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**THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS),
WATER, AND HUMAN RIGHTS FROM THE PERSPECTIVE OF
DEVELOPING COUNTRIES**

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1. INTRODUCTION

No substance is more essential to human life than water. It is a substance that must be carefully managed and subject to holistic, context-specific regulation. The multifaceted factors whose interaction must govern water management practices include climate, demographics, technological capacity, economic development and trade, consumption patterns and social and cultural processes.¹

It is widely accepted that the provision of access to safe drinking water and sanitation services for the world's poor is one of the great developmental challenges of the 21st century. At the World Trade Organisation's (WTO's) Workshop on Environmental Goods and Services in September 2009, it was reported that 884 million people have no access to drinking water and 2.5 billion people are without sanitation services.² To meet these challenges, the delivery and management of water necessitates investment-intensive services including supply, sewerage, and irrigation infrastructure.³ One of the Millennium Development Goals (MDGs) is 'to halve by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water ... and the proportion of people without access to basic sanitation'.⁴ An oft-cited report by the World Water Council and the Global Water Partnership in 2000 estimated that in order to achieve this MDG, investment in water in least developed countries (LDCs) would need to more than double from the current \$75-80 billion annually to \$180 billion.⁵

However, water is not and should not be characterised as 'a classical commercial object'.⁶ Whilst it is important to recognise the immense economic value of water in the same manner as other ecosystem services, it is vital to recognise that water is 'an inherited common good before it is an economic good'.⁷ In that regard, Fried notes:

1. O. Ünver, 'Global Governance of Water: A Practitioner's Perspective', 14 *Global Governance* (2008) pp. 409-417.

2. WTO Secretariat, *Summary of the Session on Water and Wastewater Treatment* (2009), available at: <www.wto.org/english/tratop_e/envir_e/wksp_goods_sept09_e/sum_wate_e.pdf>.

3. J. Fried, 'Water Governance, Management and Ethics: New Dimensions for an Old Problem', 6 *Santa Clara JIL* (2008) p. 1 at p. 2.

4. UNDP, Millennium Development Goals, Goal 7, Target 7c, available at: <www.undp.org/mdg/goal7.shtml>.

5. V. Petrova, 'At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water', 31 *Brooklyn JIL* (2006) p. 577 at p. 581.

6. Ibid. See also J. Budds and G. McGranahan, 'Are the Debates on Water Privatization Missing the Point? Experiences from Africa, Asia, and Latin America', 15 *Environment & Urbanization* (2003) p. 87; J.J. Hukka and T.S. Katko, 'Refuting the Paradigm of Water Services Privatisation', 27 *Natural Resources Forum* (2003) p. 142. For a discussion of the debate as to whether water should be classified as a right or a commodity, see also K. Bakker, 'The "Commons" Versus the "Commodity": Alter-globalization, Anti-privatization and the Human Right to Water in the Global South', 39 *Antipode* (2007) p. 430.

7. L. Bouguerra, *Water Under Threat* (New York, Zed Books 2006) pp. 117, 120.

‘The debate between the economic dimensions of the costs of water services and the social dimensions of water begins with the issue of the universal right to water access. Market conditions must be clearly established, and the respective roles of the private sector and public authority must be discussed and defined.’⁸

In contrast to the need for special and differential treatment driven by the universal right to water, the WTO’s General Agreement on Trade in Services⁹ (GATS) adopts a broad-brush approach and, but for a few narrowly drawn provisions, the Agreement does not differentiate between different types of services in its stated aim of maximising liberalisation.

For some, one of the key solutions to the global water crisis is the privatisation of water services, which have traditionally been the domain of government-controlled monopolies. This article considers the nexus between the GATS and the trend towards privatisation. As will be shown, because both the GATS framework and major international privatisation efforts are relatively recent phenomena, there are serious and justified concerns about the extent to which they marginalise social and developmental objectives that should be the primary drivers of water services policy.¹⁰

Within the international trade paradigm, water itself is usually considered a good. Despite this, many of the most contentious issues concerning policy choices in the water sector involve certain forms of ‘water service’, including the provision of drinking water and water for domestic purposes. The term water service is generally categorised under four headings: water collection and purification services; water distribution; sewage treatment and waste water management; and incidental water services (building and maintaining relevant infrastructure and management services).¹¹ However, these services are yet to be classified formally within the WTO framework under the Services Sectoral Classification List. Currently, only sewage services have been specified, under the general heading of environmental services.¹² However, it is significant that paragraph 31(iii) of the Doha Ministerial Declaration calls for the ‘reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services’. The proposal to include water services as ‘environmental services’ under the GATS is a matter that is vehemently opposed by many human rights and environmental non-governmental organisations (NGOs), primarily because

8. Fried, *supra* n. 3, p. 2.

9. The General Agreement on Trade in Services (GATS) was adopted under the Final Act Embodying the Uruguay Round Results on 15 April 1994.

10. A. Miller, ‘Blue Rush: Is an International Privatization Agreement a Viable Solution for Developing Countries in the Face of an Impending World Water Crisis’, 16 *Indiana International and Comparative L Rev.* (2005) p. 217 at p. 220.

11. E. Türk and M. Krajewski, ‘The Right to Water and Trade in Services: Assessing the Impact of GATS Negotiations on Water Regulation’, paper presented at the CAT+E Conference ‘Moving forward from Cancún’, Berlin, 30-31 October 2003, available at: <www.ciel.org/Publications/GATS_WaterHR_28Oct03.pdf>, at p. 6.

12. *Ibid.*

the WTO is perceived as an organisation that has proven itself to be insufficiently concerned with genuinely promoting sustainable development, particularly when this involves giving primacy to the preservation of natural resources.¹³

Critics have argued that the proposed GATS rules for trade in environmental services would either remove the right of national governments to regulate or severely restrict the delivery of services in the pursuit of public policy objectives, such as universal service obligations, equity, poverty reduction and consumer protection.¹⁴ Obviously, this has profound implications for notions of state sovereignty, a concept that, whilst nowhere near as absolute as it was once perceived to be, still remains a fundamental tenet of the entire system of international law. It is also argued that increased private sector involvement in the delivery of water services due to liberalisation under the GATS would result in a concentration of new investment and services delivery on higher-income consumers in urban areas, adversely affect community-managed water services and lead to increased consumer prices. Each of these outcomes would disadvantage the poor, and in particular, the rural poor.¹⁵

This article proceeds on the basis of two key underlying assumptions. First, a human right to water is indisputable.¹⁶ Second, water service privatisation is a global reality that is likely to persist no matter what treatment water services receive within the GATS framework. The article in section 2 will first demonstrate the legitimacy of these two underlying assumptions. Section 3 then analyses the GATS framework for water services in significant detail, while section 4 looks ahead to the future of water services under international trade law.

The aim of this article is to contribute towards a greater understanding of the role international trade law in general, and the GATS in particular, can play as part of a holistic response to the immense problems (present and future) relating to water resources in LDCs.¹⁷

2. WATER: CONTEMPORARY ISSUES

2.1 Water – the human rights context

There is much recent scholarship which discusses the classification of water as a human right. However, this section provides a limited analysis of this scholarship

13. R. Nardone, 'Like Oil and Water: The WTO and the World's Water Resources', 19 *Connecticut JIL* (2003) p. 183 at p. 197.

14. For a summary of these arguments, see R. Chandra, 'Social Services and the GATS: Key Issues and Concerns', 31(12) *World Development* (2003) p. 1997 at p. 2002.

15. C. George and C. Kirkpatrick, 'Trade and Development: Assessing the Impact of Trade Liberalisation on Sustainable Development', 38 *Journal of World Trade* (2004) pp. 441-469.

16. Petrova, *supra* n. 5, p. 582. See further the discussion in section 2.1.

17. Miller, *supra* n. 10, p. 219.

as it is intended only to offer a contextual overview to establish a foundation for the forthcoming discussion.¹⁸

Recognition of a human right to water has important implications for the world's poorest people – it is express acknowledgement of a *de facto* right of access to potable water supplies for all. Whilst extensive literature already makes a compelling case for the recognition of a human right to water, it is worth briefly outlining the context and generally accepted parameters in relation to this fundamental right.

First and foremost, a right to water for personal and domestic use, while not explicitly mentioned, is implicit and inseparable from Article 11 of the International Covenant on Economic, Social and Cultural Rights,¹⁹ which refers to 'the right of everyone to an adequate standard of living'. This interpretation was confirmed when, in November 2002, the United Nations Committee on Economic, Social and Cultural Rights declared the right to water for personal and household use as a human right in its General Comment No. 15.²⁰ The UN Committee on Economic, Social and Cultural Rights declared that

'water is a limited natural resource and a public good, fundamental for life and health. The human right to water is indispensable for leading a life of human dignity. It is a prerequisite for the realization of other human rights.'²¹

Perhaps there is no more telling indication of the fact that access to clean, safe water is a fundamental building block for a range of other human rights than the reality that a lack of such access can be attributed to an astonishing 60 per cent of the world's illnesses.²²

Advocates of an approach to water policy that is grounded in the explicit recognition of human rights suggest that such an approach creates the much needed capacity for disenfranchised populations in LDCs to assert their inalienable entitlement to adequate water services as a matter of law.²³ According to Ünver, the rights-based approach insists that no one should be excluded from water services due to poverty, inability to pay, group membership, or place of residence.²⁴

18. For an in-depth discussion of the right to water, see, e.g., L. Knight and G. Hartl, *The Right to Water* (Geneva, World Health Organization 2003); C. Dubreuil, *The Right to Water: From Concept to Implementation* (Mexico, World Water Council 2006); P.H. Gleick, 'The Human Right to Water', 1 *Water Policy* (1999) p. 487.

19. International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 *UNTS* p. 3 (entered into force 3 January 1976) (hereinafter: 'ICESCR').

20. UN Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/2002/11, 20 January 2003 (hereinafter: 'General Comment').

21. As quoted in D. Pathirana, 'Privatisation of Water Resources and Human Rights', 16 *Sri Lanka JIL* (2004) p. 1 at p. 2.

22. Petrova, *supra* n. 5, p. 580.

23. Ünver, *supra* n. 1, p. 412.

24. *Ibid.*, pp. 412-413.

There is certainly some force behind the argument that

‘In order to be meaningful, the right to water has to be defined in concrete terms, such as access (distance to source), quality, volume (minimum daily amounts), and regularity of service (availability for a certain number of hours per day).’²⁵

However, there is considerable uncertainty as to whether the adoption of such a concrete characterisation of the right is yet a generally accepted component of international human rights law. While the UN has considered the right to water to be fundamentally important for some time,²⁶ in March 2008 the UN Human Rights Council appointed an independent expert on the right to water and sanitation with a three-year mandate to develop the concept further.²⁷

McCaffrey provides the following succinct and accurate summation of the current position of the human right to water:

‘[T]here is a human right to water, while recognising that the contours of the right are not entirely clear. At minimum, it obligates governments not to discriminate among elements of its population in providing clean drinking water and sanitation services, and not mismanage its resources.’²⁸

Whilst this lack of clarity with respect to the classification of the right to water as a human right may have formally been the case, in 2010 the UN has taken steps to remedy this confusion. The UN has formally recognised the right to water and sanitation as a human right stemming from important principles of international law. The UN General Assembly, on 28 July 2010, passed a Resolution classifying ‘the right to safe and clean drinking water and sanitation as a human right’.²⁹ The UN Human Rights Council, in September 2010, reaffirmed that the right to water should be considered a human right. It passed a Resolution stating that

‘the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity’.³⁰

25. *Ibid.*, p. 412.

26. Indeed, former UN Secretary-General, Kofi Annan stated on 22 March 2001, on the occasion of World Water Day, that ‘Access to safe water is a fundamental human need and, therefore, a basic human right.’

27. J. Dellapenna and J. Gupta, ‘Toward Global Law on Water’, 14 *Global Governance* (2008) p. 437 at p. 443.

28. S. McCaffrey, ‘The Coming Fresh Water Crisis: International Legal and Institutional Responses’, 21 *Vermont L Rev.* (1997) p. 803 at p. 816.

29. GA Res. A/RES/64/292 (‘The human right to water and sanitation’), 28 July 2010.

30. HRC Res. A/HRC/15/L.14 (‘Human Rights and Access to Safe Drinking Water and Sanitation 2010’), 24 September 2010.

Whilst this formal rights-based approach to water has only recently been recognised by the UN, such an understanding of the minimum obligations concerning a human right to water is crucial when embarking on an examination of whether, and to what extent, the GATS and the broader WTO framework is an appropriate international law vehicle for the regulation of domestic water services.

The recent discussions which have led to the formal recognition of the right to water and sanitation as a human right have referred to existing international treaties. The Resolution passed by the Human Rights Council reaffirms that

‘international human rights law instruments, including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities *entail obligations for States parties in relation to access to safe drinking water and sanitation*’.³¹

Accordingly, it is evident that the recognition that access to water is a human right stems from these international instruments. The key human rights instrument on economic and social rights, the ICESCR³² establishes a series of internationally recognised human rights. The Committee on Economic, Social and Cultural Rights, which is responsible for monitoring the ICESCR, adopted a ‘General Comment on the Right to Water’ which discusses the links between the text of the ICESCR and the right to water.³³ This General Comment has been considered ‘particularly important to address the Covenant’s (apparent) silence on the issue of water’.³⁴ The General Comment asserts that the right to water emanates from the right to an adequate standard of living contained in Article 11(1) of ICESCR. Indeed, Article 11 of the ICESCR establishes the

‘right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions’.³⁵

It is noted in the General Comment that

‘Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living “including adequate food, clothing and housing”. The use of the word “including” indicates that this catalogue of rights was not intended to be exhaustive. The

31. Ibid. (emphasis added).

32. *Supra* n. 19.

33. General Comment No. 15, *supra* n. 20.

34. C. de Albuquerque, ‘Water and Sanitation as Human Rights’, in J. Lundqvist, ed., *On the Water Front: Selections from the 2009 World Water Week in Stockholm* (Stockholm, Stockholm International Water Institute 2010) p. 19 at p. 21, available at: <www.worldwaterweek.org/documents/Resources/Best/Catarina_de_Albuquerque.pdf>.

35. ICESCR, Art. 11.

right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. Moreover, the Committee has previously recognized that water is a human right contained in article 11, paragraph 1.³⁶

Accordingly, since water is necessary for any person to continue an adequate standard of living, the right to water can be seen as implicitly covered by this Article. Since its entry into force in 1976, 160 countries have ratified the ICESCR, and therefore the connection between the right to water and the ICESCR has increased importance as each of these states may be held accountable to their obligations under the treaty.

The General Comment also established the substantive content of the right to water. The substantive rights to water include availability, quality and accessibility.³⁷ Availability refers to each person having sufficient water for their domestic and personal use (e.g., drinking, sanitation and food preparation). Quality requires that the water available is safe to drink and to use as required. Accessibility contains a number of distinct components; it refers to both physical and economic access to water (i.e., affordability), non-discriminate access, and the right to access information with regard to water-related issues. It should be noted at this point that under the ICESCR, economic, cultural and social rights such as the right to water are not mandated to be immediately realisable and enforced against the state automatically. Rather, the ICESCR calls for the 'progressive realisation' of such rights, that states, dependent on their access to resources, should over time increase and improve access to and the affordability of safe drinking water.³⁸

The Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, explains that while having a right to water and sanitation is important, it is in itself is not enough, as only states are *prima facie* the duty bearers of such rights. In order to remedy the problems that deprive people from this essential human right, a framework ought to be established that imposes obligations on state and non-state parties.³⁹ As such, the framework established by the Special Representative of the Secretary-General, Mr John Ruggie, to delineate the different obligations necessary on different parties affecting human rights was adopted by de Albuquerque to assist with the demarcation of state and private sector responsibilities with respect to water and human rights.⁴⁰

36. General Comment No. 15, para. 3.

37. *Ibid.*, para. 12.

38. See, e.g., Türk and Krajewski, *supra* n. 11, p. 3.

39. C. de Albuquerque, 'Statement by the Independent Expert on the issue of human rights obligations related to safe drinking water and sanitation, Ms Catarina de Albuquerque at the 15th session of the Human Rights Council', 15 September 2010, available at: <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10356&LangID=E>.

40. *Ibid.*

Pursuant to the aforementioned framework, the ‘State is obliged to progressively realize the right to water and sanitation’.⁴¹ Moreover, the state must ensure that private service providers do not engage in conduct that is discriminatory in nature, as such it must establish a regulatory framework to ensure that human rights standards are complied with, and it should ensure that state and non-state actors are accountable for their actions with respect to water and sanitation.⁴² From the perspective of non-state service providers, Ms de Albuquerque asserts that they not only have the responsibility of complying with national laws, but they should also ‘take proactive steps to ensure that they do not violate international human rights standards’.⁴³

The authors argue that the formal recognition of a human right to water will not only mean the expansion of existing human rights and duties in the context of achieving access to water by all. It should inevitably also lead to an acknowledgement that healthy, functioning river systems and groundwater are essential for people, plants and animals, and social and cultural cohesion, as there is no substitute for making meaningful change ‘on the ground’. Moreover, recognition of a right to water may provide an impetus for change at the state level, because ‘[t]he water crisis is essentially a crisis of governance’.⁴⁴ A lack of adequate water institutions, fragmented institutional structures, and excessive diversion of public resources for private gain have impeded the effective management of water supplies. Indeed, 60 per cent of the world’s 227 largest rivers are significantly fragmented by dams, diversions and canals, which have led to the degradation of ecosystems.⁴⁵ The acknowledgement by the UN that the right to water and sanitation is contained in existing human rights treaties is likely to result in improved governance as this right is legally binding.⁴⁶

Considering that the GATS is predicted to substantially increase the incidence of water services privatisation in LDCs, it is important to acknowledge that since human rights instruments do not specify the mechanisms for water delivery the realisation of the human right to water is not automatically antipathetic to an increase in the privatisation of water services. Indeed, General Comment 15 specifically addresses particular state obligations that must be met in connection with the privatisation of water services. Despite this, the inescapable reality is that there will always be significant tension between the goals of the right to

41. Ibid.

42. Ibid.

43. Ibid.

44. *Water for People, Water for Life – UN World Water Development Report: Executive Summary* (2003), available at: <<http://unesdoc.unesco.org/images/0012/001295/129556e.pdf>>.

45. ‘U.N. Report Warns of Worsening World Water Crisis’, 5 March 2003, available at: <www.usembassy.it/file2003_03/alia/a3030516.htm>.

46. Office of the High Commissioner for Human Rights, United Nations Press release, ‘UN United to Make the Right to Water and Sanitation Legally Binding’, 1 October 2010, available at: <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10403&LangID=E>.

water and the goals of privatisation.⁴⁷ While the trends discussed in the next section show that the private sector has in some cases initially extended network coverage to poorer communities, the most common finding is that the increased involvement of the private sector has led to rises – often dramatic rises – in the cost of water.

2.2 The trend of water services privatisation – a brief contextual background

The last two decades have seen a movement towards the utilisation of more reliance on private markets to supply water services that have traditionally been provided almost exclusively by the state. A result has been increased private sector participation, particularly during the 1990s, in both developed and developing countries.⁴⁸ By 2002, it is reported that 92 countries had permitted, to some degree, the liberalisation of the water sector.⁴⁹ Over the period 1990 to 2001, more than 2,000 water and sewerage projects with private participation were undertaken in LDCs. In 1997, the total figure for private investment had risen to US\$25 billion, and by the end of 2000, at least 93 countries had private sector involvement in some of their piped water services, including Argentina, Chile, China, Colombia, the Philippines, South Africa and the transition economies of Central Europe.⁵⁰ As noted by Shiva, ‘Despite its unpopularity among local residents worldwide, the rush to privatize water continues unabated.’⁵¹ It is with this contextual background that the provisions and implications of the GATS are examined in the following section.

From a human rights perspective, the mixed experiences with privatisation and private sector involvement in water services suggest that privatisation should be approached with caution. Privatisation does not necessarily offer a guaranteed solution to water access problems.⁵² Privatisation measures in some LDCs have caused explosive price rises and social unrest as adequate water services

47. M. Williams, ‘Privatization and the Human Right to Water: Challenges for the New Century’, 28 *Michigan JIL* (2007) p. 469 at p. 492.

48. C. Kirkpatrick and D. Parker, ‘Domestic Regulation and the WTO: The Case of Water Services in Developing Countries’, 28(10) *World Economy* (2005) p. 1491 at p. 1495.

49. Dellapenna and Gupta, *supra* n. 27, p. 442.

50. Kirkpatrick and Parker, *supra* n. 48, p. 1496.

51. V. Shiva, *Water Wars – Privatization, Pollution, and Profit* (Cambridge, MA, South End Press 2002) p. 92.

52. This point is further illustrated in General Comment No. 15 which emphasises that third party, private intervention in the provision of water must be handled with caution: ‘Where water services ... are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the [International Covenant on Economic, Social & Cultural Rights] and this General Comment, which includes independent monitoring, genuine public participation, and imposition of penalties for non-compliance.’ General Comment, para. 24.

become even more out of reach for the most impoverished segments of society.⁵³ The inherent risks of privatisation are particularly acute in many LDCs due to the increased vulnerability to exploitation and inequitable practices created by significant limitations on resources, a lack of monitoring and enforcement of the practices of multinationals and a diminished capacity to implement the rule of law.⁵⁴ Furthermore, in the view of commentators such as Shiva, the ‘privatization of water services is the first step toward the privatization of all aspects of water’.⁵⁵ Therefore some measure of flexibility is essential to the protection of water rights, and therefore privatisation policies should not be made irreversible or mandatory within international trade law.

3. THE GATS AND WATER SERVICES – A CRITICAL EVALUATION

Prior to examining specific provisions of the GATS and their application to domestic water services in LDCs, it is worth briefly considering the Agreement in general terms. Like most aspects of the WTO framework, the potential impact of the GATS on sectors that have traditionally been provided by governments or subject to extensive governmental regulation are very controversial.⁵⁶ By removing restrictions and domestic regulations considered to be barriers to international competition in the area of service delivery, the GATS aims to progressively liberalise trade in services and provide multinational corporations (MNCs) with access to previously restricted services.⁵⁷ Despite a common belief throughout its negotiations that the GATS would not apply to traditional public services such as water services, the text of the Agreement contains no general exclusion for public services of any kind.⁵⁸ Shiva, amongst others, contends that ‘Water services have always been on the GATS agenda.’⁵⁹

The GATS has come under significant criticism and has been subject to a high profile global campaign involving prominent NGOs and actions groups. This

53. See, e.g., P.H. Gleick, et al., *The New Economy of Water: The Risks and Benefits of Globalization and Privatization of Freshwater* (Oakland, CA, Pacific Institute for Studies in Development, Environment and Security 2002) pp. 29, 32.

54. Dellapenna and Gupta, *supra* n. 27, p. 443.

55. Shiva, *supra* n. 51, p. 98.

56. A. Pereira, ‘The Liberalization of Education under the WTO Services Agreement (GATS): A Threat to Public Educational Policy?’, 2(3) *Manchester Journal of International Economic Law* (2005) p. 2 at p. 2. This section draws quite extensively on this article as it is quite unique in its examination of specific provisions of the GATS. Whilst Pereira’s examination of the GATS is in the context of education (another service that is fundamentally tied to the realisation of a plethora of human rights), much of the analysis is also applicable to the issues relating to water services in LDCs (either directly or by analogy).

57. Nardone, *supra* n. 13, p. 201.

58. Pereira, *supra* n. 56, p. 3.

59. Shiva, *supra* n. 51, p. 95.

campaign has been mobilised as a result of concerns that the GATS promotes the commodification of essential resources and, as such, is a direct threat to the basic subsistence rights of the poor in LDCs.⁶⁰ One of the most common statements in opposition to GATS is the fact that the Agreement treats key public services, like water, as legally indistinguishable from other service sectors that do not relate to fundamental necessities of life. With a few very limited exceptions, the provisions of the GATS fail to acknowledge any substantive difference in the nature, function and social relations of key services, such as water and an array of other, non-essential 'lifestyle' or 'convenience' services.⁶¹

The GATS' approach of refraining from defining the concept of 'services' with any specificity appears to be a product of the economic literature and analysis that preceded the GATS negotiations.⁶² There is an inherent danger of such an open-ended approach and commentators such as Nardone argue that

'GATS is too comprehensive to ensure sustainable development of water resources since it encompasses all modes of supply, as well as all government laws, regulations, and guidelines affecting trade in services.'⁶³

According to Alberto Velasco, the degree of potential intrusion of international trade forces via the GATS provisions into matters that were traditionally the exclusive concern of domestic governments, such as water services, may well amount to 'the placing of parliaments under tutelage'.⁶⁴ Shiva goes even further in stating that

'GATS is a tool to reverse the democratic decentralization to which diverse societies have been aspiring. GATS can challenge measures taken by central, regional, or local governments as well as nongovernmental bodies. Its rules are shaped entirely by corporations without any input from NGOs, local governments, or national governments.'⁶⁵

Nardone echoes these sentiments and states that 'GATS [is] a vehicle for transnational corporate control of domestic water treatment and supply systems'.⁶⁶

The GATS applies not only to central governmental entities and their regulatory function, but also to regional authorities, municipalities and non-governmental or quasi-governmental bodies, to the extent that the activities of those bodies

60. L. Mehta and B. la Cour Madsen, 'Is the WTO after Your Water? The General Agreement on Trade in Services (GATS) and Poor People's Right to Water', 29 *Natural Resources Forum* (2005) p. 154.

61. Pereira, *supra* n. 56, p. 5.

62. A. Abu-Akeel, 'Definition of Trade in Services under the GATS: Legal Implications', 32 *The George Washington Journal of International Law & Economics* (1999) p. 189 at p. 190.

63. Nardone, *supra* n. 13, p. 202.

64. As quoted in Bouguerra, *supra* n. 7, p. 116.

65. Shiva, *supra* n. 51, p. 94.

66. Nardone, *supra* n. 13, p. 183.

affect trade in services. Any measures taken by these local, regional or national entities – as long as they ‘affect’ trade in services, could potentially be subject to the GATS.⁶⁷ This is particularly significant in the context of water services, where management policies are increasingly set regionally (for example, at the river basin level). Awareness of the GATS’ provisions and implementation must trickle down to these sub-national levels to permit these covered entities to influence the ongoing international negotiations concerning the GATS in an attempt at ensuring that international trade-based outcomes do not further constrain their regulatory functions and activities.⁶⁸ Since, particularly in LDCs, many of these entities may not even be aware of the existence of the GATS, much less its applicability to their role, the need for capacity building and an open, consultative process is especially vital.⁶⁹

Many of the GATS rules and disciplines – including individual WTO member’s commitments in specific services sectors – are still in formative stages. Thus, there are serious concerns that these negotiations will create new rules and obligations that threaten governments’ and citizens’ abilities to appropriately manage their water resources and, in particular, ensure regulation and development of water services in a manner that maximises access to safe water amongst the poorest communities in LDCs.⁷⁰ Clearly, these issues have broader implications for the extent to which traditional notions of state sovereignty will play a role in future challenges with a strong nexus between international trade law and human rights. The significant lack of capacity and highly specialised expertise that many LDC governments face is also an important component of a high-level evaluation of the GATS and its appropriateness as an international mechanism for domestic water services regulation.

In addition to the well-documented impact that the GATS may potentially have on the degree of domestic flexibility and control exercisable internally by state governments, another concern about the operation of the GATS is its potential conflict with other international instruments and laws that *specifically* govern water. This is a scenario that has become a common feature of WTO discourse, particularly concerning conflicts between WTO trade laws and multilateral environmental agreements. One argument is that the established international legal framework outside of the GATS provides persuasive evidence that the Agreement is not intended to impinge on water governance and regulation.⁷¹ For example, a 1999 submission by the Deputy United States Trade Representative to the International Joint Commission states:

67. WWF and CIEL, *GATS, Water and the Environment – Implications of the General Agreement on Trade in Services for Water Resources* (Gland, World Wide Fund for Nature 2003) p. 26.

68. *Ibid.*, p. 46.

69. *Ibid.*, p. 26.

70. *Ibid.*, p. 18.

71. B. Walker Smith, ‘Water as a Public Good: The Status of Water under the General Agreement on Tariffs and Trade’, 17 *Cardozo Journal of International & Comparative Law* (2009) p. 291.

'Given the web of bilateral, regional, and international treaties governing water rights and obligations between WTO member governments, as well as the sovereign interest of all governments in managing the water resources in their territories, we consider it highly improbable that any government would seek to bring international water rights issues before the WTO.'⁷²

The extent to which there will be future conflicts between the GATS and other instruments that comprise the web of international water arrangements within the WTO dispute resolution body (WTO DSB) or another international forum remains to be seen. In the absence of other credible and established institutional mechanisms with the capacity to impose binding sanctions for the enforcement of environmental and human rights obligations, the WTO DSB seems, almost by default, to be the only viable approach. However, if the WTO jurisprudence to date provides any indication, the odds seem to be heavily in favour of an interpretation of the GATS that places the highest primacy on maximising liberalisation, even if it comes at the expense of promoting environmental sustainability and human rights.⁷³

It is clear that the GATS has significant implications for environmental regulators in the context of granting water access.⁷⁴ One possible constraint originates from the GATS 'lock-in' effect.⁷⁵ For example, in so far as granting a water right is directly associated with market access-related issues under the GATS, the reality that the GATS commitments are hard to reverse is crucial.⁷⁶ Essentially, the 'lock-in' effect would make it very difficult for a WTO member to adapt its domestic water policies, if such policy changes have the result, albeit indirect, of reducing market access once it has been granted.⁷⁷ The 'lock-in' effect shifts the onus to regulators to ensure that water allocation is properly done the first time, and that water resources do not become over-allocated (if they are not already), thereby significantly reducing regulatory flexibility.⁷⁸ This 'lock-in' approach where virtual certainty is held in the highest esteem is somewhat in conflict with the best practice principles of domestic water regulation, where policy makers work with the principles of flexibility and adaptive management to respond to changes in society's expectations, development needs and environmental quality.⁷⁹

From a strictly legal perspective, the GATS does not require the privatisation of public services. However, the Agreement contains a powerful dynamic

72. *Ibid.*, p. 310.

73. Further consideration of the possible role the WTO DSBs may play in defining the landscape of domestic water service regulation under the GATS is considered below.

74. CIEL-WWF, *supra* n. 67, p. 29.

75. *Ibid.*

76. *Ibid.*

77. *Ibid.*

78. *Ibid.*

79. *Ibid.*, p. 46.

towards the abolition of public monopolies.⁸⁰ While this does not necessarily require the abolition of public ownership, abolishing public ownership often goes hand-in-hand with the abolition of public monopolies.⁸¹ A related issue is the fact that the GATS does not require member states to extend unconditional market access in all sectors to all its trading partners. The terms of the GATS contain no restrictions on ‘the number or types of conditions, which may be attached to national treatment commitments’.⁸² The GATS does not expressly circumscribe a government’s ability to include the extension of infrastructural networks to poor rural and urban areas in contractual arrangements with foreign operators as long as such a requirement is listed in the country’s schedule of commitments.⁸³

While the General Agreement on Trade and Tariffs (GATT) contains provisions that enable members to adopt automatic safeguard measures in services, the GATS has no such provision.⁸⁴ As Pereira notes, the effect of this is that

‘governments are prevented from reversing, even temporarily, commitments that have produced catastrophic consequences. ... Members have to foresee every situation, current or future, since they will not be allowed to impose any new barrier or limitation, unless done under GATS exception clauses, which is difficult.’⁸⁵

Furthermore, under the GATS, all limitations that member states condition their commitments with operating on a ‘standstill clause’, and the subsequent introduction of further restrictions, however justified, is not permitted.⁸⁶ In an area such as water services in LDCs, where the most sustainable approach is only likely be realised through a dynamic process of experimentation, innovation and ongoing refinement through consultation, such a rigid approach is completely incongruous. There is significant doubt about whether the GATS framework is sufficiently malleable to permit the degree of domestic policy flexibility necessary to ensure the protection of the human right to water, particularly in the world’s poorest nations.

While liberalising water-related services under the GATS may not necessarily undermine, *de jure*, the ability of WTO members to introduce the kind of legislative measures necessary to safeguard the interests of the poor, there are a number of reasons to think that, *de facto*, the scope for policy autonomy might be substantially curtailed. There are a number of constraining factors on the capacity of member states to adequately protect the poor, including the inherent ambiguities of treaty interpretation, the politics and power imbalances between states on the

80. Türk and Krajewski, *supra* n. 11, p. 8.

81. *Ibid.*

82. Mehta and la Cour Madsen, *supra* n. 60, p. 158.

83. *Ibid.*

84. Pereira, *supra* n. 56, p. 14.

85. *Ibid.*

86. *Ibid.*, p. 19.

international stage, a lack of transparency in negotiation processes as well as the various domestic factors of each particular state.⁸⁷

The WTO asserts the following in relation to the GATS regime and its impact on domestic water services:

‘The GATS does not require the privatization or deregulation of any service. In respect of water distribution and all other public services, the following policy options, all perfectly legitimate, are open to all WTO Members:

- To maintain the service as a monopoly, public or private;
- To open the service to competing suppliers, but to restrict access to national companies;
- To open the service to national and foreign suppliers, but to make no GATS commitments on it;
- To make GATS commitments covering the right of foreign companies to supply the service, in addition to national suppliers.

The number of Members which have so far made GATS commitments on water distribution is zero. If such commitments were made they would not affect the right of Governments to set levels of quality, safety, price or any other policy objectives as they see fit, and the same regulations would apply to foreign suppliers as to nationals. ... A GATS commitment provides no shelter from national law to an offending supplier. It is of course inconceivable that any Government would agree to surrender the right to regulate water supplies, and WTO Members have not done so.⁸⁸

Beyond the rhetoric of the WTO, some commentators are persuaded that the GATS can potentially make a positive contribution to the status of water services in LDCs. For example, Kirkpatrick asserts that opening up the water services sector in developing countries to private participation through the GATS framework offers significant potential benefits in terms of investment, technology and management expertise.⁸⁹ However, Kirkpatrick concedes that in order for these potential benefits to be realised, an effective and robust regulatory framework needs to be established, which can control anti-competitive behaviour, safeguard the public interest and contribute to social objectives, in terms of poverty alleviation and equity.⁹⁰

In contrast to Part IV of the GATT, the GATS failed to formally adopt the principles of non-reciprocity and most favourable treatment to specifically regulate North-South trade in services. These omissions lend significant support to the argument that various GATS provisions that refer expressly to developing

87. Mehta and la Cour Madsen, *supra* n. 60, p. 154.

88. WTO, *GATS: Fact and Fiction – Misunderstandings and Scare Stories: The WTO is Not After Your Water*, (n.d), available at: <www.wto.org/english/tratop_e/serv_e/gats_factfiction8_e.htm>.

89. Kirkpatrick and Parker, *supra* n. 48, p. 1492.

90. *Ibid.*, p. 1505.

countries,⁹¹ and implore members to take into account their development situation, amount to little more than rhetorical lip-service.⁹²

The relationship between the GATS and the right to water is complex. On the one hand, the criticisms of the liberalisation of services noted above demonstrate the potential negative impact the GATS could have on the right to water, especially for the poor. However, a rights-based approach to the interpretation of the GATS could make it a useful tool enabling states to take steps to prevent private sector influences that may run counter the right to water, such as increases in price to unaffordable levels.⁹³ As noted above, the right to water requires accessibility to safe drinking water. This accessibility in many circumstances can only be achieved through the provision of adequate water services. Therefore, as these water services are necessary to deliver quality water to the ‘consumer’, it is axiomatic that the right to water should be considered as an important part of the GATS services negotiations.

Having considered the operation of the GATS in general terms and identified some significant potential hazards of the Agreement being applied to water services, this article now turns to examine some specific provisions of the GATS and their implications.

3.1 Key individual provisions of the GATS

Article I

Article I of the GATS sets out the types of entities whose regulatory measures are covered by the Agreement. In short, the activities at all levels of government (national, regional and local) as well as non-government bodies exercising governmental authority potentially fall within the scope of the GATS’ mandate. As such, the GATS is relevant to a whole plethora of governments and entities that are not ordinarily involved in, and often unaware of, international trade negotiations. The fact that the GATS covers such a broad range of entities is crucial in light of both the way water services are provided and the way policies to preserve water are developed and implemented.⁹⁴

Private participation in the water and sanitation sector in developing countries has been primarily by foreign, predominantly Northern companies. Therefore, the inclusion of ‘a service supplier of one Member, through commercial presence in the territory of any other Member’ in the definition of trade in services in Article 1.2 of the GATS is particularly relevant. The global water services market is dominated by a small number of MNCs, often working in consortia involving local enterprises, with the five biggest private sector companies, Suez, Veolia (formerly Vivendi Environment), Sociedad General de Aguas de Barce-

91. See the GATS’ Preamble, para. 4; Arts. IV, V.3(a) and (b), XI, XV, XIX.2.

92. Pereira, *supra* n. 56, p. 12.

93. See, e.g., Türk and Krajewski, *supra* n. 11, pp. 5-6.

94. CIEL-WWF, *supra* n. 67, p. 25.

lona, Thames Water and Benpres Holdings, accounting for 45 per cent of private projects in the sector during the 1990s.⁹⁵

Article 1.3 – Definition of ‘governmental authority’

Article 1.3(b) of the GATS provides that ‘services supplied in the exercise of governmental authority’, being ‘a service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers’ is excluded from the operation of the Agreement. It is widely recognised that the definition of ‘governmental authority’ provided by the GATS lacks clarity. An ordinary reading of the provision indicates that the definition is so confined in its scope that it cannot reasonably be said to encapsulate the public water services in many member states (both developed and developing) because both criteria – the non-commercial basis *and* the absence of competition – must apply for a sector to be excluded. Since the water services sector, like the vast majority of services, is typically not *entirely* without commercial purpose, it seems like it would be extremely difficult to rely on the exemption if a domestic water services policy of a particular government was challenged by another WTO member.⁹⁶

Shiva rejects the contention that the Article 1.3(c) exemption can be relied upon as applying to water services.⁹⁷ Similarly, according to Krajewski, Article 1.3(c) is fundamentally flawed because it completely ignores the nature of the service, and specifically, whether it has a public interest.⁹⁸ In summary, the general consensus amongst existing scholarship seems to be that no service can be excluded *per se*.⁹⁹

Article II – Most favoured nation

As is the case with other WTO instruments, the principle of non-discrimination is at the heart of the GATS. The most favoured nation treatment (MFNT) provision in Article II of the GATS is the general obligation that gives effect to the non-discrimination principle.¹⁰⁰ Article II.1 requires members to

‘accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country’.

The MFNT applies even if a member has not made a specific commitment in a given service and requires non-discrimination among members in relation to services or services suppliers of a like nature.¹⁰¹ The inherent risk of the MFNT

95. Kirkpatrick and Parker, *supra* n. 48, p. 1496.

96. Mehta and la Cour Madsen, *supra* n. 60, p. 158.

97. Shiva, *supra* n. 51, p. 95.

98. Pereira, *supra* n. 56, p. 5.

99. *Ibid.*

100. *Ibid.*

101. *Ibid.*

obligation is its potential to open the floodgates so that a limited trial of market liberalisation of a particular service may bind that member to a far more expansive market opening than it ever intended.¹⁰² Such a risk is particularly concerning for the water services sector because, as noted above, maximising flexibility and leaving scope for dynamic regulatory adjustment is an important component of holistic and sustainable water services policy.

As has been the experience with the GATT, the determination of whether services or service suppliers are 'like' is vital to how extensively the MFNT principle is applied. Despite this, neither the GATS itself nor the WTO DSB jurisprudence provides cogent guidance on how 'likeness' is determined. In particular, it is unclear whether services must be delivered via the same mode of supply in order to be considered 'like' services.¹⁰³

Article VI.4 – Domestic regulation

The stated purpose of Article VI.4 is to ensure that measures such as technical standards and licensing requirements are not 'unnecessary barriers to trade in services'. The procedures that the Article sets out for achieving its aim are for the Council for Trade in Services to establish bodies for the purpose of developing 'any necessary disciplines'. The permissible scope of these conditions is that they must be 'based on objective and transparent criteria, such as competence and the ability to supply the service', 'not [be] more burdensome than necessary to ensure the quality of the service', and 'in the case of licensing procedures, not in themselves [be] a restriction on the supply of the service'.¹⁰⁴

Particularly in relation to the requirement that particular measures are not 'more burdensome than necessary to ensure the quality of the service', the question of the extent to which the GATS will affect domestic water services policies remains largely unexplored. There is considerable ambiguity about whether and how concession contracts for water services – including policies that set out the negotiation of the financial arrangements contained therein – would be covered by the GATS.¹⁰⁵ If these policies were to fall under GATS Article VI.4, they would have to comply with the respective criteria and obligations for specific disciplines that will be negotiated under this mandate. Pricing arrangements for units of economic activity (for example, of water extracted) have not yet been discussed under GATS Article VI.4.¹⁰⁶

There is a wide range of domestic instruments concerning water services that could potentially be argued to fall within the ambit of Article VI.4. For example, land use restrictions that control the distribution of industry potentially affect local water quality and demand for water services, and therefore can serve as an important regulatory tool to preserve market access to water services.¹⁰⁷ In turn,

102. *Ibid.*, pp. 18-19.

103. *Ibid.*, pp. 20-21.

104. WTO, *GATS: Fact and Fiction*, *supra* n. 88.

105. CIEL-WWF, *supra* n. 67, p. 39.

106. *Ibid.*

107. Türk and Krajewski, *supra* n. 11, p. 11.

the preservation and responsible management of groundwater is crucial for a country's ability to provide safe and clean water to its citizens. As regards technical regulations, they may include setting certain quality standards for water to be provided to human beings. Again they constitute a policy tool central to the realisation of the right to water. Thus, while these policies are crucial for domestic water management, they may – in the future – be covered by trade disciplines established under Article VI.4. However, from a human rights and sustainable development perspective, water policy makers should be free to design and implement policies that pursue objectives relating to access maximisation, conservation, and quality standards without being primarily concerned with any corresponding reduction in trade or other economic impacts of these policies.¹⁰⁸ If disciplines under Article VI.4 threaten this approach, the ability of individual member states, which have the primary obligation to ensure human rights for their citizens, may be significantly compromised.

Article VIII – Monopoly suppliers

Article VIII of the GATS requires members to secure that a monopoly supplier in a certain market does 'not act in a manner inconsistent with that member's obligations under Article II [MFNT] and specific commitments'.¹⁰⁹ As such, governments that 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.¹¹⁰

Public monopolies play a central role in water services management in LDCs. The traditional view is that the supply of water is usually considered a natural monopoly, which is only efficiently provided by a monopoly supplier because water services depend on network infrastructure and building more than one infrastructure is considered economically inefficient.¹¹¹ Regulatory regimes for natural monopolies typically use public monopolies or exclusive service suppliers to avoid inefficient competition. Thus, the government's ability to at least have the *option* of resorting to such policies is fundamental when aiming to ensure the right to water. However, once a services sector – including water services – is fully committed to market access under the GATS, there is an argument that Article VIII requires all public or private monopolies to be abolished.¹¹²

Article XV – Subsidies

Proper and safe water services are essential to the realisation of sustainable development. Due to often significant disparities between the cost of providing water

108. Ibid.

109. Mehta and la Cour Madsen, *supra* n. 60, p. 159.

110. Ibid.

111. Türk and Krajewski, *supra* n. 11, p. 6.

112. Ibid., p. 6.

services to the poorest communities in LDCs and the ability of those people to pay for the actual cost of the services, government subsidies are clearly a vital instrument in the promotion and protection of human rights.

In relation to the issue of subsidies, Article XV of the GATS recognises the potential for subsidies to have ‘distortive effects on trade in services’. The Article compels members to enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects and address the appropriateness of countervailing procedures. Significantly, Article XV commands those negotiations to be carried out in recognition of

‘role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area’.

A working programme has yet to be conclusively determined in relation to the conduct of negotiations mandated by Article XV.1.¹¹³ Thus, it remains to be seen whether the requirement for negotiations to be grounded in recognition of the unique needs of LDCs will manifest itself in appropriate concessions concerning the ability of LDCs to utilise subsidies in water services. However, one cannot help but question whether the references to LDCs in Article XV.1 is likely to have a meaningful impact when it only prescribes a requirement to ‘take into account’ the special needs of the South when negotiating special disciplines rather than mandating that the *outcomes* (i.e., the disciplines themselves) manifest such recognition.

Article XVI.2 – Market access rule

In addition to the MFNT principle, the market access provision in Article XVI.2 is the other key component in the GATS’ promotion of universal non-discrimination. The market access rule is limited in its application to sectors where market-access commitments are undertaken. Absent a specific exemption in the member’s Schedule, the market access rule prohibits an array of restrictions in relation to the number of service suppliers, the total value of service transactions or assets, the total number of service operations, the specific types of legal entity or joint venture through which a service supplier may supply a service, and limitations on the participation of foreign capital. In principle, the market access obligation prevents members from adopting measures that undermine the benefits to other members that may be obtained through its national schedule.¹¹⁴

To date, no WTO member state has made a specific commitment of the kind contemplated in Article XVI.2 in relation to water services. However, it should not be assumed that this will always be the case, particularly in light of the immense pressures on LDCs to liberalise their water markets. Much of Pereira’s

113. Pereira, *supra* n. 56, p. 16.

114. *Ibid.*, pp. 22-23.

analysis of Article XVI.2, albeit in the specific context of education (another fundamental rights-based service), can be applied to issues arising in connection with the potential widespread liberalisation of water services in LDCs.

One key concern of the manner in which the market access rule operates is that, once a particular service sector is covered by its schedule, a member will not be able to apply any measure that imposes any further limitation on market access.¹¹⁵ Pereira notes that this ‘lock-out’ principle applies irrespective of whether the proposed future measures can be characterised as ‘critical measures for pursuing its economic and social development’¹¹⁶ including, for example,

‘involvement of local people in management ... license applications based upon an economic needs test, transfer of technology, adoption of research and development programs, technical marketing assistance, and linking with domestic suppliers to promote knowledge transfer’.¹¹⁷

Another area of ambiguity in the future implementation of the GATS is whether the market access and national treatment rules operate in conjunction or isolation.¹¹⁸ If it is the former, limitations on market access would only be permitted if applied on a non-discriminatory basis, potentially increasing the circumstances in which national and sub-national regulatory measures relating to scheduled services could be claimed to infringe Article XVI.2.¹¹⁹ Pereira provides the following assessment of the current status of this potentially significant issue of interpretation:

‘While some delegations believe that a clear and consistent interpretation of the overlap was possible others wonder. According to the WTO Secretariat’s interpretation, which was rejected by Canada and Brazil, the market access provision of GATS applies even to non-discriminatory measures.’¹²⁰

It follows from the above that the market access rule is a potentially significant impediment on the capacity of national, state and local government bodies to regulate traditionally important aspects of water services such as the number of service suppliers and operations, the value of service assets, and the quantity of service output.¹²¹ Article XVI seems likely to create legal insecurity for policies that aim to protect water resources by establishing quantitative caps either on the water available for economic activity or on the impact that operations of service suppliers have on water.¹²²

115. *Ibid.*

116. *Ibid.*

117. *Ibid.*, p. 22.

118. *Ibid.*

119. *Ibid.*

120. *Ibid.*, pp. 22-23.

121. Shiva, *supra* n. 51, p. 95.

122. Türk and Krajewski, *supra* n. 11, p. 8.

For countries that have entered into full and unconditional commitments under the GATS market access provision, Article XVI prohibits placing certain limits on the *number of service providers*, the total *value of service transactions*, the total *number of service operations* or the *quantity of service output* allowed in a geographical region. However, licences, concessions and permits are common regulatory tools that are implemented for the purpose of avoiding unsustainable over-exploitation of water by establishing such clear quantitative limitations for service provision.¹²³

The extent to which the GATS market access obligation would prohibit policies that aim to preserve water by placing limits on the *impact* that the *operations of service suppliers* have on the quality or the amount of water available is not yet clear. Some interpretations suggest that for a domestic measure to be deemed inconsistent with the GATS it must not only have the *effect* of creating a certain quantitative limitation, but it must also take a certain *form*, thus establishing a stricter criterion for finding a policy to be in violation of the GATS.¹²⁴ Another unresolved issue is whether the GATS will be applied in a manner that limits domestic policies setting out parameters for the negotiation of water services concessions contracts, or the contracts themselves.¹²⁵

In summary, there is a genuine cause for concern that the market access obligation might prevent LDCs from maintaining appropriate levels of control over their domestic water services sector. It is important that such concerns are given the prominence that they deserve in any negotiations surrounding the liberalisation of any aspect of the water services sector.

Article XVII – National treatment obligation

Known as the ‘national treatment obligation’, Article XVII of the GATS applies to scheduled sectors and requires members

‘to accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers’.¹²⁶

The effect of Article XVII is to prohibit governments from discriminating between foreign and local service suppliers irrespective of differences in their capacity, size and operating mandate. As noted by Shiva, in the context of water services, the obligation will be applicable ‘even if the local provider is a community non-profit and the foreign supplier is a giant water corporation’.¹²⁷

Article XVII may prove problematic for the many LDCs with water services where, as is commonly the case, the government is both a market participant

123. CIEL-WWF, *supra* n. 67, p. 47.

124. *Ibid.*

125. *Ibid.*, p. 30.

126. GATS, Art. XVII.

127. Shiva, *supra* n. 51, p. 95.

and a market regulator.¹²⁸ According to the strict terms of the national treatment obligation, members are required to apply all internal laws, regulations, taxes and standards neutrally among all market participants.¹²⁹ Despite this, it is unrealistic and inappropriate for a government to tax itself in connection with the provision of essential water services to its constituents. On this issue, even the Directorate-General for Trade of the EC has voiced concern that neutral governmental measures and regulations, which ‘may be fully justified on environmental grounds’, may have *de facto* discriminatory effects on foreign services suppliers and may be prohibited once a WTO member has made a commitment under GATS Article XVII.¹³⁰

Of particular concern from a developmental and human rights perspective is the real possibility that certain universal service obligations (USOs) might be challenged and declared invalid on the grounds that they violate the GATS’ *de facto* national treatment obligation.¹³¹ USOs are important elements of regulatory regimes aimed at promoting universal access to water.¹³² They are requirements imposed on the service provider by the state, usually involving an agreement to expand service delivery to certain previously unserved areas, or to provide the service at an affordable price. In very impoverished or marginalised areas, ‘affordable’ can mean that the service provider has to provide the service below cost. When formulating its water policies, particularly in the context of opening the water services sector to foreign corporations, a government may decide to apply USOs only to *new* service providers in the relevant sector.¹³³ As the reason for implementing policies permitting privatisation and liberalisation is typically to address a lack of domestic investment, the *new* entrants affected by the USO would most likely be foreign private providers, not domestic ones.¹³⁴ Consequently, a USO targeting such new entrants could be found to be discriminatory and consequently prohibited under the GATS *de facto* national treatment requirement. This could have far-reaching implications for domestic water management policies and their capacity to achieve sustainable, rights-based outcomes.

Having considered the specific provisions relating to market access, national treatment and domestic regulation, it should be reiterated that members, at least in theory, have absolute discretion to elect what, if any, service sectors they wish to open up to liberalisation. It is also open to members to set restrictions and conditions in their schedule that governs their commitment to open up a particular sector to liberalisation.¹³⁵ However, if past experiences concerning issues such as intellectual property and the TRIPs Agreement are any indication, it appears

128. Pereira, *supra* n. 56, p. 17.

129. *Ibid.*

130. As quoted in CIEL-WWF, *supra* n. 67, p. 43.

131. *Ibid.*

132. *Ibid.*

133. *Ibid.*

134. *Ibid.*

135. Pereira, *supra* n. 56, section III.

plausible that pressure from developed countries and international trade and monetary institutions will reach a point where LDCs feel unable to resist a move towards opening up their water services markets under the GATS. In this regard, Nardone suggests that

‘it is very likely that future GATS negotiations will require the few governments that continue to maintain public service monopolies to abandon their franchises in favor of foreign corporate competition’.¹³⁶

Similarly, as Dellapenna and Gupta note,

‘While most developed countries are able to limit external influences and have disproportionately influenced the shaping of international standards, developing countries have voluntarily and involuntarily drawn extensively on the ideas promoted at the international level.’¹³⁷

The susceptibility of LDCs to yield to pressure to expose their water services markets under the GATS is an inherent consequence of the fact that the governments of these states may be severely under-resourced, battling corruption, or fearful of detracting foreign investment.¹³⁸

Article XIV – General exceptions

Article XIV(a) and (b) of the GATS provides that nothing in the Agreement operates to prevent the adoption or enforcement by any member of measures necessary to protect public morals, human, animal or plant life or health or to maintain public order. However, such measures are prohibited from being applied

‘in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services’.

Notwithstanding the apparent breadth of the exemption, commentators argue that Article XIV ‘constitutes an inadequate remedy for the challenges that the GATS poses for domestic water management’.¹³⁹ Whilst Article XIV does legitimise and exempt some measures catering to important matters of national policy, water services are not expressly within its purview. However, it does seem that measures aimed at improving the provision of adequate domestic water services in the poorest communities of LDCs is as worthy as any circumstance for categorisation as a measure ‘necessary to protect human life’ and ‘maintain public order’.

136. Nardone, *supra* n. 13, p. 202.

137. Dellapenna and Gupta, *supra* n. 27, p. 440.

138. Petrova, *supra* n. 5, p. 587.

139. CIEL-WWF, *supra* n. 67, exec. summary.

Article XIV of the GATS is analogous to Article XX of the GATT in its reference to measures ‘necessary to protect public morals’ and ‘necessary to protect human, animal or plant life or health’. After examining the WTO jurisprudence to date concerning GATT Article XX, Kinley and Tadaki draw the following conclusions, which are equally applicable to the possible future interpretation of Article XIV of the GATS:

‘All this might lead states to – at best – reserve article XX for the most reprehensible human rights abuses, leaving less extreme abuses unpunished. Given the existing body of jurisprudence on how article XX might be applied to protect human rights, coupled with the minimal political will of the member states to invoke it, article XX thus may do no more than provide an additional measure to enforce limited human rights norms in circumstances of their most egregious breaches.’¹⁴⁰

The characterisation of a right to water as an internationally recognised human right may be significant in the interpretation of the term ‘public morals’ in Article XIV, if the WTO elected to adopt a jurisprudential approach acknowledging that

‘the very idea of public morality has become inseparable from the concern for human personhood, dignity, and capacity reflected in fundamental rights. A conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning of the concept.’¹⁴¹

However, an examination of WTO dispute resolution bodies’ decisions to date concerning the interpretation of the analogous provision in GATT reveals significant doubts about whether such an approach would be accepted, even in the context of something as fundamental to human life as basic domestic water services. A brief examination and discussion of this kind is undertaken in the following part.

3.2 The role of the WTO Dispute Resolution Body

A member alleging that another member has breached the terms of the GATS can bring a complaint before the WTO DSB. A subsequent finding of a breach can result in a suspension of concessions to the failed member and other substantive sanctions.¹⁴² Whilst having this substantial capacity to enforce its decisions is an often cited advantage of the WTO DSB, from an LDC perspective it can be also a threat to social, environmental and economic national objectives that are vital

140. D. Kinley and J. Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’, 44 *Virginia JIL* (2004) pp. 931-1024.

141. Office of the UN High Commissioner for Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights*, UN Doc. HR/PUB/05/5, November 2005, p. 5.

142. Pereira, *supra* n. 56, p. 13.

to holistic water services policy, as trade is the overriding consideration taken into account by the Body. It also creates an avenue for private corporations to compel the instigation of proceedings in the WTO DSB against member states whose domestic policy concerning water services arguably prevents free-market entry in those unique service markets.¹⁴³ Due to these institutional constraints, some commentators argue that the WTO DSB is an inappropriate forum for considering the lawfulness of member states' approaches to addressing the world's water crisis.¹⁴⁴

To date, a body of WTO jurisprudence has not been developed in relation to the relatively recently implemented GATS. However, an examination of the approach taken by the WTO DSB in determining past disputes relating to the GATT provides a useful reference point. In considering the future relationship between access to water and WTO dispute mechanisms, Nardone adopts such a historical approach and concludes:

'[W]here trade and environmental protections were at issue in past trade disputes, the outcomes have heavily favored "the cash register ring". In fact, no democratically enacted environmental, health, or food safety law has ever withstood a trade barrier challenge ... given the impact that international trade rules have had on existing environmental regulations, the future of the world's water supply looks grim. Past treatment of environmentally directed national legislation indicates that the WTO dispute resolution process will likely prevent or suborn most national/local sustainable development legislation or environmental protection regulation.'¹⁴⁵

Whilst past experience with the WTO DSB may well justify such a pessimistic outlook, one can hope that perhaps a point of differentiation will be made between the approach adopted in past disputes concerning environmental issues¹⁴⁶ and possible future disputes concerning water access, with the latter being more directly linked to the protection of fundamental human rights. Therefore, it is particularly significant that

'to date no WTO Panel or Appellate Body has ever been called upon to rule on a trade measure instituted by a Member for explicit human rights objectives'.¹⁴⁷

Lim contends that

143. Shiva, *supra* n. 51, p. 94.

144. See, e.g., Nardone, *supra* n. 13, p. 197.

145. *Ibid.*

146. The classic example of this is the use of the dolphin-'friendly' nets considered in the *Tuna/Dolphin* dispute, *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, 30 *ILM* (1991) p. 1594.

147. J. Schultz and R. Ball, 'Trade as a Weapon? The WTO and Human Rights-Based Trade Measures', 12 *Deakin L Rev.* (2007) p. 41 at p. 45.

‘the WTO dispute settlement system is simply neither mandated nor competent to handle such a matter. Whether sanctions are permitted or not to bring about the enforcement of human rights in third States is ultimately a general issue of public international law and not of WTO law.’¹⁴⁸

The lack of transparency and public disclosure surrounding dispute proceedings is another concerning aspect of the WTO DSB being charged with the responsibility of determining the lawfulness of domestic water services regulation under the GATS. Nardone rightly argues in this regard that

‘Considering the unequal distribution of the Earth’s water resources and the disadvantages already confronting developing nations at the WTO, secrecy in a legally binding dispute resolution procedure is absolutely unacceptable in the context of an international fresh water trade.’¹⁴⁹

It follows that an even more fundamental question than the manner in which the WTO DSB might determine a dispute under the GATS that has direct implications on the realisation of the human right to water is whether the Body is even the appropriate authority for determining such issues in the first place.

It is also important to consider the possible future role of the WTO DSB in light of ongoing negotiations on domestic regulations contemplated by Article VI.4 of the GATS. These new disciplines would require members to eliminate national regulations if they are more trade-restrictive than necessary. Specifically, such disciplines would enable the WTO DSB – in case of a dispute – to decide whether a particular government measure was *necessary* to achieve its objectives or whether other less trade-restrictive means could have been used. This is particularly worrisome as national decisions are often based on carefully struck political and social compromises.¹⁵⁰ If such compromises are open to review by the WTO DSB in relation to whether the regulatory approach is more trade restrictive than necessary to achieve the relevant policy objective, policies genuinely aimed at fulfilling human rights obligations may be superseded by approaches that afford disproportionate priority on minimising the risk so that they could be challenged within the WTO framework.

In summary, while it may be unlikely that the WTO DSB would find policy objectives as vital as universal access to water for domestic purposes to be illegitimate, they still would have the power in a trade dispute to judge whether the policy in question is the least trade restrictive way to achieve that human rights-based objective. The mere fact that policies could be subject in this way to WTO scrutiny in a trade dispute might have a ‘chilling’ effect on domestic environmental policy making.¹⁵¹

148. Cited in *ibid.*, p. 77.

149. Nardone, *supra* n. 13, p. 206.

150. Türk and Krajewski, *supra* n. 11, p. 10.

151. CIEL-WWF, *supra* n. 67, p. 42.

4. THE WAY FORWARD – THE FUTURE NEXUS BETWEEN THE GATS AND WATER SERVICES

The fact that the GATS legal framework is not yet clearly established and negotiations are still in progress provides an opportunity for water management policy makers to intervene in the negotiating process with the aim of minimising possible future threats to the adequate provision of water services to poor communities in LDCs.¹⁵² This article concludes by briefly considering some key issues for the negotiating agenda in connection with any move to liberalise water services under the GATS.

4.1 Capacity building – a glaring omission from the GATS

One of the fundamental flaws of the GATS is that whilst it provides a clear pathway for large multinationals to benefit from liberalised service sectors in LDCs, it fails to establish any mechanism for the North-South transfer of capacity-building measures to better equip LDC governments so that they can effectively monitor increased private activity, particularly in traditionally government-dominated sectors such as water services. Williams succinctly summarises this issue in the following terms:

‘One almost axiomatic answer to the problems of privatization is that government regulation can and should guarantee that privatization is implemented in such a way as to satisfy human rights requirements. ... In short, the dilemma is that governments that may be most tempted by privatization may also be those with poorly functioning regulatory systems, which strongly suggests that privatization will not be a universal solution for problems in implementing the human right to water.’¹⁵³

The resource demands for the proper regulation of the water services sector are significant. It is vital, especially in LDCs, that all aspects of the sector, including planning and policymaking, research, monitoring, regulation, public and stakeholder engagement, resource development and protection, environmental safeguarding, and pollution control are properly resourced.¹⁵⁴

Therefore, the problem is not necessarily the liberalisation of water services *per se*, but rather whether government oversight is able to ensure that private foreign providers will contribute to improving national water services systems, not only in fiscally profitable markets but in those segments of society where the needs are greatest. To do so, governments must be strong enough to combat the political pressure of powerful private sectors which are capable of subverting regulatory systems and acting as co-opting regulators.¹⁵⁵ This requires concerted

152. Ibid., p. 18.

153. Williams, *supra* n. 47, p. 501.

154. Ünver, *supra* n. 1, p. 415.

155. Pereira, *supra* n. 56, p. 2.

capacity-building efforts in LDCs and such efforts should not only be recognised, but facilitated through the GATS framework.

4.2 Pricing challenges

It is essential that the GATS be interpreted and implemented in a manner that does not affect the permissibility and legitimacy of the approach, in many LDCs, for domestic water policies to permit the supply of water to poor communities for domestic purposes at a 'below-cost' level.¹⁵⁶ Indeed, the right to water as established in General Comment 15 discussed above includes 'unaffordable increases in the price of water' as a human rights violation.¹⁵⁷ The need for safety nets guaranteeing access to water services for those who are unable to meet the associated costs, may imply that service providers are required to make water available free of charge to certain consumers.¹⁵⁸ Private companies are unlikely to perform this function without any reimbursement of costs and it is therefore essential that governments maintain the right to subsidise either suppliers or end consumers, when this is required to achieve legitimate social objectives.¹⁵⁹ Another alternative is making the provision of free, or below-cost, water services to the poorest communities in LDCs a condition precedent to gaining access to profitable urban and other more affluent markets. In places with a burgeoning middle class such as India, this would seem to be a very significant incentive for foreign private corporations.

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.¹⁶⁰ However, as discussed above, Article XV recognises that in certain circumstances subsidies may have distortionary effects on trade in services and future negotiations must address the appropriateness of countervailing measures.¹⁶¹

Some proponents of the increased liberalisation of water services in LDCs acknowledge that approaches to pricing must give due regard to social factors such as the inability of poor residents to pay.¹⁶² Petrova notes that

156. V. Nanda, 'Sustainable Development, International Trade and the Doha Agenda for Development', 8 *Chapman L Rev.* (2005) p. 53.

157. General Comment No. 15, *supra* n. 20, para. 44.

158. J. Allouche and M. Finger, *Water Privatisation: Transnational Corporations and the Re-regulation of the Global Water Industry* (London, Spon Press 2002).

159. *Ibid.*

160. N. McCulloch, L.A. Winters and X. Cirera, *Trade Liberalization and Poverty: A Handbook* (London, Centre for Economic Policy Research 2001) as cited in Mehta and la Cour Madsen, *supra* n. 60, p. 160.

161. Mehta and la Cour Madsen, *supra* n. 60, p. 160.

162. Petrova, *supra* n. 5, p. 588.

‘the World Panel on Financing Water Infrastructure has coined the concept of “sustainable cost recovery” which embraces the goal of full cost recovery in the long term, while supporting targeted “pro-poor” subsidies in the meantime’.¹⁶³

Despite the theoretical attractiveness of such an arrangement, Williams highlights the reality that

‘it seems unlikely that privatization arrangements can reach those in the most urgent need of water supplies: the rural poor in isolated areas. Since rural projects are less likely to show a profit, they have never been attractive to large, transnational private water providers.’¹⁶⁴

It should also be acknowledged that the flip-side of the pricing problem is that heavily subsidised, below-cost pricing for water services may contribute to the over-extraction of water and misuse of this fragile resource. There is no doubt that the price paid for water should reflect the true value of the water available, but an exception must be made amongst communities that simply cannot afford to pay the costs associated with supply for domestic purposes.¹⁶⁵ Contrary to this approach, the unfortunate reality is that, historically, *de facto* subsidies in some LDCs have primarily benefited the middle class who already have access to piped water, leaving poor residents at the mercy of private vendors who charge as much as ten times higher.¹⁶⁶

These are just some of the complex pricing issues that the negotiations surrounding the coverage of water services under the GATS must grapple with if a truly sustainable and rights-promoting outcome is to be reached.

4.3 Domestic policy flexibility

It is vital to recognise the challenges that arise from the inherently different approaches that water management authorities and international trade rules take to policy making. In order to protect water resources, regulators need flexibility to implement adaptive management plans which can respond to changes in environment and use patterns.¹⁶⁷ The provisions of the GATS, as is typical with most international trade rules, indicate a marked preference for legal security and predictability, and in so doing it seeks to ‘lock-in’ policy choices once they are established. This is particularly problematic in light of the fact that domestic water laws are in a state of flux and, at the present time, the policy and manage-

163. Ibid.

164. Williams, *supra* n. 47, p. 503.

165. CIEL-WWF, *supra* n. 67, pp. 38-39.

166. Petrova, *supra* n. 5, p. 587.

167. CIEL-WWF, *supra* n. 67, exec. summary.

ment paradigm that is most likely to promote the universal human right to water is far from clear.¹⁶⁸

At present, there is insufficient certainty that the GATS framework will permit the level of sector-based differentiation that is necessary to ensure that members, and particularly LDCs, will be able to open their domestic water services markets to privatisation (where they deem it appropriate to do so) and yet retain a sufficient level of control that enables the regulation of these markets in accordance with dynamic national needs and values, and without the constant fear of being hauled before the WTO DSB. The many outstanding issues concerning the GATS negotiations must not be carried out in isolation. Instead, there needs to be close collaboration with the host of other international organisations that have an interest in ensuring water services are regulated through a rights-based approach.¹⁶⁹

4.4 Primacy of human rights-based approach and alignment with other international law spheres regulating water services

Potential tensions between WTO law and other spheres of international law governing water services need to be addressed in a manner that recognises the primacy of the human right to water. Within the GATS framework, the social dimension of water services cannot be given mere lip-service, especially when it comes to LDCs.¹⁷⁰ On this point, Bouguerra forcefully argues that

‘It is unrealistic and scarcely imaginable that water should be wholly subject to the laws of the market, with no compensation and, above all, no help for deprived sections of the population.’¹⁷¹

The following operational principles may serve as a useful starting point for facilitating effective, rights-based water governance:

- clearly defining the role of the public authority in public-private partnership;¹⁷²
- ensuring that obligations under the GATS do not constrain governments in taking action to promote and protect human rights;¹⁷³
- allowing ‘tests’ of the trade-restrictiveness of government domestic regulation under the GATS to take into account a state’s obligations under human rights law;¹⁷⁴ and

168. Ibid.

169. Pereira, *supra* n. 56, p. 35.

170. Bouguerra, *supra* n. 7, p. 118.

171. Ibid.

172. Fried, *supra* n. 3, p. 6.

173. Commission on Human Rights, *Liberalization of Trade in Services and Human Rights, Report of the High Commissioner*, E/CN.4/Sub.2/2002/9, 25 June 2002.

174. Ibid.

- expressly permitting members the flexibility to modify and withdraw sector-specific commitments in relation to the liberalisation of trade in water services, taking into account the need for states to meet their human rights obligations.¹⁷⁵

Within the GATS system, the establishment of an overdue governance framework of this kind could be achieved through the creation of complementary rules to guide the Agreement's ongoing negotiation and implementation.¹⁷⁶

Ultimately, it is difficult to contemplate that the GATS, in its current iteration, will make a positive contribution towards the increased realisation of the human right to water in LDCs. To date, international trade law has had a predominantly negative effect on the promotion of public health in LDCs.¹⁷⁷ Any liberalisation of water services in LDCs under the GATS needs to be distinguished by a marked reversal of this disturbing yet persistent trend. The human rights stakes are simply too high for any other outcome to be accepted by the international community.

175. *Ibid.*

176. Pereira, *supra* n. 56, p. 22.

177. W. Onzivu, 'Globalism, Regionalism, or Both: Health Policy and Regional Economic Integration in Developing Countries, an Evolution of a Legal Regime?', 15 *Minnesota JIL* (2006) p. 111 at p. 186.