



WATER TRADED (DRAFT VERSION)

This paper discusses some of the key legal and policy issues surrounding access to water and the supply of water services. It looks at these issues in the context of the prevailing trend of economic liberalization and examines how external pressures, in particular from international financial institutions, can reinforce this trend and result in increasing instances of privatization in the water sector. Combined with international commitments under trade and investment agreements, this trend can affect the capacity of governments to set and alter their domestic policies. This can in turn hinder the delivery of basic services, including the provision of fundamental human rights, to those most in need.

1. INTRODUCTION

Access to water is essential for human life. Our very survival depends on it, as well as most basic activities vital to our sustenance, including agriculture, cooking, and sanitation. Yet, 460 million people around the world suffer serious water shortages,¹ and water pollution, poor sanitation and water shortages were expected to kill over 12 million people in 2002.² Water is becoming increasingly scarce, and policy makers are struggling to find a course of action to address the problem.

International financial institutions (IFIs), such as the World Bank and the International Monetary Fund (IMF), advocate privatization as the path to much-needed solutions. 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 random 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 the billion people with no safe drinking water and three billion people without sanitation systems,⁶ and there are examples where privatization has proven successful in delivering water services to those in need.⁷ However, the overall effects of the increasing shift from public to private provision of water on sustainable development are still unclear and there is much debate over whether the privatization of water can ensure adequate access to this vital resource, in particular for the poor and marginalized. IFIs contend that higher payments from consumers act as an incentive for suppliers to extend pipes to those relying on water trucks or unclean sources. Experience, however, suggests otherwise: 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 for their water. In 2001, this practice resulted in a cholera outbreak.⁸

It is fundamental, therefore, for policy makers to carefully examine the various policy alternatives before a country commits itself by entering into

legally binding, international agreements. Governments should ensure they maintain the flexibility to take the necessary corrective measures and to abandon failed policies.

The World Bank and the IMF, however, both through their individual functioning and through their relationship with international investment and trade agreements, may effectively be taking options away from national policy makers. Theoretically, the World Bank and the IMF's financial assistance is no longer conditioned to the adoption of specific measures and regulations. However, neither the IFI's programs nor their thinking have essentially changed, and national governments continue to be pressured to adopt certain policies, such as water privatization, to become eligible for loans. Those domestic choices turn into legally binding obligations when the ever-growing number of bilateral investment treaties (BITs) and the "progressive liberalization" of the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) enter the picture. By rendering these domestic policies enforceable through international tribunals they effectively lock countries into an irreversible process of liberalization and privatization.

To sum up, international financial institutions and trade and investment agreements may not only deprive national authorities of their policy options. Thereby, they may also constrain national governments' abilities to implement and adopt regulations to promote development, to prevent environmental degradation or to ensure citizens' access to water. Rather than blindly accepting the

World Bank and IMF's guidance and creating legally binding international rules to enforce the recommended course of action, policy makers should first examine how these choices affect the enjoyment of the right to water and their governments' capacities to adopt social and environmental regulations that may be necessary to ensure sustainable development and satisfy human rights obligations.

This brief aims to inform trade policy makers and, more broadly, the general public about these issues. It seeks to describe how the relationship between World Bank and IMF guidelines, on the one hand, and international agreements such as BITs and the GATS on the other, can effectively force national governments to commit to and to abide by certain policy choices, including the privatization of water services. First, section II explains the importance of water as an element of several fundamental rights, as well as its nature as a human right in itself, and the policy consequences flowing from that nature. Section III then describes the influence of international financial institutions and international investment and trade treaties on domestic policies and the enjoyment of the right to water. Section IV concludes by emphasizing the need for policy makers to comprehensively assess all of their choices before pledging to a determinate course of action and the need to maintain the necessary flexibility to adjust their policy choices.

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 below are in respect of the privatization of water services: i.e. the provision of water, drainage, sanitation etc. This is not to suggest that there is an explicit requirement that the ownership of water itself be privatized. However, the two are inextricably linked. In an increasingly urban-

ized world, ownership of water becomes meaningless unless a safe and affordable supply system is also provided. In turn, the ability to provide water services is intrinsically linked to access to and ownership of water. Thus, companies replacing public entities as water suppliers are likely to demand better-defined property rights in water, and an allocation of water rights to them as service provider to guarantee they will be able to supply water in accordance with their commercial undertaking. While these linkages between ownership of water and the ability to provide water services are of fundamental importance, in particular when it comes to managing water as a natural resource, these issues fall outside the scope of this paper.

2. WATER: A VITAL RESOURCE FOR LIFE AND DEVELOPMENT

Water is a basic element of life. Therefore, when the Universal Declaration of Human Rights declares that "all human beings have the right to life," this includes the right to water.⁹ Meeting a standard of living adequate for the health and well-being of individuals 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 agencies that specify basic water standards for quantity and quality.¹⁰

In November last year, 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".¹¹

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, 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.¹²

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.¹³ 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..."¹⁴

The nature of water as a human right has several fundamental consequences. Most important amongst these is that national governments have an obligation to promote and protect the right to water so that it is not reduced to a mere privilege or left subject to the "whim of markets."¹⁵ Privatization of water can provide the economic means needed to increase access to water, but it can also result in the denial of access for the most vulnerable individuals and groups in the population - particularly if privatization is conducted 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 the right to water.¹⁶ 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 a policy option that ensures they are able to comply with their human rights obligations. Thus, governments must retain the ability to adopt the necessary social, environmental and other regulations to maintain effective access to water for all segments of the population. However, the trend of economic liberalization and the move towards comprehensive trade and investment treaties threatens the abilities of governments to do so.

3. INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL INVESTMENT AND TRADE TREATIES: THE PUSH FOR PRIVATIZATION

A. INTRODUCTION

The combination of World Bank and IMF policies along with international investment and trade agreements can significantly affect, and eventually limit, governments' domestic policy choices. The World Bank and the IMF are the two pillar institutions of the international financial system and, together with regional development banks and individual donor governments, they are responsible for a significant amount of the financial assistance provided to the South. In addition, they are responsible for a wide range of global and national-level studies in respect of economic policy and their policy recommendations are, at the least, influential. More importantly, financial assistance can be accompanied by pressure to adopt IFI-preferred policy positions.

Similarly, international investment treaties can influence national policies, in particular in those countries on the receiving end of investment flows. As capital-exporting countries consider investment treaties an important tool to advance their investors' interests, one of the major aims of such treaties is both to facilitate foreign direct investment ('FDI') in a host country and to increase investor protection. This is achieved principally by encouraging host countries to adopt

market-oriented policies. Investment treaties can therefore encourage fundamental changes in the host country's domestic economies, which may include partial or full privatization of services sectors.

In addition, once a domestic policy position is adopted, investment treaties can prevent (or at least penalize) a host country from altering its policy position. In this context, the combination of IFI-supported policies and a country's commitments under investment treaties can significantly impact on the country's freedom to alter its domestic policies.

Similarly, commitments made under the GATS can reinforce IFI policy recommendations. As discussed below, one of the main effects of the GATS is to create legally binding obligations, subject to binding dispute settlement in the WTO. However, the relationship between GATS and IFI policy recommendations goes beyond this aspect and is more complex. For instance, IFI-induced policy changes may indirectly affect the applicability of GATS: when governments follow recommendations by IFIs to liberalize their services, they may also be placing the 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.¹⁷

Thus, IFIs, investment treaties and the GATS can all affect governments' policy choices, including those relating to the provision of essential water services.

B. INTERNATIONAL FINANCIAL INSTITUTIONS

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 world.¹⁸ Similarly, the IMF aims to foster the growth of international trade, mainly

by promoting international monetary cooperation and exchange stability.¹⁹

Currently, the IMF has two primary functions: conducting research and providing advice on macro-economic policies; and making loans to countries faced with balance of payments crises. The financial assistance provided by the IFM includes credits and loans extended to member countries with balance of payment problems to support policies of adjustment and reform. The World Bank, with US\$19.5 billion in loans in the fiscal year 2002, is one of the world's largest sources of development assistance.

The availability of these moneys is traditionally linked to a certain set of conditions. The explicit commitments that receiving countries make to implement corrective measures in return for the support are known as "conditionalities."²⁰ While the idea behind conditionalities was that resources were to be safeguarded and eventually repaid, their application caused concern. In particular, the fact that international financial institutions effectively imposed policy choices upon national governments, including in areas like the provision of services as essential as water, gave rise to concerns amongst 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 a program, by ensuring that national governments, rather than the IFIs themselves took the lead and that affected stakeholders were involved in defining national policies. However, though today the appearance of national sovereignty is carefully preserved, there has been no fundamental change in the World Bank's programs and thinking. Similarly, the perceptions of national governments about the policies the adoption of which would make them eligible for World Bank Group loans remain the same. The

key word, as expressed by the World Bank itself, is "privatization."²¹

Most of the policies "proposed" by national governments have a tendency to cut public expenditure, including reducing government involvement in and [by] increasing private 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 to "eliminate obstacles to entry and private sector participation in the transport, communications, energy, and water sectors".²² Similarly, in 2002, when the Uruguayan authorities asked the World Bank to augment its financial assistance and laid out policy choices they would adopt to obtain such support, they communicated their decision "to open to private initiative activities previously reserved for the public sector."²³

Likewise, 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 document) Under the IMF Poverty Reduction and Growth Facility, for example, many developing countries' governments have agreed to have their loan conditioned to the privatization of their water sector.²⁵ At the same time, however, it is emphasized that during 2000-2001, the IMF worked to make its conditionalities "...less intrusive into countries' policy choices."²⁶

Overall, the lending mechanisms of the IFIs have had and will continue to have significant impacts on policy choices in many developing and transition countries. On their face, these policy choices appear voluntary: they are contained in domestic policy documents and they are not legally linked to the grant of money. In practice, though, 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. Though this pressure is significant, the fact that once adopted these

policy choices are hard to reverse creates an urgent need for countries to carefully assess their options before adopting any policies in the water sector.

C. BILATERAL INVESTMENT TREATIES

Bilateral Investment Treaties and regional investment treaties are important elements of today's international legal framework for foreign direct investments (FDI). In the hope of attracting much needed FDI, developing countries conclude such treaties which provide foreign investors with easier access to and better protection in their domestic market. The number of BITs continues to increase, having reached about 2,000, with nearly four fifths of them concluded after 1990. Moreover, regional treaties, such as the North American Free Trade Agreement (NAFTA), have been and are being negotiated, and the WTO is considering negotiating a multilateral investment treaty. Interestingly though, a recent World Bank Report²⁷ expressed doubt on the efficacy of existing bilateral investment treaties in assisting developing countries in attracting new investment flows. Instead, the report advises that "unilateral reforms to liberalize foreign direct investment (FDI) are likely to have the greatest and most direct benefit for the reforming country."

While the content of each investment treaty is the result of a different set of negotiations and consequently varies, there are certain common and recurring features in these treaties. In order to provide increasing investor protection and easier access for FDI, these treaties encourage host countries to adopt market-oriented policies. Besides policies relating to the mobility of capital, most investment treaties include policies relating to investors' abilities to conduct business, such as protection against expropriation and nationalization or the prohibition of a range of vital domestic policy measures, including performance requirements, discriminatory measures, investment screening or 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.

The expropriation rules included in many investment treaties are prejudicial to a government's ability to regulate in areas such as health and environment and are also a central element of this lock-in effect. Investors have aggressively claimed damages on the basis of expansive interpretation 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 not affordable 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 below). A similar situation could occur if a government wished to reverse a failed privatization process. Thus, BITs may deprive national authorities in host countries of their rights to implement and adopt regulations to promote development, to prevent environmental degradation or to ensure citizens' access to water.

These constraints upon governments' abilities to exercise their right to regulate are further extended by the fact most investment treaties include mechanisms which allow private investors to challenge national governments in front of international arbitration tribunals. Investment litigation and arbitration thus increasingly intrude into areas of domestic policies, including water policies.²⁸

Significantly, where investment agreements grant investors a right of action against the host state, investors have adopted an aggressive approach to the interpretation of the agreement. Unlike governments in state-to-state

litigation or arbitration procedures, corporations are safe in the knowledge that any reciprocal action will be brought against their home country, and not them.²⁹

The International Center for Settlement of Investment Disputes (ICSID), which functions under the auspices of the World Bank, has already seen several water cases, mostly involving Northern corporations and Southern governments. The infamous Cochabamba case and a suit by the French water company Générale des Eaux against the Argentine Republic are among those best known. These processes not only raise fundamental questions about constraints for domestic policy choices and regulatory prerogatives, but also about the way broad questions of public policy and law are decided. Investment tribunals mainly operate according to procedures established for resolving private commercial disputes, which generally disregard the fundamental principles of transparency and stakeholder participation.³⁰

In sum, investment agreements and their litigation processes together with IFI policy recommendations to privatize and liberalize the water sector lead to significant limitations on national governments' abilities to make domestic policy decisions. These limitations may - under some circumstances - conflict with a government's duty to respect, protect and fulfill the right to water or a government's wish to protect its water resources in general.

D. GENERAL AGREEMENT ON TRADE IN SERVICES

The GATS also provides a framework by which domestic policy choices about the liberalization of water services can be converted into legally binding, international obligations. Where this occurs, obligations in respect of liberalization will then be subject to enforcement through the WTO's dispute settlement system.

Box 1

The Cochabamba case illustrates the constraints a government faces if IFI induced policy changes and bilateral investment treaties 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, it 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 ("Agua 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 bilateral investment treaties contain clauses which grant corporations access to ICSID arbitration processes: in the Cochabamba case, such access was granted by a bilateral investment treaty between the Netherlands and Bolivia. Although Bechtel is a U.S. corporation, establishing a P.O. Box presence in the Netherlands sufficed to make use of the treaty's arbitration provisions.

Like most international arbitration processes, ICSID operates in secret - without any possibility for public input or scrutiny: 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."

One of the major WTO agreements, the GATS establishes the legal framework for trade in services, with the goal of progressively liberalizing such trade. WTO Members are currently pursuing this goal through a set of far reaching negotiations, covering essentially all services sectors, including the provision of water.

Many of the policies through which WTO Members liberalize trade in services essentially parallel the policies developing countries adopt in the context of the World Bank's or the

IMF's lending instruments. Providing for increased market access in a particular services sector, including for foreign private service providers; eliminating quantitative restrictions to

services trade; prohibiting discrimination between foreign and domestic services providers; eliminating or regulating governmental monopolies;³¹ all these are policies advocated by the IFIs and recognized as "trade liberalization measures" under the GATS. The GATS even implicitly recognizes this overlap of policy choices by granting Members "credit for autonomous

liberalization", which includes liberalization measures undertaken in the context of IFIs.³²

The difference between the effects of IFIs and the GATS on national policies is that by accepting commitments to liberalize under the GATS, a country effectively turns IFI policy suggestions into legally binding international obligations. IFI-induced policy choices are then not only extremely difficult to reverse,³³ but also become subject to enforcement through the WTO's dispute settlement system. While the WTO dispute settlement system - in contrast to dispute settlement under many investment treaties - does not provide private corporations with the right to sue governments, businesses frequently lobby or pressure their home country governments into lodging a complaint against another WTO Member. Any domestic regulatory action which negatively affects trade in services and which could be perceived as violating GATS obligations may be subject to such a WTO complaint - even if undertaken pursuant 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 to open up domestic services markets to foreign competition. Frequently, this pressure stems from the export interests of service providers. In addition, liberalization undertaken autonomously, in the case of developing countries under the guidance of the IFIs, provides exporting countries with an additional argument to push developing countries to accept legally binding commitments under the GATS.³⁴ In consequence, the so-called "bilateral request-offer

Box 2

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

Current GATS negotiations have recently been the stage of pressure by the EC, the 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 tradeable 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 European Communities and their Member States, Classification Issues in the Environmental Sector, S/CSC/W.25, 28 September 1999; Communication from the European Communities and their Member States, GATS 2000 Environmental Services, S/CSS/W/38, 22 December 2000; Leaked EC Draft Requests, available at www.gatswatch.org

negotiations" may allow individual WTO Member governments to compel their trading partners to open their markets for water provision to foreign, private service providers.

Private involvement in the provision of services, however, may not bring about the expected benefits, in particular for the poor, marginalized and disadvantaged of the society. Also, overwhelmingly broad liberalization commitments may effectively con-

strain 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.

In consequence, policy makers may wish to retain flexibility to reverse, change or adapt their policies. As pointed out, however, GATS liberalization commitments will be hard to reverse. Though the GATS contains a

mechanism for modifying such national commitments, this 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. Thus, a WTO Member government may wish to carefully consider how to treat sensitive sectors, such as water, under the GATS.

Explicitly excluding certain services sectors from the GATS may be one way to proceed. Accepting only selective commitments, with several conditions and limitations may be another option to pursue. In any case, WTO Members may wish to tread with caution and ensure that any new GATS obligations do not impede their ability to fulfill pre-existing international obligations, including those under international human rights laws.³⁵

It should be noted that water is but one example of how commitments under the 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.

4. CONCLUSIONS

Should current trends continue, by 2025 3.5 billion people (48% of the projected population) will suffer from serious water shortages.³⁶

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. However, 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 the adoption of World Bank and IMF policies, in conjunction with international investment and trade treaties, may unintentionally result in a country locking-in the process of privatization. Thus, before making legally binding commitments, it is essential for trade policy-makers and WTO negotiators to rely on the expertise of those familiar with affected policy areas, such in human rights and the environmental and social aspects of development. In particular, governments - before lock

ing themselves into legally binding policy choices - may wish to assess:

- the impacts of policy choices, such as privatization and liberalization of water services on the marginalized and disadvantaged segments of society, including upon a government's ability to ensure adequate provision of services to these segments; and
- the impact of international bilateral and multilateral trade and investment agreements on the capacity of national governments to adopt much needed social, environmental and other regulations.

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 which will maximize the contribution of water policies to sustainable development. Such a thorough assessment is also crucial to allow policy makers and negotiators to develop a negotiating agenda, which will minimize the potential negative effects of international trade and investment rules. Finally, a comprehensive and balanced assessment of policy options would also assist countries to meet their obligations in international law, including human rights and environmental rules and thereby increase coherence in international policy making.

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17. The scope of the GATS is defined in Article I, which establishes that the 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 commercial considerations (i.e. user fees) into the supply of essential services as well as introducing competition in such 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 the GATS and Article I.3 (b) see *Krajewski, Markus*, Public Services and the Scope of the GATS, a CIEL Research Paper, <http://www.ciel.org>.
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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 *What is the IMF, IMF at a Glance*, at <http://www.imf.org/external/pubs/ft/exrp/what.htm#glance>
- 21 See reference to World Bank documents and statements in Introduction. However, also see *supra* note 3. Note that the World Bank and the IMF have no means of enforcing the policy suggestions other than withholding subsequent loans.

ENDNOTES (CONTINUED)

22. International Monetary Fund and the International Development Association, *Republic of Mozambique: Initiative for Heavily Indebted Poor Countries (HIPC) Completion Point Document*, 9 (June 16, 1999), at <http://www.worldbank.org/hipc/country-case/mozambique/completion.pdf>.
23. Uruguay, *Letter of Intent, Memorandum of Economic Policies, and Technical Memorandum of Understanding*, June 18, 2002, available 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, IMF at a Glance* at <http://www.imf.org/external/pubs/ft/exrp/what.htm#glance>.
25. Multinational Monitor, *Bearing the Burden of IMF and World Bank*, Vol. 22(9) September 2001, at <http://multinational-monitor.org/mmm2001/01september/sep01corp1s1.html>.
26. *What is the IMF, IMF at a Glance*, at <http://www.imf.org/external/pubs/ft/exrp/what.htm#glance>
27. *Global Economic Prospects 2003: Investing to Unlock Global Opportunities*, http://publications.worldbank.org/ecommerce/catalog/product?item_id=1755536
28. Investment litigation tribunals, such as those under ICSID tribunal, cannot legally require changes in a country's domestic policies. They can however, through the imposition or threatened imposition of financial damages, effectively create pressure upon the defendant and its decision making authorities.
29. NAFTA provides perhaps the best example of investor-state disputes. See for example: *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 U.S. waste treatment company successfully challenged Canadian laws prohibiting the export of hazardous wastes, in accordance with obligations under a multilateral environmental agreement.
30. 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, Aguas del Tunari S.A. (Bechtel) v. Republic of Bolivia (Case No. ARB/02/3)*, available at http://www.ciel.org/Publications/CITIZENS_Aug02I.pdf. In February 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 is suing the people of Bolivia for \$25 million. See February 12th 2003 press release "Secretive World Bank Tribunal Bans Public and Media Participation in Bechtel Lawsuit Over Access To Water; Citizens excluded from \$ 25 million suit against Bolivia for company's failed water privatization scheme" at http://www.ciel.org/Ifi/Bechtel_Lawsuit_12Feb03.html.
31. 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 merely place constraints on certain anti-competitive practices (Articles VIII and IX GATS).
32. Article XIX.3 GATS and paragraph 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 http://www.wto.org/english/news_e/pres03_e/pr335_e.htm
33. In theory, WTO Members are allowed to take back liberalization measures, 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 not financial, but rather in terms of market access commitments).
34. Committing the sector under GATS should be easy, it is argued, because the country has effectively already undertaken the policy changes at the national level. However, this argument disregards the fundamental change in nature, which a shift a domestic policy measures experiences when being turned into an international, legally binding commitment.
35. See, for example, High Commissioner on Human Rights, *supra* note 18, at paragraphs 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 market through WTO negotiations only on the basis of empirical evidence gathered through assessments."
36. UNDP et al., *supra* note 1, at 25.