the exercise of governmental authority, has led many NGOs to claim that the GATS is biased towards the interests of multinational corporations and that it potentially spells disaster for poor people's access to public services which as one commentator says is 'good news for corporate profits. Bad news for people' (Barlow, 2001, 113). Lal Das (2001), writing for Third World Network, argues that the focus on 'progressive liberalisation of services' services largely benefits countries which are endowed with relatively more developed level of services. Indeed, as a group of developing countries argued in 2002, developing countries share of world service exports has increased only by 6% since the adoption of the GATS to 1999. By contrast, OECD countries account for three quarters of world's exports of services and most of these are concentrated in the hands of multinationals. These trends would appear to contradict Article IV of the GATS which seeks to enhance developing country participation in world trade in services (WTO 2002a).

So far most discussions have focused on the movement of capital rather than the movement of labour, which is included in Mode 4 of the GATS. This is against the will of developing countries, such as Bangladesh and India, which stand to gain more from the free movement of labour than movement of capital. . While the EU in its current offer

¹³ The GATS allows countries to make temporary exemptions to this principle at the time of signing the agreement (WTO:1998).

has agreed to increase the duration of temporary movement of skilled workers from three to six months (e.g. IT workers from India), it is highly resistant to meeting the developing country demand of opening up its markets to 'semi-skilled' and 'unskilled workers.' However, countries such as Bangladesh feel that this is the comparative advantage of many low income countries in the services sector and an important way to eliminate poverty due to the growing importance of remittances as a livelihood strategy, given that their commercial service sectors are unlikely to be able to compete with European or American TNCs (WTO 2003a and 2003b).

It must be borne in mind that most water related services currently are not included in the GATS' 'services sectoral classification list.' While sewage services and wastewater are explicitly mentioned, water delivery/ distribution for domestic purposes are not explicitly mentioned. However, since 2000 the European Union has been very keen to re-classify what is meant by 'environmental services' in the current list of services under the GATS. In an interview one of the EC bureaucrats working in services admitted, 'It's important for us because most of the companies we know also look at domestic water supply and purification for drinking.'¹⁴ This seems to echo the NGO assertion that there has been successful lobbying on the part of European water giants, such as Vivendi and Suez Lyonnaise des Eaux, who are behind attempts by the European Union to include water collection, purification and distribution services under environmental services in the current services negotiations (FOE, 2001).

Indeed the growing NGO literature on the GATS indicates a close entanglement of industry with government. Information published by both Corpwatch and GATSwatch reveals how an influential British services industry lobby (LOTIS) provides an informal private forum where government and business share confidential information related to ongoing services negotiations and discuss strategies for future negotiations (Corpwatch, 2001; GATSwatch, 2001). Also American GATS policy is argued to be developed in close co-operation with multinational companies that have an interest in progressive liberalisation of global services markets. According to Tony Clarke (2001), Director of the Canadian Polaris Institute, the now bankrupt Enron, managed not only to influence, but to a large extent determine, the United States' negotiation position in the GATS 2000 negotiations, as a consequence of its position as a key member of the Coalition of Service Industries (UCSI) and its close relationship with the Bush administration. As the former Venezuelan negotiator to the WTO said in an interview: 'The US trade advisory committee claims to consult with civil society, but in reality it first invites the opinions and consults with about 350 corporation and then maybe speaks to three NGO representatives!' The corporate influence is by no means only restricted to Northern players. In India, the Confederation of Indian Industries submitted detailed guidelines for trade liberalization in services such as education, tourism and Information Technology to the Ministry of Commerce (Viswanathan 2003).¹⁵

¹⁴ Interview, Ann-Mary Redmond, European Commission, Geneva, 19/6/03.

¹⁵ Similarly Nasscom and several major Indian IT companies are lobbying both in the WTO and in the US against US protectionism which is directed against high-skilled professional jobs going overseas through business process outsourcing (Ray 2003)

Critics have also argued that the exemption from the GATS of services provided in the exercise of governmental authority, defined as those services that are supplied “neither on a commercial basis, nor in competition with one or more service suppliers”, does not necessarily mean that water services and other public services are outside the reach of the GATS. The WDM (2001) is for example highly sceptical with respect to the extent to which this exception will apply to public services since the increasing presence of private sector actors in all such sectors in most countries arguably constitutes competition to the public sector. As Table 1 shows, there is often a continuum between what constitutes the public and private in service delivery and the separation of what’s public and private is rarely clear-cut. Similarly, even governments now charge user fees for public services in health and water. It is therefore not clear under what conditions competition would be seen to exist and under what conditions services would qualify under the GATS clause for governmental services. This ambiguity in the agreement can clearly, thus, be manipulated to suit powerful interests and broadly depends on the lens of interpretation. Krajewski (2001), who has discussed the scope of the GATS, concludes that the application of international principles of treaty interpretation to Article 1:3(b),(c), which defines the scope of the GATS, is likely to result in a narrow interpretation of what constitutes services provided in the exercise of governmental authority. This consequently means a broad scope of GATS.

GATS disciplines can either be applied horizontally across all the commitments a country signs up to or sectorally. According to NGO critic Barlow (2001), the horizontal application of the principle of non-discrimination or the Most Favoured Nation (MFN) principle would mean that once a country has opened up one of its service sectors to a foreign company it will no longer be able to exclude other foreign corporations from that sector, regardless of the social or political reasons it may evoke to do so. In addition, the WDM (2002) argues that the MFN rules will make it virtually impossible for developing countries to discriminate against companies that have a poor social track record (e.g. those that violate human rights standards). Furthermore, it is argued that developing countries will not be able to compete against foreign firms and build up their own services capacity through regional co-operation. This is seen to provide an unfair advantage to developing countries that already have well established services industries in place. Further controversies arise with regards to the principle of National treatment and market access.

In principle, countries can list conditions and limitation in their schedules regarding the participation of foreign companies in certain sectors and principles to favour domestic firms. Still, as the organisations behind the GATSAttack (2001) claim, this principle could restrict the ability of governments to commit public funds to public works, municipal services and social programs because national treatment rules would require such funds to be made available to all actors, public or private, domestic or foreign. It is also argued that the principle of national treatment can limit governments’ ability to enact policies that favour the growth of local companies or favour local suppliers and local managers, hire or train local staff (WDM, 2002:21).

Another problem concerns the potential impacts of GATS on domestic regulation and government measures. These could include domestic laws, guidelines, subsidies, licensing standards and economic means tests. Moreover GATS could apply to all levels of governments (including federal and provincial). In India, for example, the state governments have relative autonomy in several sectors, including water, education, health and a broad application of the GATS could undermine the autonomy of provincial and local government. Many of these issues are still to be decided by the WTO Working Party on Domestic Regulation, which is still considering proposals under Article VI:4 of the GATS. The most criticised proposal among NGOs is the idea of subjecting national regulation to a 'necessity test'.¹⁶ The acceptance of such a test is perceived to be a serious challenge to the provision of universalised public services and would, according to the 'STOP the GATS Attack' campaign, imply that 'governments would bear the burden of proof in demonstrating that any of their countries laws and regulations are 'not more burdensome than necessary' (in other words, the least trade restrictive) regardless of financial, social, technological or other considerations' (2001:3).

According to the supporters of the WTO and the GATS, the above arguments against the GATS are based on misunderstandings and scare stories, which are 'misleading the public and undermining support for international economic co-operation' (WTO 2001). From their point of view the GATS explicitly recognizes 'the right of members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives' (WTO, 2001: 11). In the following section we investigate the validity of this statement by analysing the ability of governments to formulate and implement policies, which based on existing privatisation experiences, appear to be essential if poor people's access to clean and affordable water is to be safeguarded under future privatisation initiatives under the GATS.

V. The GATS: A Circumscription of Government's Regulatory Freedom?

Based on the discussions in the previous sections on existing privatisation experiences, it is clearly essential that governments maintain their regulatory freedom when privatising domestic water services in order to ensure poor people's continuous access to adequate water supplies. We had flagged the importance of anti-monopolistic regulation. International liberalisation of domestic water services under the GATS would not put an end to the existence of private monopolies in this sector, since the defining characteristics of the sector cannot be expected to change in the near future. However, what is important in the context of this paper is that international liberalisation of the water sector under the GATS would not counter national efforts to regulate monopolies in order to safeguard consumers against monopoly power abuse. Article VIII of the GATS requires members to secure that a monopoly supplier in a certain market does 'not act in a manner

¹⁶ 'A necessity test is the clause that permits a trade restriction only if it can be proved to be necessary for the declared objective – that is, effective and not dominated by non-trade approaches' (McCulloch et al., 2001:239)

inconsistent with that Member's obligations under Article II [MFN] and specific commitments' (WTO, 1994:291)¹⁷. As such, governments, which chose to liberalise water services under the GATS, maintain the right to regulate water tariffs and quality, as well as to limit the scope of exclusivity rights granted to private enterprises, as long as these restrictions are non-discriminatory and in accordance with the national treatment commitments undertaken (WTO, 2002). Would foreign private sector involvement in domestic water services help or hinder governments' efforts to regulate in these areas? Openness to trade should increase the pool of bidders for water concessions, which one could assume would improve rather than worsen governments' negotiating power over the conditions to be applied. If markets were to be opened up in a significant way, we could expect trans-national corporations' actions to be closely scrutinised by international environmental pressure groups, which again could make them easier to control than smaller domestic players. Similarly, many firms may enter the game, making the existence of dominance more rare. However current trends suggest that foreign companies may be more difficult to control, especially since the water industry is dominated by a few powerful global players, which are both vertically and horizontally integrated (Ugaz, 2001).

Another key issue regarding poor people's access to water resources under privatised management arrangements, is a government's ability to secure the development of essential infrastructure in rural areas and impoverished urban neighborhoods. This regulatory task relates to the question of national treatment. In the unlikely event that a country makes an unconditional commitment to liberalise its water sector, as well as an unqualified commitment to national treatment in the sector, the type of policies required to support the development of essential infrastructure in rural areas would be difficult to implement. But as mentioned above, the GATS does not require its members to extend unconditional market access or national treatment to all its trading partners in all sectors. In fact there are no restrictions on 'the number or types of conditions which may be attached to national treatment commitments. A requirement that foreign banks wishing to establish in the country should set up branches in every village, for example, would also be perfectly legitimate' (WTO, 2002:1). It follows from this example that GATS provisions do not circumscribe governments' ability to include the extension of infrastructural networks to poor urban, as well as rural areas, in contractual arrangements with foreign operators. As long as this requirement is listed in the country's GATS' schedule. This conclusion is further supported by Article XIX of the GATS, which specifically states that developing countries may attach to their market opening commitments, conditions designed to increase their participation in services trade – e.g. the transfer of technology (WTO, 2002).

As mentioned above network expansions to poor areas may however, also be furthered advanced by redefining technical standards associated with formal network provision, which currently are designed for industrial countries, to suit local conditions. The extent

¹⁷ McCulloch et al., (2001:238) rightly argues that the pro-competitive provisions of the GATS are limited in *scope* and *bite*, and this paper agrees that a strengthening of both domestic and international regulation in this area would be to the benefit of consumers, rich and poor.

to which such a redefinition of technical standards would be possible under the GATS is not clear. Article VI.4 of the agreement requires current negotiations to develop regulatory disciplines, which can ensure that domestic ‘qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services’ (WTO, 1994:290). The kind of disciplines, which evolve are likely to determine the extent to which the GATS allows national governments enough room of manoeuvre to undertake changes in service standard specifications, which are required to further encourage expansion of water distribution networks to poor urban and rural areas. More specifically, the outcome will depend on the exact definition of ‘technical standards’ and ‘barriers to trade’. While members currently have taken no decisions in this area, we can get an idea about what interpretation may be given to these terms from looking at the WTO Agreement on Technical Barriers to Trade, as well as at the work that has already been carried out by the “Working Group on Domestic Regulation”, which is charged with the development of these disciplines.

With respect to technical standards, these are defined in the WTO Agreement on Technical Barriers to Trade as “product characteristics or their related processes and production methods, including the applicable administrative provisions with which compliance is compulsory” (Quoted in TCH, 2001:8). If this definition were to be extended to services it is likely that the conditions under which a service is produced and delivered, for example technical specifications with respect to water distribution networks, would be subject to regulation under Article IV and therefore be required to constitute *no barrier to trade*. But what is that likely to mean?

From the regulatory disciplines, which have been drawn up by the “Working Group on Domestic Regulation” for the Accountancy sector, we can learn that domestic regulation in the mentioned areas should “(...) not be more trade restrictive than is necessary to achieve the legitimate objective they seek” (WTO, 2002:3). In other words, if two or more measures exist, which can achieve the same objective, one should choose the measure with the least restrictive impact on trade (Ibid.). Determination of which is the least trade restrictive measure is undertaken by the application of an economic necessity test.¹⁸ It is difficult to determine what implications this would have in practice for governments ability to adapt service standards to suit conditions in poor urban and rural areas. However, while it is very important to watch development in this area closely, one might assume that changes in technical specifications regarding the delivery of water services would be accepted under the GATS, as long as the conditions set are equally achievable by domestic and foreign firms. In other words non-discriminatory.

Finally, the special characteristics of the water sector imply that universal provision of water services will continue to require explicit state involvement with respect to safety-net regulation. To fulfil this need for safety nets that guarantee access to water services for those who are unable to meet the costs associated with this, may imply that operators

¹⁸ McCulloch et al (2001:239) state that “a necessity test is the clause that permits a trade restriction only if it can be proved to be necessary for the declared objective – that is, effective and not dominated by non-trade approaches.”

have to provide water free of charge to certain consumers (Finger and Allouche, 2002). Private companies are however, unlikely to perform this function without any reimbursement of costs and it is therefore essential that governments maintain the right to subsidies either suppliers or end consumers, when this is required to achieve legitimate social objectives. As we have seen the GATS currently contains no specific disciplines intended to govern the use of demand or supply-side subsidies and subsidisation is therefore only subject to the principle of non-discrimination where national treatment commitments exist (McCulloch et al, 2001). Article XV in the GATS does however, recognise that in certain circumstances subsidies may have distortionary effects on trade in services and requires that future negotiations address the appropriateness of countervailing measures (WTO, 1994: 296). Suggestions have been made to subject the use of subsidies to an economic necessity test. However, we believe that it is essential that any future GATS disciplines developed in this area allow for the use of subsidies in cases where market failures make this the best instrument to legitimate social objectives. Still, following interviews with negotiators from middle income and poor countries in Geneva it appears that the US and the EU are not keen to flesh out and nuance the unfinished discussions of the Uruguay Round around the 'rules dimension' concerning subsidies and safeguards that would protect the interests of the poor.

VI. The GATS and the Basic Right to Public Services

Some of the NGO criticisms of the potential negative impacts of the GATS are also endorsed by the High Commissioner for Human rights (HCHR) in several reports which are the first step to determine the human rights impacts of trade.¹⁹ The HCHR raises concerns about certain aspects of GATS, which include the broad scope of the GATS which could constrain Governments from protecting people's basic rights, the possible subjection of domestic regulations to a so-called 'necessity test', and the vagueness attached to subsidies, especially 'cross-subsidisation' which is crucial for the realisation of universal access to social services and the potential difficulties for countries to modify their schedules.

However, the approach adopted by the HCHR is more conciliatory than that of the critical NGOs since it seeks to explore how the international trade regime can be made compatible with the international human rights regime. She advocates that the protection and promotion of human rights should be one of the objectives of trade liberalisation. The role of states is emphasised, not only as negotiators of trade law and setters of trade policy, but also as the primary duty bearer for the implementation of human rights and the approach seeks a consistency between the progressive liberalisation of trade and the progressive realisation of human rights (E/CN.4/Sub.2/2002/9: 2). The legal basis is clear. All of the 144 members of the WTO have at least ratified one human rights instrument which now serve as international customary law, while the majority has ratified the ICESCR, which provides a strong endorsement of social and political rights. (The US is a notable exception.)

¹⁹ E/CN.4/Sub.2/2002/9. Accessible at: www.unhchr.ch

It is on the basis of the above approach to international trade law that the High Commissioner goes on to consider the implications of services liberalisation under the GATS for the realisation of basic human rights, such as the right to health (including the right to water), the right to education and the right to development. While she recognises that positive outcomes may be the result of GATS regulated service liberalisations, in the form of improved economic performance, transfer of technology and decreasing consumer prices in areas such as telecoms and transport, she also notes several areas of potential conflict between service liberalisation and the realisation of the before mentioned human rights. She especially expresses concern with regards to the impact of increased private, foreign or domestic, investment in health, education and water services on public entitlements to these services. In relation to this the introduction of user fees in basic service delivery is a cause of concern. The introduction of such fees "(...) can reduce and even cut off service supply to the poor, marginalised or vulnerable" (E/CN.4/Sub.2/2002/9: 21).

Still, despite some reservations, the Office of the UNHCHR in principle seeks to apply human rights standards to the WTO. Thus it would contend that in principle the progressive liberalization of trade in services can go hand in hand with the progressive realization of human rights.²⁰ For this to proceed it is necessary to promote assessments of WTO impacts from a human rights perspective and encourage a flexible process whereby a country's commitments can be withdrawn if the economic, political and social changes that a country encounters demands this. Whether these overarching considerations could dictate WTO agreements is however questionable. After all, as Geneva based human rights specialist, Robert Archer, argues, the WTO has created the possibility that human rights commitments become secondary to the overarching principles of trade and dismantling barriers to trade.²¹ In part this also has to do with the politics of ambiguities and the politics of interpretation. In other words, much depends on whether the GATS will be interpreted and applied according to human rights concerns if and when water services are liberalized under the GATS which we explore briefly.

As discussed earlier, due to its multifaceted nature, neither is publicness nor privateness an innate characteristic of water. Rather both emerge as a result of socio-political interventions and choices. The 2002 UN General comment has stressed that the right to water is a human right and that responsibility for the provision of sufficient, safe, affordable water to everyone, without discrimination, rests with the state. As such water becomes a public entitlement, access to which does not depend on ones ability to pay.

This interpretation of the nature of water can be contrasted with an understanding of the right to water as a contractual (or property) right. If, 'access to public services is understood as a private contractual right, it is determined by the terms and conditions of the contract between service supplier and consumer' (Krajewski, 2002:5).²² It is a well-

²⁰ Interview with Simon Walker, Office of the High Commissioner on Human Rights, 18/6/03.

²¹ Interview with Robert Archer, International Council on Human rights Policy, 18/6/03.

²² This paper is in draft form and permission to cite should be obtained from the author.

known fact that the defining characteristic of such a contract is the consumer's ability to pay for the service provided by the supplier. In other words, if the right to water is perceived as a contractual rather than a human right, water services would be subject to the laws of demand and supply, which invariably, due to the nature of markets, would be unable to guarantee equality and affordability of access.

Viewing the water/trade nexus through a human rights lens does not necessarily mean that water services need to be free of charge or state run. Instead, such a lens implies that states, which involve private actors in the provision of basic services, are legally obliged to establish effective and flexible regulatory mechanisms that can secure the progressive realisation of the right to water for all people. In the current international context, where an increasing number of developing countries are privatising their basic social services, setting up strong mechanisms to regulate private services in a pro-poor manner is of major importance. The key question is, however, whether the regulatory space needed for governments to secure its citizens universal, equal and affordable access to public services is compromised by the principles of the GATS. The answer to this question is likely to depend on the interpretative lens through which one views the GATS.

For example if one adopts a constitutional, or a distinct neo-liberal, approach to the GATS, the agreement is likely to place certain limits on states' ability to regulate. This is because WTO law, from the constitutional perspective, is perceived to serve constitutional functions, i.e. impose limitations on discretionary governmental policies, which would otherwise amount to a violation of basic rights (Krajewski, 2002). While it is evident that the constitutional approach is concerned about the universal realisation of basic rights, it understands these rights in a narrow economic sense, i.e. its main focus is on private contractual rights, such as property rights. This focus, along with the reliance on the market for the realisation of these rights is problematic from the point of view of public services (Krajewski, 2000). As mentioned above the right to basic services, such as water, health and education, must be viewed as individual human rights and not private contractual rights. In fact several inconsistencies are likely to exist between the progressive realisation of market freedoms and individual entitlements to these public services.

The above discussion should make it clear that the impact of the GATS on national governments' ability to manage liberalisation of water services to the benefit of the poor need not be as draconian as it is made out to be by its critics, if it is interpreted and implemented in a manner that is pro-poor. As the discussion on rights showed, at one level it is conceivable that the progressive realization of trade liberalization can be compatible with pro-poor right-based approaches. Thus in an ideal world, the GATS does not appear to limit domestic governments' regulatory freedom of manoeuvre and in the few instances that it does it is due to the agreements' defining principle of non-discrimination. Whether the impact of this principle on governments' ability to manage liberalisation in the interest of the poor is sufficiently negative to justify the strong criticisms levied against it, is of course a valid question. However, the real world most typically falls short of being ideal and the possibility exists that the ambiguities around

the interpretation of the agreement itself (for example around what constitutes the ‘exercise of government authority’ or whether or not a constitutional or human rights lens should be applied) could be manipulated to serve the interests of powerful nations and corporations. Similarly, current GATS negotiations, especially on domestic regulation and subsidies, could result in inexpedient restrictions on governments’ freedom to formulate and implement the regulation deemed necessary to safeguard the interests of the poor when private actors take part in the provision of water services. Why we might expect this to be the case is the question to which we turn in the next section.

VII. The Politics of Process

Several aspects of the reality within which the GATS negotiations take place have the potential to work against the realisation of the ideal scenario, which was sketched out above. We call these realities the politics of process. These refer to the unequal nature of members to participate equally in WTO processes and negotiations, the ways in which institutional arrangements at the WTO are embedded in wider issues of political economy and power, the ambiguities of interpretation and the politics of implementation. By no means are all these malaises merely to be found at the multilateral level of politics. Indeed, even if safeguards clauses could be negotiated in Geneva by developing countries, there is the real world politics of the pre- and post-agreement phase which often spills over into the arena of domestic politics at the federal, regional and local level. We now turn to investigate a few key issues and wherever possible flag the differences in multilateral and domestic levels of politics and policy-making.

Who has the capacity to regulate/ negotiate?

At the time of offering commitments, a government’s ability to maintain a fair degree of regulatory freedom to oversee the liberalization of its services under GATS depends on its ability to specify in the form of ‘limitations’, any regulation that it would seek to maintain or develop. The specification of such ‘limitations’ does however, require an enormous degree of administrative capacity and foresight by GATS signatories at the point of making a commitment. Often this is lacking to many developing country negotiators. While it is true that the WTO secretariat has been offering promises of ‘technical assistance’ and ‘capacity building’ to developing countries, the actual assistance delivered is often very little more than the odd seminar presented by international WTO technocrats who are largely legal and economic specialists based in Geneva. Often they are not equipped to deal with intangible issues around social equity and participation, bearing in mind the local needs and concerns of local businesses, academics and civil society members. Rather than empowering developing countries to define, negotiate and consolidate their own positions vis-à-vis the WTO, there is a rather top-down approach towards assistance and capacity building which seeks to push countries to adapt to and take on board existing obligations and commitments, often framed by the Quad group (ie. The EU, the US, Canada and Japan). Little wonder, then, that many developing country negotiators view activities around ‘capacity building’ and

‘technical assistance’ as a tool to pressurize developing countries to agree to negotiations on new issues (Varma in Kwa, 2002).

Clearly, negotiators and staff members from low income countries are also highly over-stretched. There is a massive difference between the missions of the Quad group who have staff members responsible for and aware of all the different aspects of the WTO and others from low income countries who have one ambassador and a few staff members torn between trade, diplomatic and defense issues. Consider this quote by the Bangladesh ambassador: ‘Do we have the freedom to regulate? In principle yes. In reality no. The weaker country is usually at a massive disadvantage. In order to make a request or respond to one you need to give details of what exactly everything entails – you need to be familiar with national laws, rules and specific regulations, and that too for every country. We don’t have this level of detail of other countries. By contrast, the more powerful countries have all these details about us... this is reflected in their requests. I am astonished by the level of detail that they specify in their requests!’ He is referring to the recent EU requests which were targeted at 109 countries, including all the countries classified as Least Development Countries (LDC) in the WTO (WDM 2003: 9). By contrast, the EU received requests from only one LDC (ibid; 12). Middle income countries such as Brazil, South Africa and India, by contrast, are trying to get more savvy at negotiating. As one negotiator from a middle income country said, ‘The EC lays down safeguards for almost small eventuality, but we are not expected to do the same. Why can’t they (the Quad countries) share that experience with us? We are now researching their commitments and trying to learn to lay down that same level of detail around safeguards when we offer our commitments. They are sometimes surprised, but we’ve got to learn to play their game!’

The request-offer mode often ends up being a bilateral negotiation between two countries, despite the multilateral context of the WTO. Clearly, the rich and powerful countries can exert tremendous pressure on a poorer country to respond quickly or positively to a request. One LDC ambassador said, ‘ Here in Geneva the different developing countries can support each other and resist pressure. For example, the LDCs can get together and exert pressure or India, Brazil and South Africa can make noise. Back home in the capitals it’s a different story. The process of arm-twisting is much more overt.’ Here the domestic realm of politics emerges as key. For example, industrialized countries are known to communicate with ministers in the capitals of developing countries with the aim of confusing them about what their trade delegations are up to in Geneva. This results in developing country negotiators modifying or backing down on their positions at the last minute due to pressure from the capitals. For example, it is now well known that both Pakistan and Nigeria backed down from being very critical of the draft declaration at Doha even though they were initially very vocal at denouncing it. This change in positions had much to do with the US granting a massive aid package to both countries (Bello, 2003). It is conceivable that similar bilateral pressure is exerted around the GATS. Thus experienced negotiators from the EU and the US can succeed in reverting the so-called ‘blessings from the capitals’ and making Geneva-based negotiators look foolish vis-à-vis their colleagues and ministers in the capitals. Furthermore, decisions at the WTO are rarely reached in a transparent manner (see Kwa

2003; Bello 2003). The so-called 'green room' of the Director General is notoriously famous for small meetings to which key players are invited before formal decisions are made. This calls to question the whole notion of poor countries' flexibility to regulate and negotiate.

No turning back?

The potential negative consequences of governments' lack of capacity and foresight at the time of making GATS commitments seems to be reinforced by the rigidity of Article XXI of the GATS, which sets out the procedure that a country must follow in case it wants to modify its GATS commitments. The article specifies that (1) modifications cannot be initiated until three years after the initial commitment entered into force, (2) that other members must be given three months notice of what the nature of the modification is and (3) that the modifying country must come up with compensating commitments, which compensate for the modification and satisfy all WTO members. As such GATS commitments clearly take on a certain degree of irreversibility, if not in theory, then in practice and this could potentially have a negative effect on people's access to basic social services, among these water. As Barlow suggests (2001: 113) it is highly likely that 'it would, quite simply, have been illegal for the Bolivian government to re-nationalise the Cochabamba water company' had it committed its water services to the GATS. However, in this respect it is important to note that the Bolivian government might have been able to get around the provisions of Article XXI by invoking Article XIV of GATS, which states that 'nothing in this agreement shall be construed to prevent the adoption or enforcement by any member of measures necessary to protect human, animal or plant life or health, national security or public morals'. Measures that fall under this article allegedly entitle governments to violate or withdraw any GATS commitments it deems necessary. Nevertheless, what constitutes 'necessary' is nowhere defined. As such, the absence of any examples of modifications or withdrawals of commitments under any of the mentioned articles implies that the level of irreversibility attached to GATS commitments remains uncertain.

Another issue related to the difficulties in reversing GATS commitments is rooted in the stated aim of the agreement, which according to Article XIX 'is to progressively liberalise trade in services'. Since 'progressive liberalisation' is to be achieved either through the commitment of more sectors or through the gradual elimination of existing barriers to trade in scheduled sectors, governments that have managed to make limitations to GATS provisions in their original schedules may be asked to give up such limitations by other GATS signatories in future negotiations. For example, the Thai government had developed regulations aimed at curbing massive expansions of major European retail stores (retail trade in Thailand has been gradually liberalized since the late 1980s). However following the June 2002 EU GATS requests, the Thai government scrapped several provisions, including the draft 'Retail Business Act' which was under discussion for two years and aimed at curbing the expansion of foreign-owned firms. This was because it did not want to be seen sending a wrong signal to the international community (see WDM 2003 pp. 13 and 14 for more details).

The fact that developing country negotiators are wary of the virtual irreversible nature of GATS may explain why they are making commitments to far fewer sectors than what has already taken place under processes of autonomous liberalization in their countries. A negotiator from a middle income country explains, 'We could get locked into a process which could just go badly wrong.' Here strong pressure on the domestic front can determine whether or not countries can resist this lock in. Due to the high profile campaign around GATS, delegates increasingly encounter rigorous questioning from parliamentarians, trade unions and civil society groups back home. For example, a delegate from the South Africa mission said, 'Our Education Minister has been very firm in asserting that education is not for sale. Our water people have clearly said that they are not going to allow us to put water on the table! Consequently we are not going to begin any negotiations around these issues unless and until we are sure that we are not going to get locked into agreements that are detrimental to our social obligations back home.' Thus one could argue that strong NGO criticisms of GATS in both the North and the South have resulted in raising the awareness of the potential impacts of GATS amongst lay people and have alerted developing country negotiators to be more vigilant about GATS negotiations around sensitive sectors such as health and water. By contrast, countries in accession may lack this flexibility. For them, complying to different aspects of GATS may be part of their accession agreement, locking them into a quasi irreversible process.

Would the interests of the poor be protected?

According to EU documents that were leaked in April 2002, the Union is not only requesting that the services sectors in several developing countries be opened up to foreign direct investment by European TNCs, but it is also demanding that a series of countries review and dismantle limitations made to commitments undertaken in previous rounds of the GATS negotiations. Despite previous assurances that the EU would not target Least Developed Countries (LDCs), 17% of the LDCs received requests to open up more than 5 sectors. The EU requests also included explicit references around water distribution (WDM 2003).

Even in the unlikely case that member states were able to mobilise adequate technical and administrative capacity, as well as perfect foresight, that would make limitations on modifications and reversibility less important there are several reasons why one should still question the impact of GATS-regulated privatisation on poor people's access to healthy and affordable water supplies. Firstly, it might not be reasonable to expect that governments have the will to regulate in the interest of the poorer sections of society even if they have the capability to do so. In many cases political interference and corrupt practices remain the rule rather than the exception when ownership is transferred from public to private hands. Moreover, evidence from water privatisation all around the world indicates that, private operators are very skillful at drafting contracts in their favor and circumventing the rules. The fact that the water industry is dominated by a few powerful global players often make privatisation negotiations look like a struggle between David

and Goliath and this obviously has clear implications for developing countries ability to regulate the water sector post-privatisation as was discussed in the sections on water privatization.

The domestic arena of policy making and the politics of the policy process also need to be highlighted. Trade ministers are often known to rarely consult with various stakeholders at home. For example, the health insurance sector in Thailand was opened up with any consultation with the health ministry who discovered this new development at a meeting in Geneva organized by NGOs²³. Some South African trade officials had no idea about South Africa's unique constitutional right to water. Clearly in a process of horse-trading, trade officials could barter away social sectors in return for what they consider to be a country's top priority. For example, some negotiators admitted that they would consider responding to Mode 3 requests if they got some concessions in Mode 4. If this were done without adequate consultation and considerations of equity and welfare concerns, the results could potentially be very damaging.

Power asymmetries

The problem of power asymmetries is also important to keep in mind in relationship to the outcome of the GATS negotiations. Massive power symmetries exist between developed and developing countries and this may influence the outcome of negotiations. Developed countries tend not only to be better equipped in terms of technical expertise than their developing counter parts, they can also rely on powerful support from prominent international organisations, such as the World Bank and the IMF. Moreover, as already discussed both American and European negotiators have developed close alliances with industry lobby groups that appear to be key in developing the position of governments in GATS negotiations.

VIII. Conclusion

In sum, while the international liberalisation of basic social services under the GATS at the *de jure* level could be managed in ways that will be able to safeguard the interests of the poor, power games, politics and reasons of a wider political economy suggest that GATS could *de facto* undermine poor people's rights to water. Taking into consideration the high level of natural monopoly, which characterises the water sector, and water's importance for human well being, it is essential that domestic governments maintain the ability to regulate the water sector, if and when international liberalisation of water services becomes a reality. However, experiences from non-WTO related water privatization coupled the lack of clarity around subsidies and domestic regulation around GATS leave us no real reason to be sanguine.

²³ John Hilary, ActionAid, UK, Interview 28/6/03.

The activist concern that GATS is a 'frontal attack on the fundamental social rights' need not hold if GATS is interpreted and applied in a manner that is consistent with countries' social and human rights obligations. Thus, while in principle water can be both a commodity and a right, in practice, the paper has demonstrated that market forces are poised to highlight its value as a commodity, often at the detriment of poor people's rights to water. The present regime of the WTO/ GATS also seems more comfortable with endorsing the rights of corporations than those of more marginalised constituencies. This coupled with the politics of WTO negotiations and processes often disadvantage weaker and poorer countries. Big questions also remain unanswered regarding the political will to make the workings and interpretations of GATS consistent with social, equity and welfare concerns. To date there have been inadequate social, technical and economic assessments undertaken of the potential impacts of GATS and very little official attempts to mainstream human rights considerations. Until these are squarely in place, it is best that the social sectors such as water remain out of the reach of GATS-directed liberalisation.

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