

# The WTO services agreement: Problems for municipalities

## INCREASING MARKET ACCESS

In 1994, countries signed the first multilateral free trade agreement on services, the WTO General Agreement on Trade in Services (GATS). The purpose of the GATS is to achieve “progressively higher levels of liberalization” of services trade through “successive rounds” of negotiations to “increase effective market access” to services sectors in all countries. Although municipal governments were not involved in the 1994 negotiations, they may increasingly find that their scope for decision making is affected by them.

## SCOPE AND COVERAGE

The GATS disciplines apply to governmental “measures affecting services,” a broad coverage that includes laws, regulations, procedures, administrative actions, and subsidies. They cover all “modes” of providing trade in services, including cross-border supply (data processing in the United States); consumption abroad (tourism, foreign students); commercial presence (foreign investment) and the presence of staff of foreign businesses (management consultants). The GATS specifically applies to municipal measures (GATS article I:3a).

It contains two levels of liberalization commitments. All countries must make their measures affecting services public (transparency) and provide all foreign service suppliers with any advantage provided to those of any other WTO member (most favoured nation).

In addition, in 1994, countries made more stringent commitments regarding service sectors they chose to list in country-specific schedules. The national treatment provisions (GATS article XVII) require that countries treat foreign businesses at least as favourably as domestic ones, to provide “effective equality of opportunities,” and prevent

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even incidental (unintended) disadvantages for foreigners, such as might result from short timelines for tendering processes. “Market access” (GATS article XVI) prohibits, for both domestic and foreign services in sectors listed in the country’s schedule, measures that restrict numbers of service suppliers, total values of service sales or assets (economic means tests), numbers of service operations or employees, types of legal structures, and foreign ownership. These provisions prohibit, for both domestic and foreign services, many measures countries have used to develop national economies in industrialized countries.

## DOMESTIC REGULATIONS

A GATS Working Party on Domestic Regulations is currently considering rules for all domestic regulations,

whether or not they discriminate between domestic and foreign companies. Regulations regarding professional qualifications and licensing and technical standards for services must not be “more burdensome than necessary to ensure the quality of the service” (GATS article VI.4). This standard is so vague and inappropriate, as a criterion of measurement for public protections that it invites biased decision making in favour of strictly economic interests. The GATS contains no articulated standard for measuring “burdensome” such as whether it includes measures that add mere inconvenience to potential exporters, or must entail significant costs or even serious disadvantage. The Canadian government has not indicated what meaning it considers applicable to these discussions, or whether there is an agreed definition among negotiators (not that such an agreement would bind future trade dispute panels) and if so, what the agreed definition is.

The concept of regulations being burdensome conflicts with the increasing relevance of precaution in regulation making for environmental protection 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.

## GOVERNMENT SERVICES

A key question under the GATS is whether its disciplines apply to government services. They are not covered if they are “neither supplied on a com-

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mercial basis nor in competition with private suppliers" (GATS article I:3c). However, the WTO concedes that the meaning of "commercial basis" is unclear. It may include businesses owned by public entities and services, which are paid for by the public. Precedents in other jurisdictions suggest that this exemption would likely be interpreted narrowly in the case of a challenge. Services purchased for governmental purposes and not for resale are likely not affected by GATS as they fall within "government procurement" for which GATS does not contain significant rules.

Municipal services to the public are most likely covered, not exempt, since they're often provided by a mix of public and private suppliers, and fees for service are common (waste disposal, water, public transit). It would be difficult to argue they're provided neither on a commercial basis nor in competition with private suppliers. Public utilities (transit commissions, water and sewage boards, library boards) are "monopolies and exclusive services suppliers" under GATS and must comply with its rules.

## POTENTIAL GATS IMPACTS ON CANADIAN WATER AND SEWAGE SERVICES

The Canadian schedule to the GATS lists many commitments that affect water services in Canada. These include engineering and project management services for water supply and sanitation works; sewage services; sanitation and similar services; business services including inspection and quality control; and construction services. They also include various environmental services and the non-specific "other environmental services," which may cover elements of water service delivery.

The degree of private sector involvement in water and sewage construction and operation in various Canadian centres means it is likely that GATS rules apply to the provision of these services in most Canadian cities. The govern-

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mental services exemption is unlikely applicable.

The broad coverage of services related to water service delivery in the Canadian schedule gives rights to foreign companies (engineering, construction, including scientific water testing and monitoring firms) to the same degree of involvement in water services and wastewater quality and quantity monitoring as Canadian companies may have. It increases the number and scale of private sector players who may create pressure for more privatization of water services or parts of these services.

### "MORE BURDENSOME THAN NECESSARY"

Measures to promote water efficiency and use reduction, as well as energy reduction related to water services, are not exempted from GATS coverage because the GATS general exception (article XIV) does not protect measures adopted for conservation of a resource. Since GATS covers subsidies, private water companies may seek access to the subsidies now paid to public water providers. Much-needed improved national water quality standards and standards for operator training might be found, in a trade dispute, to be "more burdensome than necessary."

Changed land use planning for watershed management, stormwater runoff absorption, and demand management may ultimately imply limits to urbanization in certain rural areas and denial of water to proposed new businesses, meaning reduced opportunities for market entry by new suppliers, con-

trary to GATS article XVI.

The need for energy conservation, to reduce greenhouse gas emissions, requires flexibility for municipalities in designing service systems to meet multiple purposes. This flexibility is reduced when, due to high capital costs, corporations gain long-term contracts and procedures for service delivery. The flexibility is further reduced by GATS, which gives foreign firms more strategies to demand access to such long-term service commitments.

The necessary use of a mix of regulatory tools (sewer use bylaws, permits, policies, user fees, and education) to control discharges to sewers implies controls on rights of establishment of industries, as well as questions of domestic regulation of water effluents, both vulnerable to GATS oversight.

### A COMPLEX WEB OF DOCUMENTS

The effects of the GATS may be considerable for municipal water and sewage services. Unfortunately, the GATS is a particularly difficult agreement to understand and apply. A complex web of documents, it includes commitments, the GATS text, the service classification schedules, and the country-specific schedules. Each document contains unclear wording, unclear exemptions, and unclear overlap between obligations with regard to services and goods. These complexities mean it is difficult to predict all possible impacts. In addition, defending municipal measures, should trade disputes be launched, will also be difficult. 