

Water for sale: The impact of international services on public policy and law

WATER AS BIG BUSINESS

Like virtually every sector of the global economy, the water and water services industry is dominated by a decreasing number of large and growing corporations that must maximize shareholder value by increasing revenues and profit. This imperative to grow is being pursued on two broad fronts.

The first is the acquisition of water rights: transforming water from a public resource to a commodity on the open market. In many countries, public ownership of fresh-water resources are increasingly being assigned to private interests, usually through licensing and permitting schemes. In developing countries, the World Bank is promoting private water rights, in an effort to define water as an economic rather than a social good.

The second involves the acquisition of water services. Because corporate mergers and acquisitions of private utilities and water companies have consolidated much of the industry, the new frontier for corporate growth lies in privatizing public water services. To overcome resistance to the loss of public control over drinking water services, an incremental strategy, public-private partnerships (P3s), has been developed. A typical P3 involves a joint venture between a transnational water corporation and a local government in which the former contracts to design, build, and operate water plants and delivery systems, usually for several decades.

In developing nations, P3s are underwritten by development agencies and financing institutions such as the World Bank, with funding often tied to the participation of the water transnationals. Thus these institutions not only underwrite global corporate expansion but also inhibit poor countries from developing public water infrastructure.

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However, to achieve their goals, water corporations must overcome a number of obstacles: first among these is government as resource owner, service provider, or regulator. This is where international trade and investment agreements come into play by codifying a trade liberalization agenda to constrain the exercise of these traditional and sovereign powers.

AN AGENDA FOR DEREGULATION

Trade officials may decry the characterization, but NAFTA and WTO rules do represent an agenda for deregulation. Indeed, trade rules concerning services and investment are not in fact about services or investment, but rather

about the capacity of governments to participate in, or regulate, these economic sectors. In fact, trade agreements are little more than a catalogue of *measures* that governments are prohibited from adopting or maintaining. A “measure” is virtually any government action that even indirectly affects services or investment.

In addition, international investment and services agreements impose constraints on *non-discriminatory* domestic measures, thereby abandoning the historic justification for trade constraints on sovereign government authority, which was to level the playing field for foreign goods, investors, and service providers. Now broad categories of government regulation are prohibited no matter how fairly conceived or applied.

THE GENERAL AGREEMENT ON TRADE IN SERVICES

Most services, particularly water, are delivered on a local basis and have nothing to do with international trade. However, the GATS defines “trade in services” so expansively that it applies to even the most local transactions if the interests of foreign corporations are at stake. Thus the GATS defines “trade in services” to include the supply of a service “through commercial presence in the territory of another [WTO] member.” By so distorting the concept of trade, the GATS extends international trade law and sanctions to matters of domestic policy and law never before the subject of international trade disciplines.

WATER SERVICES

To date, much of the debate on the impact of the GATS on water has focused on the supply of drinking water. Because full GATS disciplines apply only to services to which countries have made specific commitments, the WTO

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disingenuously argues that as no member has yet made a commitment to *water distribution*, public policy options concerning water remain unaffected. But this ignores European proposals to encourage such commitments and the explicit obligation of all WTO members to expand this services treaty.

Moreover, in the new round of trade negotiations launched in Doha, November 2001, members agreed to initiate negotiations immediately on *the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services*. The European Union and many others define water supply as an environmental service.

The WTO's posture also obscures the broader ramifications of the GATS services classification regime, which includes hundreds of categories that specifically refer to water. These range from the construction of dams and the operation of water-treatment plants to the manufacture of soft drinks. A great many other services depend upon the supply of water, or can adversely affect water quality through polluting activities.

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Thus, while the WTO correctly says that no country has committed water-supply services, dozens have made commitments to other water-related services, including:

- environmental services including pollution control and wastewater and sewage treatment;
- general construction work for civil engineering, including construction for waterways, harbours, dams and other water works, for long distance and local pipelines;
- engineering and project management services for water supply and sanitation works; and

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- technical testing and analysis services (for example, water quality) including quality control and inspection (for example, water and wastewater works).

In other words, while the supply of drinking water is not yet a committed service, virtually every aspect of designing, building, and operating water supply infrastructure is the subject of services commitments made by many WTO member countries.

WATER QUALITY AND WATER PROTECTION

The extent to which water is degraded and depleted depends largely upon the regulatory framework in place to protect it. But the GATS provision on *Domestic Regulation* imposes broad constraints on *non-discriminatory* measures, including those needed to protect and conserve water. By requiring that regulations be *no more burdensome than necessary*, the GATS empowers the judgment of international trade adjudicators to supersede those of accountable, elected representatives.

Consider, for example, setting ambient water quality standards, given scientific uncertainty about the concentra-

tion of a toxic substance or pathogen that will compromise ecosystem or human health. We know that pollution controls or water quality standards are often opposed by the companies that must bear the costs of compliance.

Now, foreign service providers can turn to dispute resolution under the GATS to challenge such unwanted initiatives. An international trade tribunal will then decide whether a less "burdensome" approach to protection might have been adopted: perhaps better water treatment technology could have been used; other sources of pollution controlled more assiduously; better watershed management practices adopted; or perhaps public health officials might be more vigilant in issuing "boil water" advisories. It isn't surprising that no environmental measure has ever been able to satisfy such open-ended and ill-defined criteria.

CONSERVATION IS NO EXCUSE

While the GATS does allow government measures to protect human, animal, or plant life, if these can pass the "necessity" test, it does not allow the other critical WTO environmental exception for measures relating to the "conservation of exhaustible natural resources." Thus no government can use conservation to justify interfering with the rights of foreign services providers.

The failure of the GATS to acknowledge conservation as a legitimate exception is the clearest indication of its intent to loosen or eliminate public control of water. International investment treaties are even more problematic, typically allowing no meaningful exceptions for either conservation or environmental and human health protection.

FOREIGN INVESTMENT

In 1998, efforts to create a Multilateral Agreement on Investment (MAI) under the auspices of the Organisation for Economic Co-operation and Development (OECD) fell apart when France withdrew from the negotiations. How-

ever, the prototype for the MAI remains integral to the North American Free Trade Agreement (NAFTA), and is the model for both the Free Trade Areas of the Americas initiative (FTAA) and the Agreement on Trade-Related Investment Measures of the WTO. The principles of the MAI have also been embedded in almost 2000 bilateral investment treaties (BITs) quietly negotiated over two decades, most within the past few years. More than 100 nations are parties to such treaties.

THE RIGHT OF PRIVATE ENFORCEMENT

The most remarkable feature of these regimes is the right of private enforcement they accord foreign corporations. Under NAFTA, for example, foreign investors are granted a virtually unqualified right to enforce the constraints it imposes on government policy and regulation. However, unlike the GATS and other WTO agreements, there is no reciprocity—foreign investors have no obligations whatsoever under the treaties they may enforce.

This represents a profound departure from the norms of international trade law, which allowed only nation states to access dispute procedures. As a result, the powerful enforcement mechanisms of these international treaties have been freed from the diplomatic, strategic, and practical constraints that often limit state-to-state dispute resolution.

When investor claims do arise, they are decided, not by national courts or judges, but by private tribunals operating under international law and in accordance with procedures established for resolving private commercial claims, not disputes over questions of public policy and law. The tribunals deliberate in camera, and pleadings and evidence are routinely subject to strict confidentiality orders.

Not surprisingly, these investment treaties have become weapons with which to attack government efforts to achieve health, environmental protection, and other societal goals. They

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have been invoked or threatened on at least five occasions to challenge government actions concerning water or water services, including claims

- by Canadian-based Methanex Corporation against the United States, for US\$970 million in damages because of a ban by California and other states on the fuel additive the company manufactures, because it has become a major groundwater contaminant. Among other claims, Methanex is arguing that the ban was unnecessary because less trade-restrictive measures were available;
- by US-based Sun Belt Water Inc. against Canada, for US\$10 billion, because a Canadian province interfered with its plans to export water to California. Even though Sun Belt had never actually exported water, it claims that the ban expropriated its future profits;
- by Compania de Aguas del Aconquija (CAA), an affiliate of Compagnie Générale des Eaux (a subsidiary of Vivendi), against Argentina, for US\$300 million, arising from a water and wastewater privatization deal gone sour. The claim alleges that public health orders, mandatory

service obligations, and rate regulations all offended its investor rights;

- threatened by Aguas del Tunari, an affiliate of US-based Bechtel, against Bolivia for more than US\$25 million, for breach of its contract to provide water services to the City of Cochabamba. When public anger erupted over rate increases too steep for many residents to afford, Bolivia cancelled its privatization deal with the company; and
- by US Metalclad Corporation, against Mexico, for more than US\$15 million, because an impoverished rural municipality refused to grant it a building permit for a 650,000-ton/annum hazardous waste facility on land already so contaminated by toxic wastes that local groundwater was compromised.

EXPANDING THE CONCEPT OF EXPROPRIATION

Several of these claims turn on a provision of NAFTA, common to other investment treaties, that prohibits government measures that directly or indirectly nationalize or expropriate foreign investments, or take a measure tantamount to nationalization or expropriation. When such expropriation occurs, the investor must be compensated for the full market value of its investment. That the expropriation was for a public purpose, carried out on a non-discriminatory basis, and in accordance with due process of law is irrelevant.

When the tribunal ruled in favour of Metalclad, Mexico unsuccessfully appealed to the courts, which commented that NAFTA's expropriation rule was so broad that it would include a legitimate rezoning by a municipality or other zoning authority. By this standard, any government action diminishing the value of foreign investment interests could provide a basis for an investor claim.

PUBLIC-PRIVATE PARTNERSHIPS AND GLOBALIZATION

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privatized, bidding is usually dominated by transnational water corporations, and local competition is virtually nonexistent. Because these corporations qualify as foreign investors and service providers under NAFTA, BITS, and the GATS, they benefit from the exclusive rights these regimes accord. Thus, when these transnational corporations become partners in a public-private partnership (P3) relationship, what would otherwise be entirely a matter of domestic regulation and contract becomes subject to international trade regulation as well.

Defenders of P3 arrangements are encouraging municipalities to believe that they can oust foreign investor rights through clever contract drafting, even suggesting that specific trade obligations be excluded by the agreement. But governments can no more contract out of the international obligations than they can alter those commitments by domestic legislation.

PRIVATIZATION

Public services depend upon a framework of policies, laws, institutions, and funding arrangements that restrict the rights of private investors and service providers, to ensure public policy goals such as universal and affordable service. But international investment and services agreements seek to minimize the capacity of governments to regulate or otherwise intervene in the market. For example, the first principle of international trade law, *National Treatment*, obligates governments to accord “no less favourable” treatment to foreign investors and services than is provided to their domestic counterparts. However, by failing to distinguish between private and public sector service suppliers, the trade regimes provide little latitude for policies, programs, and regulations that may explicitly or effectively favour public sector service providers. In fact, the very existence of public sector service monopolies may be regarded as a barrier to foreign service providers. Thus

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Canada, for one, has declared a reservation to its National Treatment obligations that—the supply of a service, or its subsidization, with the public sector is not a breach of this commitment.

But such reservations are rare, highly qualified, and likely to be given very narrow application if the WTO’s record is to be a guide. WTO attempts to quiet concern about the loss of public control over water stress that drinking water services are not yet covered by GATS disciplines. However, this argument rests upon the meaning of an ambiguous exclusion for “services delivered in the exercise of government authority”—a definition fraught with controversy and also likely to be narrowly interpreted.

CONCLUSION

The advent of international investment and services agreements has superimposed binding international disciplines over the exercise of sovereign authority concerning water. Because these agreements codify an agenda of privatization, deregulation, and free trade, they are fundamentally incompatible with maintaining public ownership of water, public sector provision of water services, and public regulation for conservation and environmental purposes.

Moreover, the powerful private enforcement machinery of international investment treaties has now been invoked by several transnational corporations to assail water protection laws,

water export controls, and decisions to re-establish public sector water services when privatization deals have gone sour.

Only slightly less problematic is state-to-state enforcement of the GATS and other international services agreements. While these international “trade” regimes establish certain exceptions that may allow governments to rebuff trade challenges and investor claims, these safeguards are ambiguous, highly qualified, and limited in their application. Moreover, even the modest environmental exceptions that apply to other international trade agreements have largely been written out of international investment and services agreements.

In many ways, the establishment of truly enforceable international disciplines, crafted to serve the interests of the most powerful private institutions in the world, represents a profound challenge not only to the sovereignty of nations, but to the protection of such a basic human right as the right to water. If water is to remain part of the global commons, with use and allocation decisions reflecting the public trust; and if water is to be a basic human right guaranteed every human being, then international trade, investment, and services agreements must be fundamentally reformed to restore the sovereign authority of governments to achieve these ecological and human imperatives. 