



A CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW ISSUE BRIEF

GOING WITH THE FLOW: HOW INTERNATIONAL TRADE, FINANCE AND INVESTMENT REGIMES AFFECT THE PROVISION OF WATER TO THE POOR

This brief discusses some of the key legal and policy issues surrounding access to water and the supply of water services. It describes how pressure from International Financial Institutions (IFIs), combined with obligations under international agreements such as bilateral investment treaties (BITs) and the General Agreement on Trade in Services (GATS), can drive national governments to adopt and retain policies that may not be in their best interests, such as privatizing the provision of water services.

Section 1 argues that liberalization and privatization of services such as the provision of water is not a universal answer to meeting basic human needs. Section 2 explains the importance of water as an element of several fundamental rights and as a human right in itself, and then sets out the ensuing consequences for policy making. Section 3 describes the IFIs' influence on increasing privatization of services, and sections 4 and 5 then explain how international investment and trade treaties, concession contracts and the GATS can subject domestic policy choices to international enforcement; thus, countries are effectively "locked into" an irreversible process of liberalization and privatization. Finally, Section 6 concludes by emphasizing that the "lock-in effect" of binding international agreements creates an urgent need for policy makers to comprehensively assess all of their choices before pledging to a course of action, in order to ensure that they maintain regulatory flexibility and authority. By relinquishing the ability to set and alter regulatory choices, governments may compromise the delivery of basic services, including those essential to the enjoyment of human rights. The provision of water to those most in need is a case in point.

1. BACKGROUND: PRIVATIZATION IS NOT A ONE-SIZE-FITS-ALL SOLUTION

Access to water is essential for human life. Our very survival depends on it, as well as the most basic activities vital to our sustenance, including agriculture, cooking, and sanitation. Yet, more than a billion people lack adequate access to water.¹ Among these, the poor and indigenous populations are the most severely impacted. Eighty percent of those without improved sources of drinking water are rural

poor, and, at the same time, the number of urban dwellers lacking access has increased by 28% since 1990.² Water access is a rapidly growing problem, and policy makers are struggling to find a course of action.

IFIs, such as the World Bank and the International Monetary Fund (IMF), emphasize privatization as the solution. A recent World Bank draft document on water resources stated that "...private investment and management is playing, and must play, a growing role",³ and in May, 2002, the World Bank Director for Water and Power directly declared that water and sanitation loans will not be awarded to African countries unless they allow for the participation of private companies.⁴ A review of IMF loan policies in 40 countries reveals that during 2000 IMF loan agreements with 12 borrowing countries included conditions imposing water privatization or cost recovery requirements.⁵

Privatization may well be a viable option for improving access to water for some of the billions of people with no safe drinking water or sanitation systems.⁶ However, this is a vastly debated issue. The IFIs contend that higher payments from consumers are an incentive for suppliers to extend pipes to those relying on water trucks or unclean sources. Indeed, there are examples where privatization has proven successful in delivering water services to those in need.⁷

During the past years, however, it has become increasingly evident that privatization does not constitute a one-size-fits-all solution. The overall effects of the increas-

ing shift from public to private provision of water on sustainable development are still unclear, and recent cases, in fact, suggest that privatization can fail to meet the goal of creating access to this vital resource, especially among the poor and marginalized. To cite one example: despite the 1999 imposition of water charges in South Africa, there was no significant expansion of water pipes, and the poor in Kwagulu-Natal had to continue relying on polluted river supplies. In 2001, this practice resulted in a cholera outbreak.⁸

Increasing private participation and liberalization of trade in water services has proven *not* to be the universal answer to providing sustainable and equitable access to water. What

Privatization of water services offers a possible -- but neither the only nor a guaranteed -- solution to the problem of water scarcity. When approaching questions related to essential water services, governments should be wary that adopting World Bank and IMF policies, in conjunction with concession contracts and international investment and trade treaties, may unintentionally lock in the process of privatization. It is essential to understand the inter-linkages among different economic policies.

is more, the push to liberalize through international, legally binding investment and trade agreements creates new problems: By rendering domestic policy choices enforceable through international tribunals, these treaties effectively lock countries into an irreversible process of liberalization and privatization.⁹

2. ACCESS TO WATER: A HUMAN RIGHT ESSENTIAL TO SUSTAINABLE DEVELOPMENT

A number of international declarations have defined access to water as a human right and as an element of other basic rights -- thus including water access among rights that governments are obliged to protect and promote.

Water is a basic element of life; humans die without water. Therefore, when the Universal Declaration of Human Rights declares that "all human beings have the right to life," this includes the right to water.¹⁰ Water must also be clean: water can carry fatal pathogens and other pollutants. A standard of living adequate for the health and well-being of individuals -- another recognized human right -- requires the availability of a minimum amount of clean water. This fact has long been recognized by the World Health Organization and other United Nations (UN) and international aid organizations that specify basic water standards for quantity and quality.¹¹

In November, 2002, the UN Committee on Economic, Cultural and Social Rights issued a General Comment declaring access to water a human right and stating that water is a social and cultural good, not merely an economic commodity. This now requires the 145 countries that have ratified the International Covenant on Economic, Social and Cultural Rights to progressively ensure access to clean water, "equitably and without discrimination".¹²

The right to water is also included in other human rights, such as the right to a healthy environment, as expressed in the Stockholm Declaration (UN Conference on the Human Environment) of 1972. This Declaration emphasizes the need to preserve water through careful planning and management, as it is one of the earth's natural resources that must be safeguarded for the benefit of present and future generations. Moreover, it states that a failure to integrate the right to water into government policies can lead to further environmental degradation. For instance, the lack of sanitation facilities for poor and marginalized communities can cause the pollution of fresh water sources.¹³

The right to water is also intrinsically linked to the right to development, as acknowledged by the UN Sub-Commission on the Promotion and Protection of Human Rights.¹⁴ The Declaration on the Right to Development establishes that "States should undertake, at the national level, all necessary measures for the realization of the right

to development and shall ensure, *inter alia*, equality of

opportunity for all in their access to basic resources..."¹⁵

The nature of water as a human right has several necessary consequences. Most importantly, national governments are obliged to promote and protect access to water so that it remains a right rather than a privilege and is not left subject to the "whim of markets."¹⁶

Privatization of water can provide the economic means to increase access to water, but it can also result in the denial of access for the most vulnerable individuals and groups in a population -- particularly if privatization proceeds without adequate governmental regulation and proper assessment of its effects. To fulfill their obligation to promote the human right to water, governments must take appropriate legislative and other measures to prevent violations of this right.¹⁷ This duty applies to governments not only when they act as national regulators, but also when they negotiate trade rules or set trade policy.

In order to fulfill this duty, national governments must retain the prerogative to choose policy options that ensure their ability to comply with human rights obligations. Thus, governments must retain the ability to adopt social, environmental and other regulations necessary to maintain effective access to water for all segments of the population. However, the trends of economic liberalization and comprehensive trade and investment treaties threaten these abilities. IFIs, investment treaties, concession contracts and GATS can all affect policy choices, including those relating to the provision of essential water services, and often the cumulative impact denies governments the necessary flexibility to set and adjust policies.

3. INTERNATIONAL FINANCIAL INSTITUTIONS: PUSHING PRIVATIZATION

The World Bank and the IMF are the foundation of the international financial system and are among the world's primary sources of loans and development assistance, particularly to the South. In addition, they are responsible for a wide range of global- and national-level studies on economic policy, and their policy recommendations are, at the least, influential. While the stated objective of both institutions is to support sustainable and stable development, the extent to which their lending practices actually adhere to these principles is questionable, and their efforts at reform so far appear to fall short.

According to its mandate, the World Bank "aims to help developing countries fight poverty and establish economic growth that is stable, sustainable, and equitable," through a "mix of finance and ideas" that includes the provision of financial, advisory, and training services around the world.¹⁸ With US\$19.5 billion in loans in the fiscal year 2002, the World Bank is one of the world's largest sources of development assistance.

Similarly, the IMF aims to foster the growth of internation-

al trade, mainly by promoting international monetary cooperation and exchange stability.¹⁹ Currently, the IMF has two primary functions: to conduct research and provide advice on macro-economic policies and to make loans to countries faced with balance of payments crises. The financial assistance provided by the IMF includes credits and loans extended to member countries with balance of payment problems to support policies of adjustment and reform.

The availability of these moneys is traditionally dependent on a set of conditions. The explicit commitments to implement corrective measures that receiving countries make in return for support are known as "conditionalities."²⁰ While the rationale for conditionalities is to ensure that resources are safeguarded and eventually repaid, their application has caused concern. Financial assistance is often accompanied by pressure to adopt IFI-preferred policy positions, and private sector participation in the provision of essential services is prominent among them. The fact that IFIs have effectively imposed policy choices upon national governments through conditionalities, including in areas like the provision of water, has given rise to concerns among civil society groups and policy makers.

The World Bank's Poverty Reduction Strategy Papers (PRSPs) were developed to address some of these concerns. Mainly, PRSPs focused on increasing country "ownership" of programs by ensuring that national governments, instead of IFIs, take the lead and that all stakeholders are involved in defining national policies. However, these efforts have so far failed to bring about real change: While the appearance of national sovereignty is carefully preserved, the World Bank continues to operate programs much as it always has. Accordingly, national governments hold the same perceptions about the kinds of policies they would need to adopt for World Bank Group loan eligibility. The key word, as expressed by the World Bank itself, is "privatization."²¹

Most policies that national governments "propose" for IFI assistance tend to cut public expenditure, often by reducing government involvement and increasing private control of the provision of services. In 1999, the World Bank awarded debt relief to Mozambique only after the country agreed to privatize the water supply in Maputo and "eliminate obstacles to entry and private sector participation in the transport, communications, energy, and water sectors."²² Similarly, in 2002, when Uruguay specified policy choices it would adopt as part of a request to the World Bank for augmented financial assistance, among these was a promise "to open to private initiative activities previously reserved for the public sector."²³

Conditions for IMF assistance are comparable. According to the IMF, "lending is *conditional* on policies: the borrowing country must adopt policies that promise to correct its balance of payments problem."²⁴ (emphasis in original) These policy conditions have consistently tended toward liberaliza-

tion and private sector participation. For example, under the IMF Poverty Reduction and Growth Facility, many developing countries' governments have agreed to have their loan conditioned by the privatization of their water sector.²⁵ Yet, at the same time -- illustrating the inconsistency between the IFIs words and actions -- the IMF claimed that during 2000-2001 it worked to make its conditionalities "...less intrusive into countries' policy choices."²⁶

Overall, the lending mechanisms of IFIs have had and will continue to have significant impacts on policy choices in many developing and transitioning countries. On their face, these policy choices appear voluntary: They are contained in domestic policy documents and are not legally linked to the grant of money. In reality, however, the situation is different. With governments under financial pressure, they are often unable to avoid IFI policy recommendations, including on issues such as the privatization of water. Yet despite this pressure, countries need to carefully assess their options before adopting any policies in the water sector.

4. REGIONAL AND BILATERAL INVESTMENT TREATIES (BITs): LOCKING IN POLICY CHOICES

International investment treaties can influence national policies, particularly in those countries on the receiving end of investment flows. Capital-exporting countries regard investment treaties as an important tool to advance their investors' interests. Consequently, the major goals are to facilitate foreign direct investment (FDI) in a host country and to increase investor protection. These goals are achieved principally by encouraging host countries to adopt market-oriented policies and by setting up dispute settlement systems that effectively prevent host countries from altering a policy, including to strengthen the regulation of an investment -- or at least penalize them for doing so.

Developing countries conclude investment treaties in the hope of attracting much-needed FDI. The number of BITs continues to increase, having now reached about 2,000, nearly four-fifths of which were concluded after 1990. Moreover, regional investment treaties, such as the North American Free Trade Agreement (NAFTA), have been and continue to be negotiated, and the World Trade Organization (WTO) is considering negotiation of a multilateral investment treaty. Interestingly, however, a recent World Bank Report²⁷ expressed doubt that existing BITs can effectively assist developing countries in attracting new investment flows.

While the content of each investment treaty varies, they have certain recurring features. In order to increase investor protection and provide easier access for FDI, treaties usually encourage host countries to adopt market-oriented policies, thereby provoking significant changes in host countries' domestic economies. For example, many investment treaties contain policies relating to the mobility of capital. Most also include policies which protect investors against

expropriation and nationalization without compensation or which restrict governments from using a range of vital domestic policy measures, including performance requirements, so-called discriminatory measures, investment screening and approval processes. The policy changes required under international investment treaties largely parallel those promoted by the IFIs, but they go a step further in that they effectively lock governments into legally binding obligations.

Privatization of services provisions are also frequently implemented through concession or host-government arrangements. Such agreements are negotiated between host countries and foreign investors, who typically acquire rights to explore and exploit natural resources or to offer certain services. The agreements then set forth the respective rights and responsibilities of the country and the foreign parties for the project. Although investment treaties and concession contracts differ in their nature, they frequently operate in conjunction and have mutually reinforcing components that yield common effects.

A primary example of this relationship is the recent inclusion in many investment treaties of mechanisms allowing private investors to bypass national courts and challenge national governments in front of international arbitration tribunals. In addition, the investment provisions of certain recent bilateral free trade agreements establish breach of an investment authorization or agreement (herein after "concession contract") as a new, separate cause of action.²⁸ In these cases, if the private investor operating the concession feels that the government has breached a concession contract, the investor has an explicit right to bring a claim against the host government before an international arbitration tribunal with respect to all issues under the concession agreement. Investment litigation and arbitration thus increasingly intrude into domestic policy areas, such as water services like drinking water and water for irrigation.²⁹ They also undercut the rule of law by removing an important set of cases from the domestic judicial system.

Usually host countries do not enjoy reciprocal recourse to arbitral tribunals vis a vis private investors. While investment agreements grant investors the right to bring arbitral actions against a host country, investors have successfully avoided symmetrical accountability. Unlike governments, which can face state-to-state litigation or arbitration procedures, investors are safe in the knowledge that any arbitral action will be brought against their home country, and not them.³⁰

The International Center for Settlement of Investment Disputes (ICSID), which functions under the auspices of the World Bank, has already seen several water cases, most

involving Northern corporations and Southern governments. The Cochabamba case (see Box 1) and a suit by the French water company Générale des Eaux against the Argentine Republic are among the best known.

Many of these cases have involved the expropriation rules included in typical investment treaties. Unless carefully limited, expropriation rules are prejudicial to a government's ability to regulate in areas such as health and environment, and they are also a central element of the lock-in effect.

Box 1: The Cochabamba case illustrates the constraints a government faces if IFI-induced policy changes and bilateral investment treaties (BITs) operate in tandem.

In the late 1990s the World Bank pressured Bolivia to privatize the public water system of its third-largest city, Cochabamba. In particular, The World Bank threatened to withhold debt relief and other development assistance. In 1999, in a process with just one bidder, the California-based engineering giant Bechtel was granted a 40-year lease to take over Cochabamba's water system, through a subsidiary the corporation formed for just that purpose ("Aguas del Tunari"). Within weeks of taking over the water system, Bechtel raised prices by an average of more than 50%, leaving the poorest segments of the population without access to water. The rate hikes sparked massive citywide protests that the Bolivian government brutally suppressed. In April 2000, as anti-Bechtel protests continued to grow, the company's managers abandoned the project. In consequence, Bolivia rescinded the contract.

As a response, Bechtel filed legal action against Bolivia last November, demanding \$25 million in compensation. This figure is far greater than Bechtel's investment in the few months it operated in Bolivia, because it includes a portion of the company's expected profits from the project. Bechtel filed the case with the International Centre for the Settlement of Investment Disputes (ICSID), which operates under the auspices of the World Bank. Many BITs contain clauses that grant investors access to ICSID arbitration processes. In the Cochabamba case, such access was granted by a BIT between the Netherlands and Bolivia. Current information suggest that, although Bechtel is a US corporation, establishing a PO Box presence in the Netherlands sufficed to make use of the treaty's arbitration provisions.

Like most international arbitration processes, ICSID operates in a secretive fashion, without providing the possibility for public input or scrutiny. Thus far, the tribunal has rejected a request for participation by civil society and the media. As Oscar Olivera (a leader of the coalition of Bolivian peasants, workers and others that formed in opposition to Bechtel) stated: "The fact that a World Bank court is preparing to hear this case behind closed doors, without any public scrutiny or participation, is a clear example of how global economic rules are being rigged to benefit large corporations at the expense of everyone else."

The legal team representing the Bolivian petitioners includes California-based Earthjustice and the Washington, DC-based Center for International Environmental Law (CIEL). For more information and contacts: http://www.ciel.org/Ifi/Bechtel_Lawsuit_12Feb03.html; To view the petition: <http://www.earthjustice.org/news/documents/bolivia-petition.pdf>

Investors have aggressively claimed damages on the basis of expansive interpretations of these rules, arguing that any change in national regulations that decreases the value of

the investment constitutes compensable expropriation. For example, if governmental authorities decided to impose water price caps because prices applied by a private company are unaffordable to some segments of the population, such a measure could affect the water company's return on its investment. Thus, the measure would expose the government to claims for financial damage, as recent cases have proven (see Box 2).

A similar situation could occur if a government sought to reverse a failed privatization process. Thus, BITs and other investment agreements can deprive national authorities in host countries of their ability to implement and adopt regulations to promote development, prevent environmental

public policy and law in venues designed for economic disputes. Investment tribunals -- which mainly operate according to procedures for resolving private commercial disputes and which generally disregard fundamental principles of transparency and stakeholder participation -- are not the appropriate domain for disputes concerning public policy and public interest.³¹

In sum, investment agreements and concession contracts, combined with IFI policy recommendations to liberalize and privatize services sectors, lead to significant limitations on national governments' abilities to make domestic policy decisions. These limitations may conflict with a government's duty to respect, protect and fulfill the right to water or a government's general protection of its water resources.

Box 2: The European Communities (EC) uses current GATS negotiations to promote changes in developing countries water policies

GATS negotiations have recently been the stage of pressure by the EC, home to many of the world's largest water companies, to liberalize the provision of water services in other WTO Members' markets. The EC has manifested its desire to obtain market access in several submissions to the relevant WTO committees and in negotiating documents directly addressed to its trading partners.

In September 1999, a restricted EC document to the WTO's Committee on Specific Commitments proposed to explicitly include water distribution services into the sector of "environmental services." This would entail the WTO's express acknowledgement of water provision as a tradable service. Activities included in this service would be, among others, the distribution of potable water, as well as its purification, treatment and monitoring services (S/CSC/W/25).

In December 2000, the EC submitted a proposal on the liberalization of water services (as part of environmental services) to the Special Session of the Council for Trade in Services. In its submission to this negotiating body, the EC encouraged Members to "reduce trade barriers to the minimum as well as [to] increase country coverage" (para. 4) of commitments. The document further lists typical obstacles to trade in water services, including "...monopolies and exclusive providers issues, restrictions on the legal form of doing business, equity limitations and ...restrictions on foreign investment..." (para. 12) (S/CSS/W/38).

In June, 2002, the EC finally targeted its trading partners with individual, country-specific requests to open their water markets. Target countries included many developing countries, including Mexico, Indonesia, and Pakistan, but also Northern countries such as the United States, Switzerland, Canada and Australia.

Sources: Communication from the EC and their Member States, Classification Issues in the Environmental Sector, S/CSC/W.25, September 28, 1999; Communication from the European Communities and their Member States, GATS 2000 Environmental Services, S/CSS/W/38, December 22, 2000; Leaked EC Draft Requests, available at www.gatswatch.org

5. THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS): LOCKING IN POLICY CHOICES

Similarly, commitments made under the GATS can both induce and lock in policy changes, including those made at the behest of IFIs. As part of the World Trade Organization (WTO), the GATS is a vehicle to promote liberalization of trade in services, thereby increasing participation of foreign, private-sector service providers. WTO Members are currently pursuing such liberalization through a set of far-reaching negotiations, covering essentially all services sectors, including the provision of water for drinking, sanitation, etc. However, the GATS not only advocates policy change, but fortifies these changes once in place through a legally binding dispute settlement system in the WTO.

Many of the policies through which WTO Members liberalize trade in services parallel the policies that developing countries adopt in the context of the World Bank's or the IMF's lending instruments. For example, typical "liberalization" policies include providing increased market access in a services sector, including to foreign private service providers; eliminating quantitative restrictions to services trade; prohibiting discrimination between foreign and domestic services providers; and eliminating or regulating governmental monopolies.³² These are all policies advocated by the IFIs and recognized as liberalization measures under GATS. The GATS even implicitly recognizes this overlap by granting Members "credit for autonomous liberalization", including liberalization measures taken to meet IFI recommendations.³³

By accepting commitments to liberalize under the GATS, a country thus effectively turns adopted IFI policy suggestions into legally binding international obligations. IFI-induced policy choices are then not only extremely difficult to reverse,³⁴ but also become subject to enforcement through the WTO's dispute settlement system. While this

degradation or ensure citizens' access to water. These arbitral processes not only raise basic concerns about constraints on domestic policy choices and regulatory prerogatives, but also about the propriety of addressing

system (in contrast with dispute settlement under most investment treaties) does not allow private corporations to sue governments, businesses frequently lobby or pressure their home governments to lodge a complaint against another WTO Member. Any domestic regulatory action that negatively affects trade in services and that could be perceived as violating GATS obligations may be subject to such a WTO complaint -- even if the action was taken pursuant to international human rights obligations.

The potential for services-related WTO disputes depends on the depth and scope of each country's individual commitments to services trade liberalization. It is frequently argued that the GATS "progressive liberalization" approach allows governments to define the pace of liberalization in their domestic services sectors by selectively accepting GATS obligations. However, this theoretical flexibility is undermined by the political pressures WTO Members face from their trading partners. Frequently, this pressure stems from the export interests of service providers in developed countries. Whatever the reason, it is beyond question that the most developing countries do not have the political muscle of the industrialized countries or blocks such as the United States, Japan and the EU. In addition, liberalization undertaken autonomously (in the case of developing countries under the guidance of IFIs) provides exporting countries with additional leverage to push developing countries to accept legally binding commitments under GATS.³⁵ Consequently, the so-called "bilateral request-offer negotiations" can allow individual WTO-Member governments to compel their trading partners to open their markets for water provision to foreign, private service providers.³⁶

Though the GATS contains a mechanism for modifying national commitments, the process is extremely burdensome and has not yet proven effective. This irreversibility is even more significant given that a WTO Member could face a challenge through the WTO dispute settlement system if it does not comply with its obligations.

Private involvement in the provision of services, as noted earlier, may not bring about expected benefits, in particular for the poor, marginalized and disadvantaged. Furthermore, overwhelmingly broad liberalization commitments may effectively constrain domestic regulatory prerogatives, impeding countries from enacting regulations governing the conduct of private companies and ensuring the provision of adequate, affordable and safe water services.

Thus, it behooves a WTO-Member government to consider very carefully how to treat sensitive sectors, such as water, under the GATS. Explicitly excluding certain services sectors from GATS may be one way to proceed. Rejecting or only selectively accepting commitments with several conditions and limitations may be another option to pursue. In any case, WTO Members may wish to tread cautiously and ensure that any new GATS obligations do not impede their ability to fulfill pre-existing international obligations, includ-

ing those under international human rights laws.

6. CONCLUSIONS AND RECOMMENDATIONS

Should current trends continue, by 2025 3.5 billion people (48% of the projected population) will suffer from serious water shortages.³⁷

Privatization of water services offers one possible solution to the problem of water scarcity. Many believe that the privatization of water supplies will bring greater economic efficiencies and surer supplies to water-needy areas -- along with profits to those supplying these services. However, few argue that privatization is the only answer to water supply problems. Moreover, there is considerable concern that the shift from public to private provision of water will negatively affect sustainable development. Cases like Cochabamba and South Africa have put the world on alert.

When approaching questions related to essential water services, governments should be wary that adopting World Bank and IMF policies, in conjunction with concession contracts and international investment and trade treaties, may unintentionally lock in the process of privatization and the health, safety, and environmental regulations in place at the time the privatization occurs. It is essential for economic policy makers, including WTO negotiators, to rely on the expertise of those familiar with affected policy areas (such as human rights and the environmental and social aspects of development) and to recognize the inter-linkages among different economic policies.

In particular, governments must assess:

- the extent to which international bilateral and multilateral trade and investment agreements *lock in* governments' ability to reverse and change policy choices, including those crucial to achieve much-needed social, environmental and other goals.

Given this lock-in effect, it is even more important that governments assess:

- the *potential impact of policy choices* -- in particular to privatize and liberalize water services -- on the ability to ensure adequate provision of services to the marginalized and disadvantaged segments of society and to protect natural resources.

Only on the basis of a comprehensive, transparent and thorough analysis of the above issues will policy makers and negotiators be able to develop domestic policy options that maximize water policies' contribution to sustainable development. Such a thorough assessment is also crucial to allow policy makers and negotiators to develop a negotiating agenda that minimizes the potential negative effects of international trade and investment rules. Finally, a comprehensive and balanced assessment of policy options would

assist countries to meet their obligations under international law, including human rights and environmental rules, and thereby increase coherence in international policy making.

Water is but one example of how commitments under GATS (and its linkages to other institutions, processes and

commitments) can affect the provision of basic services. The issues discussed above apply equally to other essential services, such as health and education, as well as sectors such as telecommunications, transport and financial services.

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ENDNOTES

1. World Health Organization, *The Right to Water*, Health and Human Rights Publication Series no. 3, ch. 2 (Feb. 2003).

2. *Id.* at chs. 2 and 3.

3. World Bank, *Water Resources Sector Strategy: Strategic Directions for World Bank Engagement*, at <http://lnweb18.worldbank.org/ESSD/essdext.nsf/18ByDocName/StrategyPublicConsultationWaterResourcesSectorStrategy>

4. Speech by Jamal Saghir to the World Bank's Water Forum on May 6, 2002, cited by Nancy Alexander, *Who Governs Water Resources in Developing Countries? A Critique of the World Bank's Approach to Water Resources Management*, News & Notices for IMF and World Bank Watchers, vol. 2, no. 7 (Summer 2002), at http://www.challengeglobalization.org/html/news_notices/summer2002/summer_2002_1.shtml

5. Citizens' Network on Essential Services, *IMF and World Bank Push Water Privatization and Full Cost Recovery on Poor Countries*, News & Notices, vol. 2, no. 4 (Spring 2001), at http://www.challengeglobalization.org/html/tools/private_sector_dev3.shtml#water

6. Peter Gleick, *The Human Right to Water*, vol. 1, no. 5, Water Policy, 487-503 (1999).

7. See for example World Bank, *Bolivia Water Management: A Tale of Three Cities*, Précis No. 222 (Spring 2002).

8. Sara Grusky, *IMF/World Bank Water Policies and the Price Paid by the Poor*, Multinational Monitor (Sept. 2001), at <http://multinationalmonitor.org/mmm2001/01september/sep01toc.html>

9. Much of the discussion in this paper relates to the privatization of water services. In that context, it is relevant to note that there is a distinction between the privatization of water and that of water services. The policy directives attached to the GATS, IFI policies and investment treaties discussed in this paper are those in respect to the privatization of water services, e.g. the provision of water, drainage, sanitation etc. This is not to suggest that private ownership of water services necessarily would require private ownership of water itself. However, the two are inextricably associated. Companies replacing public entities as water suppliers are likely to demand better-defined property rights and an allocation of water rights to guarantee that they, as service providers, will be able to carry out their commercial undertaking. For a discussion of the linkages

between ownership of water, the ability to provide water services and governments efforts to managing water as a natural resource.

10. Center for Economic and Social Rights, *The Right to Water*, at <http://www.cesr.org/PROGRAMS/water.htm>

11. Gleick, *supra* note 6.

12. UN Committee on Economic, Social and Cultural Rights, *The Right to Water*, The International Covenant on Economic, Social and Cultural Rights, arts. 11 and 12, E/C.12/2002/11 (Nov. 2002).

13. Center for Economic and Social Rights, *Facts about the Right to Water*, at <http://www.cesr.org/PROGRAMS/water.htm>

14. UN Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Promotion of the Realization of the Right to Drinking Water and Sanitation*, Resolution 2001/2. The Sub-Commission asked the Special Rapporteur "to continue his study on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, at the national and international levels, taking into account questions related to the realization of the right to development..."

15. UN Declaration of the Right to Development adopted by General Assembly resolution 41/128 of Dec. 4, 1986, art. 8, at <http://www.unhchr.ch/html/menu3/b/74.htm>

16. High Commissioner on Human Rights, *Liberalization of Trade in Services, and Human Rights* (June 25, 2002), E/CN.4/Sub.2/2002/9.

17. *Id.* at p. 10.

18. World Bank, *At a Glance*, at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040559~menuPK:34560~pagePK:34542~piPK:36600~theSitePK:29708,00.html>

19. See Article I of the Articles of Agreement of the International Monetary Fund, setting out the purposes of the IMF, at <http://www.imf.org/external/pubs/ft/aa/aa01.htm>

20. For IMF conditionalities, see International Monetary Fund, *What is the IMF, The Role of the IMF at a Glance*, at

<http://www.imf.org/external/pubs/ft/exrp/what.htm#glance>; see also Bretton Woods Project, *Poverty Reduction Strategy Papers (PRSPs): A Rough Guide*, at <http://www.brettonwoodsproject.org/topic/adjustment/PRSP%20rough%20guide/PRSP%20rough%20guide.htm>

21. World Bank, *supra* 18; IMF and Bretton Woods Project, *supra* 20. See also *supra* note 3. Note that the World Bank and the IMF have no means of enforcing the policy suggestions other than withholding subsequent loans.

22. *International Monetary Fund and the International Development Association, Republic of Mozambique: Initiative for Heavily Indebted Poor Countries (HIPC) Completion Point Document*, (June 16, 1999), at <http://www.worldbank.org/hipc/country-case/mozambique/completion.pdf> (on file with the World Bank).

23. See the Uruguay government's letter of intent to the IMF, June 18, 2002, at <http://www.imf.org/External/NP/LOI/2002/ury/02/index.htm>

24. The document then continues that "[T]he conditionality associated with IMF lending helps to ensure that by borrowing from the IMF, a country does not just postpone hard choices and accumulate more debt, but is able to strengthen its economy and repay the loan. The country and the IMF must agree on the economic policy actions that are needed. Also the IMF disburses funds in phases, linked to the borrowing country's meeting its scheduled policy commitments." See *What is the IMF, The Role of the IMF at a Glance*, at <http://www.imf.org/external/pubs/ft/exrp/what.htm#glance>

25. *Bearing the Burden of IMF and World Bank*, Multinational Monitor, vol. 22, no. 9 (Sept. 2001), at <http://multinationalmonitor.org/mm2001/01september/sep01corp1s1.html>

26. IMF, *What is the IMF, The Role of the IMF at a Glance*, at <http://www.imf.org/external/pubs/ft/exrp/what.htm#glance>

27. World Bank Group, *Global Economic Prospects 2003: Investing to Unlock Global Opportunities*, at http://publications.worldbank.org/ecommerce/catalog/product?item_id=1755536

28. For the text of the US - Singapore Free Trade Agreement see <http://www.ustr.gov/new/fta/Singapore/final/text%20final.PDF>; see specifically, Article 15.15.1 a) (i) C, pp. 168 in the investment chapter; For the text of the US - Chile Free Trade Agreement see <http://www.ustr.gov/new/fta/Chile/text/10text.pdf>; specifically, Article 10.15 (a/b) (i) C.

29. Investment litigation tribunals, such as those under ICSID tribunal, cannot legally require changes in a country's domestic policies. However, through the imposition or threat of financial damages, they can create pressure for the defendant and its decision-making authorities.

30. NAFTA provides perhaps the best example of investor-state disputes. For example see *Ethyl Corporation v. Government of Canada* 38 ILM 708 (1999), where a US chemical company successfully challenged Canadian environmental regulations on gasoline additives, and *S.D. Myers Inc v. Government of Canada* (award available at <http://www.state.gov/documents/organization/3992.pdf>), where a US waste treatment company successfully challenged Canadian laws prohibiting the export of hazardous wastes, in accordance with obligations under a multilateral environmental agreement.

31. Affected stakeholders and the public are, however, requesting full transparency of and access to such tribunals. For an example, see *Letter from Civil Society to ICSID Dispute Resolution Panel, Re: Demand for Public Participation*, *Agua del Tunari S.A. (Bechtel) v. Republic of Bolivia* (Case No. ARB/02/3), at http://www.ciel.org/Publications/CITIZENS_Aug02l.pdf. In Feb. 2003, the ICSID tribunal decided that neither the public nor the media were allowed to participate in or even witness the proceedings in which Bechtel sued the people of Bolivia for \$25 million. See the Feb. 12, 2003, press release, *Secretive World Bank Tribunal Bans Public and Media Participation in Bechtel Lawsuit Over Access To Water*, at http://www.ciel.org/Ifi/Bechtel_Lawsuit_12Feb03.html

32. As long as a government has not entered into full market access commitments (Article XVI) in the relevant sector, GATS obligations, strictly speaking, allow public and private monopolies to exist, but place constraints on certain anti-competitive practices (Articles VIII and IX GATS).

33. Article XIX.3 GATS and para. 13 of the GATS Negotiating Guidelines acknowledge such credit for autonomous liberalization, the latter stating that "...account shall be taken and credit shall be given in the negotiations for autonomous liberalization undertaken by Members...". See *Guidelines and Procedures for the Negotiations on Trade in Services*, March 29, 2001, S/L/96. For an analysis of the trade policy content of PRSPs, see Christian Aid, *Too Hot To Handle?*, at <http://www.christian-aid.org.uk/indepth/0304toohot/toohot.pdf>. Note that the relationship between GATS and IFI policy recommendations goes even beyond promotion and enforcement. One illustration of the complexity is the case where a country might inadvertently subject a service sector to the purview of GATS, simply by adopting an IFI policy recommendation: When governments follow recommendations by IFIs to liberalize their services, they may also place those services under the scope of the GATS, because the liberalization of a sector may place the service outside the coverage of the "governmental services exclusion" of the GATS. The scope of the GATS is defined in Article I, which establishes that GATS applies to trade in all services, apart from services provided in governmental authority. A service in governmental authority, in turn, is defined a service being "...supplied neither on a commercial basis nor in competition with one or more service suppliers". IFI-induced policy changes, such as the introduction of competition or commercial considerations (e.g. user fees) into the supply of essential services may effectively remove the service in question from the exception and make it subject to GATS disciplines. For a discussion of the scope of GATS and Article I.3 (b) see Krajewski, Markus, *Public Services and the Scope of the GATS*, a CIEL Research Paper, at <http://www.ciel.org>.

34. In theory, WTO Members are allowed to undo liberalization measures; however, both Article XXI and the respective guidelines developed for that purpose (S/CS/W/21) are extremely burdensome, in so far as they require the payment of adequate compensation on an MFN basis to any affected trading partners (note that compensation is fulfilled through market access commitments rather than monetary payment).

35. Committing the sector under GATS should be easy, it is argued, because the country has already undertaken the policy changes at the national level. However, this argument disregards the fundamental change in nature that a domestic policy measure undergoes when it becomes an international, legally binding commitment. For a discussion of the practical constraints to this "theoretical flexibility", see Peter Hardstaff (head of policy for World Development Movement), *The "Flexibility" Myth: Why GATS is a Bad Model for a New WTO Investment Agreement*, delivered to a seminar on WTO Investment Agreement in Geneva, Switzerland, Mar. 20, 2003; for a comprehensive evaluation of the EC requests to developing countries see Peter Hardstaff and Clare Joy, *Whose Development Agenda?* An analysis of the EU's GATS requests of developing countries, London (Apr. 2003).

36. For more information see Elisabeth Tuerk, Robert Speed, and Aaron Ostrovsky, *Going With the Flow - Does the GATS Drive Privatization?*, Fresh Water and International Economic Law, Edith Brown Weiss, et al. eds., forthcoming 2003. Also see CIEL and World Wildlife Fund (WWF) joint publication, *Water and the GATS*, forthcoming July 2003.

37. For example see High Commissioner on Human Rights, *supra* note 16, paras. 66 and 67. The report states that, when considering market access commitments, some sectors "...should be treated very carefully and might require more sophisticated supplementary measures or sequencing..." and encourages "...States to open markets through WTO negotiations only on the basis of empirical evidence gathered through assessments."