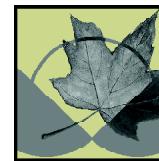


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## The GATS, South African local governments and water services

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### Introduction

The General Agreement on Trade in Services (GATS) has been described as "perhaps the most important single development in the multilateral system since the GATT itself came into effect in 1948."<sup>1</sup> Despite its importance, the agreement is still not widely known or understood.

Nonetheless, negotiations are now underway to expand GATS coverage and to develop new GATS rules designed to further restrict domestic regulation. As a key WTO member, South Africa will face pressure to cover additional services under the treaty, including water and sanitation services.

This paper provides a backgrounder on the GATS agreement and an update on current GATS negotiations. In particular, it explores key implications of increased GATS coverage for essential municipal services, focusing on water and sanitation. What types of local, regional or national government measures are likely to be restricted by the GATS? What are the potential impacts of GATS on public provision of basic services? What are the impacts on the flexibility of governments to regulate services provided at arms-length? What sorts of local economic development measures might run afoul of GATS commitments? What are the implications of the ongoing negotiations to develop new GATS

rules, particularly proposed "disciplines" to further restrict non-discriminatory "domestic regulation"? Most importantly, how might GATS interfere with public policies and initiatives to ensure the quality, affordability and accessibility of essential services such as water and sanitation?

The paper also assesses implications for local governments of the limited GATS commitments that South Africa has already made covering water-related and sanitation-related services. More significantly, it examines potential impacts if the South African national government gives in to pressure, external or internal, to make further commitments. Finally, it suggests steps that South African local governments and community-based groups might take to protect their ability to strengthen and reform public services, preserve regulatory autonomy, and to ensure that access to basic services, especially for the poor and vulnerable, is not adversely affected by the GATS negotiations.

### Update on the current GATS negotiations

The GATS is part of the World Trade Organisation (WTO) "single undertaking," meaning that, in 1994, governments had no choice but to be part of the GATS if they wanted to be members of the newly-created WTO. The extent of commitments made by



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countries when the GATS was signed varies greatly. Developed countries, along with a few developing countries, made extensive commitments. But many developing countries took a more cautious approach.<sup>2</sup> For a developing country, South Africa made fairly extensive GATS commitments in 1994. These will be considered later in the paper.

GATS proponents viewed these initial commitments as simply a down-payment that would be increased through future negotiations. In fact, the GATS treaty contains a so-called "built-in" agenda that requires "successive rounds of negotiation" to broaden and deepen coverage under the agreement.<sup>3</sup> All service sectors are on the table in these ongoing rounds of negotiations.

The current round of services talks began in early 2000 and was later rolled into the broader Doha round negotiations that began in 2001. At the November 2001 launch of the Doha round, members agreed to specific deadlines for the services negotiations. Participants were to submit initial requests for specific commitments by June 30, 2002 and initial offers by March 31, 2003.

By early 2004, over 60 of the 148 WTO members had made requests of *other* countries to make specific commitments in *their* services sector. These requests add up to a set of demands that most WTO members make *full commitments in nearly every* sector. The requests also target *all* limitations (or country-specific exceptions) protecting otherwise GATS-illegal government measures from challenge. The main push for liberalization of water and environmental services is being driven by the EU. This high-pressured dynamic is deliberately intended to build momentum for significant further commitments.

What is yet to be determined is how far individual governments, including the South African government, are willing to go to meet these sweeping requests. By February 2005, fifty WTO members had tabled initial offers for the increased application of GATS to *their own* domestic service sectors.<sup>4</sup> Many developing countries have not yet tabled initial offers.<sup>5</sup>

Most of the initial offers tabled to date are light on new or substantial commitments.<sup>6</sup> This is to be expected at this stage in the negotiation. The process of request-offer, revised request and counter-offer will continue until the very end of the Doha negotiations. At that point, the WTO will combine the services package with the results of the other negotiations in a final overall agreement to be adopted by all members.<sup>7</sup>

Many developing countries have deliberately linked the pace of the services negotiations to match that of other parts of the WTO talks - in particular, agriculture. The U.S., European Union and Japan, and their corporate lobby groups, clearly expect substantial new GATS commitments and movement on new rules controlling services regulation as payment for any reduction in their agricultural subsidies. If there is a breakthrough in agriculture, the stage is set for GATS negotiations to move rapidly.

A significant unblocking of the agricultural talks, and the overall Doha round, occurred in July, 2004. Spurred by a deal hammered out by just five governments - the United States, the European Union, Australia, Brazil and India - WTO members approved a so-called "framework agreement" that is expected to put the Doha negotiations back on track. Governments did not set a new formal deadline to replace the former milestone of January 1, 2005. But a realistic decision point is prior to the expiry of U.S. fast-track negotiating authority in the middle of 2007.<sup>8</sup>

Under the services provisions of the July 2004 framework agreement those countries that have not yet submitted offers "must do so as soon as possible."<sup>9</sup> All governments are now expected to submit revised offers by May 2005. These offers are to be "high quality ... particularly in areas of export interest to developing countries." The framework agreement also requires members to "intensify the negotiations on rule-making under the GATS" which call for new GATS restrictions on subsidies (GATS Article XV), government procurement (GATS Article

XIII), and domestic regulation of services (GATS Article VI.4), as well as the development of safeguards provisions (GATS Article X).<sup>10</sup>

## GATS basics

The basic aim of the GATS is straightforward: to expand “trade in services.” It is designed to achieve this goal by restricting government measures that interfere with the ability of foreign companies and investors to profit by supplying services. The agreement provides certain flexibilities for governments when they make GATS commitments and includes provisions purporting to safeguard public services and the right to regulate. The desirability of restricting governments’ policy flexibility over services and the adequacy of GATS safeguards to protect legitimate and desirable public policies from threat are the crux of the issue.

### Scope of the GATS

The scope of the treaty is very broad. It applies to all government measures affecting trade in services. No service sector is excluded “a priori.” It is vital for local politicians, officials and citizens to understand that the GATS covers measures taken by *all* levels of government, including central, regional, and local governments.

The GATS purports to exclude services provided “in the exercise of governmental authority,” but these are narrowly defined as services provided *neither* on a commercial *nor* a competitive basis (GATS Article I:3.c). Accordingly, if a service is provided exclusively by government on a not-for-profit basis then the exclusion likely applies, but having *either* commercial or competitive elements present in the financing or delivery of a service would negate the protective effect of the governmental authority exclusion. Because most so-called “public service” systems, including those at the local government level, are actually mixed public-private systems with varying degrees of private financing and delivery of services, the governmental authority

exclusion cannot be relied upon for protection from GATS rules.

The GATS defines “trade in services” quite unconventionally to include not just cross-border trade - where a supplier located in one country provides a service to a consumer located in another - but also other ways in which foreign suppliers can provide services.

The four GATS “modes of supply” are:

- Cross-border services trade (mode 1). This mode is closest to the conventional meaning of international trade, and includes, for example, an engineering consultant located in the United States giving advice to a South African firm through mail, over the phone or by Internet.
- Consumption abroad (mode 2). Examples of this mode include tourism or a student travelling abroad to attend university.
- Commercial presence (mode 3). This mode includes all forms of foreign direct investment; for example, when a European water company establishes in South Africa to provide water services formerly provided by a local authority.
- Natural persons (mode 4). This mode covers persons travelling internationally to provide services; for example, when technicians or management personnel from a European water company come temporarily to South Africa to provide services.

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Significantly, the GATS covers investment - services provided through commercial presence (mode 3). As the WTO Secretariat has observed: “This [i.e., mode 3] is probably the most important

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mode of supply of services, at least in terms of future development, and also raises the most difficult issues for host governments and for GATS negotiations.”<sup>11</sup> Because foreign investment is so commonplace in a globalized economy, almost any conceivable government action could be a measure affecting “trade in services” as defined by the GATS.<sup>12</sup>

## **Key GATS provisions and GATS-illegal government measures.**

Certain GATS rules - the key being the Most-Favoured Nation treatment article - are “top-down” and apply across-the-board to all sectors irrespective

of whether commitments have been taken. But the strongest provisions of the GATS are “bottom-up,” applying only to those sectors that governments specifically agree to cover. These sectors or subs-sectors are listed in each country’s schedule to the GATS.

Each member government has the ability to list only certain sectors or sub-sectors, can choose which modes of trade it wants

to cover in its GATS schedule, and can put conditions (known as limitations) on the commitments it makes. This latitude in scheduling is the main source of what is often referred to as the “flexibility” of the GATS.

Yet even a cursory examination of this purported “flexibility” gives cause for concern. Probably the best way for local officials and elected representatives to grasp the potential impacts of GATS provisions is to consider examples of the types of policies

are disallowed in sectors or sub-sectors where full commitments have been made.

### **National treatment (GATS Article XVII)**

If the South African government were to make an unlimited national treatment commitment covering water and sanitation services, no level of South African government could take measures that favoured domestic services or suppliers over foreign ones. The GATS definition of national treatment provides that governments, in the committed sector and mode, must accord conditions of competition to foreign services and suppliers that are “no less favourable” than those accorded to its own like services and suppliers.

For example, the following conditions, used in many countries around the world to provide some measure of protection from undue outside influence and control, to strengthen local accountability, or to ensure fairer working conditions, would not be allowed:

- Any requirement that foreign water and sanitation companies take local South African partners.
- Government subsidies, preferential loans, or loan guarantees available only to South African providers, or exclusively to community-owned or controlled entities.
- Any requirement that a certain percentage of managers or boards of directors of water service providers be local or national.
- Any requirement that foreign firms train local workers or personnel.
- Government measures that mandate technology transfer to local entities, whether private or public.
- Measures giving preferences or right of first refusal to local providers or community-based providers when water concessions are let or public assets are sold.
- Affirmative action programs, for example, that oblige foreign service providers to hire a certain

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number of South African black or women workers, to employ a certain level of South African black or women managers or to divest a certain part of their assets to South African black- or female-owned firms.

The GATS national treatment rule does not permit these types of government measures to be applied on any level - national, regional or sub-regional.

#### *Market access (GATS Article XVI)*

The GATS market access article is particularly intrusive on government autonomy because it deliberately prohibits *non-discriminatory* government measures. In principle, national treatment is a relative restriction that allows each member government to adopt any policy it chooses (even if those differ from other members) so long as the measure is not discriminatory in law or in effect. By contrast, the GATS market access provision is framed in absolute terms. It precludes certain types of policies, whether they are discriminatory or not.

In sectors and modes where full commitments are taken, GATS Article XVI disallows six types of so-called "quantitative restrictions," whether these are applied "in the form of numerical quotas or economic needs tests." Such restrictions can not be adopted "either on the basis of a regional subdivision or on the basis of its entire territory."

The six types of government restrictions that are not allowed (unless they are specifically exempted in a country's schedule) are:

- Limitations on the number of service suppliers, including in the form of monopolies or exclusive service suppliers (for example, providing water and sanitation services through government monopolies or exclusive arrangements with private service suppliers);
- Restrictions on the total value of service transactions or assets (for example, private suppliers are authorised to perform only X million Rand of

certain services or must have assets of X million Rand);

- Restrictions on the total number of service operations or the total quantity of service output (for example, policies limiting expanded water services to lucrative customers or regions until improved water or sanitation services are first provided to under-served customers or regions);
- Restrictions on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ (for example, limits on the numbers of engineers or bill collectors that can be employed in a sector or region);
- Restrictions on or requirements for certain types of legal entity or joint venture for the supply of a service (for example, a requirement that a foreign water corporation must enter into a joint venture with a local, community-based entity to enter the market or licensing rules that permit only not-for-profit entities to provide certain water or sanitation services.);
- Limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment (for example, a requirement that 10% of assets of a service company be held by black South Africans, which would be an effective limit of 90% ownership by foreign service providers).

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To reiterate, it does not matter whether such restrictions, including economic needs tests,<sup>13</sup> are

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discriminatory (applying only to foreigners) or non-discriminatory (applying equally to foreign and domestic suppliers), or are applied on a national or a regional basis. They are disallowed in any case.

The GATS is a complex treaty. These are examples of general types of measures that are inconsistent with the GATS. The inconsistency of a specific measure would depend on its exact form and the

**The range and variety of GATS-illegal measures underscore the perceptive remarks by the director general of the WTO when the GATS was negotiated. Renato Ruggiero stated that the GATS extends into areas “never before recognised as trade policy. I suspect that neither governments nor industries have yet appreciated the full scope of these guarantees or the full value of existing commitments.”**

ciated the full scope of these guarantees or the full value of existing commitments.”<sup>14</sup>

## Procurement

One area of debate over GATS interpretation pertains to government procurement. Government procurement is exempted from the most restrictive GATS rules: most-favoured nation, national treatment and market access.<sup>15</sup> A standard refrain when Canadian municipal governments express concerns

regarding the impact of the GATS is that procurement is excluded and most of what local governments do is procurement. Such reassurances, however, are simplistic and potentially misleading.

The grey area lies in how government procurement is defined. The GATS contains no formal definition of procurement, but procurement is usually defined as purchase for the government's own use. Not all contractual relationships between a local government and a private service supplier are procurement.

New models of contracting such as public-private-partnerships (or P3s) blur the line between government procurements, which are excluded from certain GATS provisions, and services investments, which are not. If some of these new P3 contracting arrangements are deemed investments, then governments could lose the legal protection afforded by the procurement exceptions.

There is a continuum from traditional procurement (for example, a local authority tenders a contract for a private company to construct a water treatment facility that will be publicly operated) to long-term concessions, where a water provider runs the service at arms-length, arranges its own financing and collects its own revenues. Such long-term concessions are essentially privatizations, not recognizable as procurement, and, in all likelihood, covered by the GATS.

Exactly where on this continuum the line will be drawn between *excluded* procurement and *covered* services investments is a matter that will likely be resolved only through the WTO dispute settlement process. But local government officials need to understand that the further they stray from traditional forms of procurement contracts, the less protection they will have under the GATS government procurement exclusion.

It should also be noted that the same GATS article that excludes government procurement provides for further negotiations to cover market access to government procurement of services under the treaty. The European Union is now

pushing hard for commitments by developing country governments to cover procurement under the GATS, particularly in the area of water and sanitation.<sup>16</sup>

## South Africa's existing GATS obligations and commitments

### *Most-Favoured Nation (MFN) treatment*

The first step in analyzing South Africa's existing GATS obligations is to reiterate that the top-down rules of the GATS apply to all services. The most important of these rules is Article II MFN treatment, which requires that the best treatment given to a foreign service provider or service from any WTO member country must be extended to foreign service providers or services from every other WTO member country ("favour one, favour all"). This rule already covers South African water and sanitation services, except those provided in the exercise of governmental authority (and as noted above, for measures related to government procurement).

Consequently, any discriminatory treatment, in law or in effect, between foreign services providers from different WTO member countries could give rise to a GATS MFN claim. For example, if subsidies were available on more generous terms to one foreign provider than another or if one foreign provider could make the case that they had been put at a competitive disadvantage vis-à-vis other foreign competitors by regulatory measures (such as price controls or requirements that they ensure access to less profitable regions or customers), then they could work with their home government to raise this as an issue through the WTO.

It is important not to overstate this risk. To sustain an MFN claim a foreign service provider would have to demonstrate that any difference in how they were treated by governments resulted in them receiving less favourable treatment than that given to *like* services or suppliers of another WTO member country. On the other hand, it is important for policy-makers to be aware, that as the local presence of foreign water and sanitation companies

increases, the possibility for such GATS discrimination claims increases correspondingly.

### *South Africa's specific commitments*

As already noted, the most restrictive GATS rules apply only to those sectors or sub-sectors (and modes of supply) where a country has made specific commitments. For a developing country, South Africa made rather extensive GATS commitments at the end of the Uruguay Round in 1994. South Africa, however, has not made specific commitments directly covering water and sanitation services *per se*.

In fact, because of a quirk in the UN classification system that most WTO member governments, including South Africa, used in 1994 to schedule their commitments, no WTO country has yet directly covered "collection, purification, and distribution services of water" in their GATS schedule.<sup>17</sup>

However, as Michelle Swenarchuk of the Canadian Environmental Law Association has pointed out: "the provision of water services actually requires elements of many other services, and if portions of those services are committed, the door is open to foreign service suppliers, including water corporations, to contest measures that may exclude them from rights to provide water services."<sup>18</sup>

These related services include (among others):

- engineering and project management services for water supply and sanitation work,
- sewage services,
- sanitation and similar services,
- construction services,
- technical testing and analysis services including quality control and inspection,

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- urban planning and landscape architectural services,
- architectural services,
- nature and landscape protection services,
- other environmental services.

As Swenarchuk advises: "To maintain full governmental authority over water services, decision-makers need to consider all the different services that are part of providing water" when they assess the potential impacts of GATS commitments on water.<sup>19</sup>

## **The impetus of the Black Economic Empowerment Act is clearly at odds with both the national treatment and market access rules of the GATS. Measures favouring ownership, transfer of assets, technology or even training for black South Africans appear to be national treatment violations.**

Significant policy flexibility over these services. Yet the full commitments in other closely-related services such as engineering or construction raise questions about the GATS-consistency of some measures adopted by the post Apartheid South African government and about future measures that might conflict with the GATS.

For example, the impetus of the Black Economic Empowerment Act is clearly at odds with both the national treatment and market access rules of the GATS. Measures favouring ownership, transfer of

In the category of environmental services, of which sewage services would be one example, South Africa's 1994 GATS commitments are "restricted to consultancy services only." In other related sectors such as engineering and construction, South Africa has made virtually full GATS commitments for modes 1 to 3 as well as certain commitments for mode 4 (movement of natural persons). The omission of water and sanitation services provides all levels of South African government with significant policy flexibility over these services. Yet the full commitments in other closely-related services such as engineering or construction raise questions about the GATS-consistency of some measures adopted by the post Apartheid South African government and about future measures that might conflict with the GATS.

assets, technology or even training for black South Africans appear to be national treatment violations. Some aspects of the Black Economic Empowerment Act would be protected. For example, affirmative action related to access to government procurement is excluded from the GATS national treatment rule. But other aspects such as sectoral plans that set enforceable targets for black ownership or management in covered services sectors are problematic. Likewise, a requirement that 10% of a service investment be owned by black South Africans is effectively a limit of 90% on foreign ownership, and therefore a violation of the market access (Article XVI) rule.

This issue illustrates how binding GATS commitments can constrain the democratically-determined policies of subsequent governments that were not envisaged at the time that GATS commitments were made or are conscious efforts to reverse policies of previous regimes.

### *Pressure to expand GATS commitments and rules*

The GATS agreement does not stand still. It is a treaty that is deliberately designed to be in a permanent state of negotiation to expand its coverage and toughen its rules.

The European Union and an ad hoc group of WTO governments called the "Friends of Environmental Services" have proposed a new classification system that would facilitate making commitments that clearly cover all aspects of water and sanitation services, including water for human use. Since the EU GATS requests were leaked in 2002, we know that the European Commission negotiators are pressuring South Africa and many other developing countries to make commitments covering water and sanitation services.

Despite public pressure and misgivings expressed by certain European politicians and some member governments about their offensive position on water and sanitation services, the European Commission recently reaffirmed its intention to press

other countries for GATS commitments covering water and sanitation when it announced a second round of (still secret) GATS requests had been sent to other WTO member governments.<sup>20</sup> The European Commission claims that it has “reduced the scope” of its water requests, but, because it still refuses to make its GATS requests public, it is impossible to verify what this means.

Another important area where the GATS rules are forging ahead relates to the negotiations to develop new “disciplines” on non-discriminatory regulation under Article VI.4 of the GATS. Specifically, the article seeks to prevent “unnecessary barriers to trade” in regulations regarding “qualification requirements and procedures, technical standards and licensing requirements” and to ensure that regulations are “not more burdensome than necessary to ensure the quality of the service.” Such restrictions, if agreed to, would pose very significant challenges to the regulatory autonomy of all levels of South African government.

Japan, the EU and a number of other governments are pushing for the application of some form of “necessity test” to non-discriminatory regulations affecting trade in services. This would mean, for example, that measures regulating or subsidizing access to free water, restricting the ability of companies to cut off water services for non-payment, and requirements to fulfill universal obligations would all be susceptible to challenge even if they were totally even-handed in their application to both foreign and domestic service suppliers.

As Swenarchuk notes: “The concept of regulations being burdensome conflicts with the increasing relevance of precaution in regulation-making for the environment and human health. Application of a precautionary principle or approach involves taking steps to prevent or minimize harm when a risk has become apparent, even though scientific uncertainty exists regarding some elements of the risk and the cause-effect relationships that produce it. Technical standards implemented on a precautionary basis are likely to be particularly vulnerable to a finding that they are unnecessarily burdensome.”<sup>21</sup>

## **Actions that local governments can take to protect their autonomy**

Proponents of GATS expansion, including the Quad, a small number of developing country representatives (for example, Hong Kong and India), the WTO secretariat, and key corporate lobby groups have recently taken up the theme that the services negotiations are in crisis. This “crisis talk” is meant to set the stage for increased pressure for an ambitious services deal. Because of its importance as a market and its key position as one of Africa’s leading countries, South Africa will be one of the main targets of this push, which will build as negotiations approach their culmination.<sup>22</sup>

The GATS negotiations are now set to intensify. If an overall agreement on agriculture and industrial market access can be reached, services will certainly be swept along. It is not unusual for the biggest concessions to occur in the final days, even hours, of a long negotiation.

This negotiating dynamic poses a difficult challenge for municipal officials and their citizens. Even though local governments are covered by the treaty’s provisions, they have no direct role in the negotiations. The final WTO package will almost certainly be brokered by a handful of powerful countries and South Africa’s national government representatives may not even be present in the room when the final deal is struck. Once such a deal is made, it is almost impossible to change its specifics without the whole package unravelling.

## **Measures regulating or subsidizing access to free water, restricting the ability of companies to cut off water services for non-payment, and requirements to fulfill universal obligations would all be susceptible to challenge even if they were totally even-handed in their application to both foreign and domestic service suppliers.**

To influence this negotiating process and to avoid harmful concessions in services, it is vital that municipal governments and politicians begin now to analyse the potential impacts of GATS commitments on their authority and policy autonomy and to effectively communicate their concerns to the national government and South African representatives at the negotiating table. Without question there will be intense pressure applied in the end-

**In order to withstand the ever-present temptation to make trade-offs that sacrifice certain domestic interests for the benefit of export sectors, government negotiators must be under specific, non-negotiable instructions to reject any GATS package that undermines local governments' ability to provide or to regulate essential services such as water and sanitation.**

game of these talks. In order to withstand the ever-present temptation to make trade-offs that sacrifice certain domestic interests for the benefit of export sectors, government negotiators must be under specific, non-negotiable instructions to reject any GATS package that undermines local governments' ability to provide or to regulate essential services such as water and sanitation.

South African local governments should not feel that they are alone

in grappling with the complex task of evaluating the potential impact of the GATS on their autonomy. Nor are these issues unique to developing countries.

As international trade treaties stray further from traditional issues, such as tariffs, into "behind-the-border" regulatory matters, it creates serious structural problems of democratic accountability and legitimacy. In Canada, for example, most of the authority for regulating services resides constitutionally with the provinces and the actual delivery of essential services such as water and sanitation is largely left to municipal governments. In effect, those governments that are most immediately

concerned with municipal services and have expertise in their delivery and regulation are not even present at the international trade negotiating table.

Dozens of Canadian municipalities, large and small, have passed resolutions of concern on the GATS. These resolutions, although non-binding, aim to attract the attention of federal government negotiators and compel them to consider the impacts on local governments before making further GATS commitments. To some extent, they have been effective. The federal government has set up a joint working group to consider municipalities' concerns on the GATS and other commercial trade treaties. As municipal governments have become aware of the risks of trade treaty litigation, this issue has also been a factor in some high-profile rejections by local governments of public-private partnerships. The more traditional public service models are being recognized as less risky from a trade treaty litigation perspective.

In the U.S., state and local officials are increasingly worried over the possible impacts of GATS commitments on local public services and public interest regulation. As a result of this concern, and some high-profile water privatisation failures (such as in the city of Atlanta), U.S. Trade Representative (USTR) officials have tried to reassure local and state governments that the U.S. will not make GATS commitments covering water and sanitation services in the current negotiations. Many state and local officials remain concerned, however.

U.S. state and local government officials have also actively pressed their concerns in other sectors. For example, they have set up a Working Group on Energy and Trade to investigate potential conflict between trade rules and state and local energy policy, meet with U.S. trade negotiators and then report back to participating states and national associations. This group has identified 40 questions about potential conflicts between the GATS and U.S. domestic regulation.<sup>23</sup> The USTR remains a strong proponent of greater GATS coverage of energy services, but state and local officials are playing an

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invaluable role in insisting that the full implications of the GATS' many grey areas need to be understood *before* further commitments are entertained.

## Conclusion

The debate between GATS proponents and critics is sometimes mischaracterized as a struggle between those who favour foreign trade and investment and those who oppose it, or even more simplistically as between those who are "pro-" and "anti-" globalization. In reality, the debate is about whether restrictions put on governments' policy flexibility by treaties such as the GATS are justifiable, whether commercial interests are being privileged over other legitimate interests, and how the multilateral system should develop in future. Local governments, especially elected officials, should play a vital role in this debate.

As the UN High Commissioner on Human Rights stated: "Human Rights law does not place obligations on States to be the sole provider of essential services; however, States must guarantee the availability, accessibility, acceptability and adaptability of essential services including their supply, especially to the poor, vulnerable and marginalized."<sup>24</sup>

The High Commissioner also observed that, "What is referred to as a right to regulate under GATS is in fact a duty to regulate under human rights law."<sup>25</sup> The GATS, however, embodies a starkly contrasting view of the role of regulation. As a recent WTO dispute settlement panel expressed it: "Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired."<sup>26</sup>

A vital aspect of the duty to regulate is to preserve the ability to reverse unsuccessful policies affecting the provision of essential services.<sup>27</sup> Worldwide, many local governments, responding to a range of pressures, have been experimenting with more market-oriented service delivery. These initiatives have had mixed results. One of the insidious aspects of GATS commitments is that they

make it far harder for governments to change course after failed market-oriented experiments without becoming entangled in an international trade dispute.

In discussing some of the political stumbling blocks facing the Nelspruit Water Concession, Smith et. al. note "the difficulty of embarking on a long-term contract when the state is in a process of transition ... a 30-year contract assumes the legislative environment of the state will remain static. This is a ludicrous assumption considering South Africa has undergone such an enormous degree of transition, much of which has occurred at the local level."<sup>28</sup> This insight applies with even greater force to the terms of a legally-binding international treaty enforced by trade sanctions.

There is no convincing domestic policy rationale for South Africa to make binding GATS commit-

ments covering essential services, including water and sanitation. South African authorities remain free to encourage the participation of foreign investors in the provision of services without making binding GATS commitments. But where governments don't know yet what the solutions to their basic services and development challenges are going to be, it is wrong to lock in a particular model through a trade treaty.

Nonetheless, there will be strong pressure on the South African government to accede to external pressures for extensive new GATS commitments, perhaps in exchange for concessions - that could provide only temporary value - for South African exporters. It is unwise for a country, especially one undergoing as much social and political change as South Africa, to agree to permanent, constitutional-

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style commitments in return for market access gains that could well prove to be ephemeral.

From a citizen's point of view, a more advantageous position is for South Africa not to make further GATS commitments affecting municipal services. Binding GATS commitments would constrain democratic decision-making, stifle policy creativity and restrict many reasonable and desirable policy options intended to ensure the quality, affordability and accessibility of essential services such as water and sanitation.

In relation to essential services, the priority of the South African GATS negotiators should be to insist that the grey areas in the agreement be clarified before new commitments are made and to champion interpretations of GATS obligations that "do not constrain governments in taking action to promote and protect human rights."<sup>29</sup> 

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## Endnotes

- <sup>1</sup> WTO Secretariat, "An Introduction to the GATS," October 1999. p. 1.
- <sup>2</sup> Tourism, distribution, banking, insurance, telecommunications and professional services are areas where most countries have made commitments. In certain other sectors, such as health, education and postal services, commitments are relatively uncommon. GATS Article XIX.
- <sup>3</sup> "WTO receives new services offers in ongoing Doha negotiations," *BNA WTO Reporter*, October 4, 2004.
- <sup>4</sup> "Initial services offers show low level of commitment," *Bridges Weekly Trade News Digest*, March 4, 2004.
- <sup>5</sup> A list of countries who have submitted initial offers is available on the WTO website at: [http://www.wto.org/english/tratop\\_e/serv\\_e/s\\_negs\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm). The following countries have made their offers publicly available on the WTO web site, and there is a link to these offers from the web site listed above: Australia; Canada; Chile; EC; Iceland; Japan; Liechtenstein; New Zealand; Norway; Slovenia; Turkey; and the United States.
- <sup>6</sup> These "request-offer" negotiations proceed mainly through bilateral meetings between government negotiators. These discussions, and most of the requests and offers, are secret. This lack of transparency makes it very difficult for officials, especially those at the local level, and the public at large to exercise proper oversight.

<sup>8</sup> President Bush signed the Trade Act 2002 into law on August 6, 2002. The legislation gives "fast-track" authority to the U.S. president to negotiate trade deals that the Congress must then either accept or reject without amendment. This authority will continue until June 1, 2005 with an automatic two-year extension to 2007, unless Congress adopts a majority resolution of disapproval.

<sup>9</sup> World Trade Organization, "Doha Work Programme," Decision adopted by the General Council on August 1, 2004, W/T/L/579. The services provisions occur mainly in Annex C.

<sup>10</sup> For an overview of some of the public policy issues at stake in the GATS rule-making talks, see Scott Sinclair, *GATS: how the World Trade Organization's new 'services' negotiations threaten democracy*, (Canadian Centre for Policy Alternatives, 2000), chapter 4.

<sup>11</sup> "An Introduction to the GATS," WTO Trade in Services Divisions. October 1999, p.3.

<sup>12</sup> As the WTO Secretariat commented in 1999, "rules governing commercial presence are very different from the tariffs and other border measures that principally affect trade in goods. GATT has only gradually become involved in some sensitive domestic policy issues such as subsidies and technical standards. Right from the beginning, however, the GATS has been forced to grapple with internal policy issues such as rights of establishment that are inherent in the commercial presence of foreign interests." *ibid.* p. 3.

<sup>13</sup> An "economic needs test" is a government measure which restricts the entry of service suppliers based on an assessment of the needs in the market.

<sup>14</sup> Address given by Mr. Renato Ruggiero, Director-General of the World Trade Organization, (2 June 1998) in Brussels, to the Conference on Trade in Services, organized by the European Commission.

<sup>15</sup> Other GATS rules, notably transparency and domestic regulation, already apply to government procurement of services.

<sup>16</sup> See, for example, EC documents S/WPGR/W/39 and S/WPGR/W/42, available at [www.wto.org](http://www.wto.org).

<sup>17</sup> These services are excluded from the sewage services section of the UN classification system (the UN provisional CPC) and classified as "goods" under sub-class 18000 (Natural water).

<sup>18</sup> Michelle Swenarchuk, Canadian Environmental Law Association, "GATS, Water Services and Policy Options," a paper prepared for the International Centre for Trade and Sustainable Development and the World Conservation Union event "Ensuring Access to Water and Sanitation, The Trade Dimension," at the Commission on Sustainable Development, 22 April 2004, New York, available at [www.cela.ca](http://www.cela.ca).

<sup>19</sup> *Supra*, p. 2.

<sup>20</sup> The revised European GATS requests were announced in late January. A summary of the revised requests can be found at: [http://trade-info.cec.eu.int/doclib/docs/2005/january/tradoc\\_121197.pdf](http://trade-info.cec.eu.int/doclib/docs/2005/january/tradoc_121197.pdf).

<sup>21</sup> *Supra*, p. 4.

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- <sup>22</sup> Both the U.S. and the European Commission have emphasized that they put a very high priority on services. Outgoing EU trade commissioner Pascal Lamy stated that: "Services negotiations need to move from second into third gear," adding that "It will be inconceivable to conclude the [Doha Round] without a significant level of new and substantial commitments on services." In the run-up to the July framework deal, global corporate groups from the United States, Europe, Australia, Canada, Chile, Hong Kong, India, Japan, and Singapore lobbied intensively in Geneva while decrying the fact that "services negotiations continue to be hostage to agriculture, though the service sector dwarfs the agriculture sector in volumes of global trade, worldwide GDP, and employment." More recently the new EC Trade Commissioner Peter Mandelson remarked that:"So far, progress in services negotiations in the Doha Round has been slow. We need to ensure that services negotiations match the ambition of other negotiating areas such as agriculture ..."
- <sup>23</sup> The Working Group includes state legislators (National Conference of State Legislature), utility regulators (National Association of Regulatory Utilities

Commissioners), attorneys general (National Association of Attorneys General), local governments (National League of Cities, and the International Municipal Lawyers Association) as well as individual state and local governments.

- <sup>24</sup> Report of the High Commissioner, United Nations Commission on Human Rights, "Economic, Social and Cultural rights: Liberalization of trade in services and human rights," June 25, 2002 (E/CN.4/Sub.2/2002/9), p. 4.

<sup>25</sup> Supra, para. 55.

- <sup>26</sup> World Trade Organization, "United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services," Report Of The Panel, WTO document symbol WT/D285/R, 10 November 2004. para. 6.316.

<sup>27</sup> Report of the High Commissioner, para. 50.

- <sup>28</sup> Laila Smith, Shauna Mottiar and Fiona White, "Testing the limits of market-based solutions to the delivery of essential services: the Nelspruit Water Concession," Centre for Policy Studies Research report 99, p. 22.

<sup>29</sup> Supra, p. 4.