

The Trade in Water Services: How Does GATS Apply to the Water and Sanitation Services Sector?

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Abstract

This paper explores the potential impact of the *General Agreement on Trade in Services* ('GATS') on the water and sanitation services sector. It argues that water and sanitation require special consideration in the liberalisation debate given their essential role in promoting human health and survival and their position as a human right. GATS has the potential to benefit the sector through creating increased efficiencies and encouraging additional funds to expand dilapidated infrastructure. Conversely, the at times punitive nature of trade laws risk undermining individual human rights and national legislation. At present there is some uncertainty as to how the Agreement will apply to the sector as no WTO Members have nominated their water sectors for liberalisation. The recent *US — Gambling* decision demonstrates the power of the WTO to define and potentially to extend a Member State's original commitment. Similarly, it has been argued that certain provisions have the scope to trigger a commitment without the consent of the Member State. This paper argues that given the essential role of water and sanitation, greater certainty must be provided to ensure the effective operation of trade laws, the validity of national legislation and the protection of water consumers.

1. Introduction

The liberalisation of water and sanitation services is arguably one of the most controversial areas within the World Trade Organisation ('WTO') at the present time. At the centre of this controversy is the *General Agreement on Trade in Services* ('GATS')¹ and its application to the water and sanitation market. The WTO views GATS as a voluntary mechanism with which Member States may engage and enjoy a number of benefits including investment, competition, technology transfer and ultimately market growth.² Critics, however, view the agreement as a mechanism through which the WTO is attempting to take control

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¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 ('*Marrakesh Agreement*'), annex 1B (*General Agreement on Trade in Services*) 1869 UNTS 183 (entered into force 1 January 1995) ('GATS').

of national water markets for the benefit and profit of private water firms and their stakeholders.³ The purpose of this paper is to consider the nature and potential impact of trade liberalisation on the water and sanitation services sector and determine whether a WTO Member State, such as Australia, is required to liberalise its water market under the agreement. This discussion will involve an overview of the WTO free trading system and the key provisions of GATS, and a consideration of the potential nature of water market liberalisation and its likely outcomes with specific reference to the impact of the Agreement on human rights and national regulation. The paper will then consider the central question of whether a Member State is required to liberalise its water and sanitation market under GATS. It will be the position of this paper that at present there is a substantial degree of uncertainty as to how GATS will apply to the water and sanitation services sector, and that this uncertainty may result in the unintended liberalisation of water markets. Given their essential role in maintaining and promoting human health and survival, this paper will argue that WTO Member States, including Australia, must protect the water rights of their citizens by accessing the pre-existing protections contained within the WTO mechanism or alternatively, work with other Member States to remove water and sanitation services from the operation of GATS. This certainty will benefit the WTO, private water firms, Member States and water consumers.

2. *What Is Free Trade?*

The theory of free trade is based upon the concept of 'comparative advantage' which asserts that when countries specialise in the production of certain goods or services, they develop economies of scale which result in greater efficiency, thereby enabling a country to be more competitive in international markets. Such increased competitiveness and improved access to international markets is vital for the expansion of global economic growth and, in the context of the developing world, poverty reduction.⁴ International trade rules are designed to prevent government interference and ensure that these new specialised economies are not denied market access through the protectionist behaviour of other governments.⁵

2 World Trade Organisation ('WTO'), *GATS — Fact and Fiction* <http://www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf> accessed 1 November 2007.

3 See, for example, Maude Barlow and Tony Clarke, *Blue Gold: The Battle Against Corporate Theft of the World's Water* (2002); Marco C E J Bronckers, 'More Power to the WTO?' (2001) 4 *Journal of International Economic Law* 41; International Forum on Globalisation, *Intrinsic Consequences of Economic Globalization on the Environment: Interim Report* (2002); Riccardo Petrella, *The Water Manifesto: Arguments for a World Water Contract* (2001); Vandana Shiva, *Water Wars: Privatisation, Pollution and Profit* (2002).

4 United Nations Conference on Trade and Development, *Trade and Development Report: Overview* (2004) at [1] <http://www.unctad.org/en/docs/tdr2004overview_en.pdf> accessed 5 November 2007; WTO, *Free Trade Helps Reduce Poverty, Says New WTO Secretariat Study* (2000) <http://www.wto.org/english/news_e/pres00_e/pr181_e.htm> accessed 12 November 2007.

5 John H Jackson, 'World Trade Rules and Environmental Policies: Congruence or Conflict?' (1992) 49 *Washington and Lee Law Review* 1227 at 1230–33.

The liberalisation and promotion of free trade has been ‘the objective’ of international law since the adoption of the *General Agreement on Tariffs and Trade* (‘GATT’) in 1947⁶ and later, the creation of the WTO in 1995.⁷

GATT is a multilateral agreement which regulates the cross-border trade of goods.⁸ Originally, the agreement had been intended to form part of the International Trade Organisation but following the organisation’s abandonment, operated independently until the formation of the WTO in 1995. During this time, GATT evolved into an international organisation of its own, adopting a charter and basing itself in Geneva.⁹ GATT aims to reduce the barriers to trade that exist between Member States through restricting the tariffs that may be charged to those agreed upon by the parties in the Schedules of Concessions (art II) and allowing the benefits of these concessions to flow to all members (art I).¹⁰ The core provisions of GATT are the Most-Favoured-Nation Treatment principle (‘MFN’) (art I),¹¹ the National Treatment principles (art III),¹² and the General Elimination of Quantitative Restrictions (art XI).¹³ These are principles of non-discrimination designed to provide for the equal treatment of Members and market access for their goods, and restrict the barriers that parties may impose for reasons of domestic concern.¹⁴

On 1 January 1995, following the Uruguay Round of negotiations, the WTO was established by the *Marrakesh Agreement Establishing the World Trade Organization* (‘*Marrakesh Agreement*’)¹⁵ which formally replaced the GATT as the body responsible for the promotion and implementation of free trade.¹⁶ The *Marrakesh Agreement* annexed GATT, thereby keeping its provisions in force,¹⁷ however it also extended its scope of operation beyond the trade of goods, including GATS, the *Agreement on Trade-Related Aspects of Intellectual Property*

6 *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force provisionally 1 January 1948).

7 Thomas J Schoenbaum, ‘International Trade and Environmental Protection’ in Patricia W Birnie and Alan E Boyle, *International Law and the Environment* (2nd ed, 2002) at 697.

8 Aly K Abu-Akeel, ‘Definition of Trade in Services Under the GATS: Legal Implications’ (1999–2000) 32 *George Washington Journal of International Law and Economics* 189 at 189.

9 Mitsuo Matsushita, Thomas J Schoenbaum and Petros C Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (2nd ed, 2006) at 1–3.

10 David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (2nd ed, 2002) at 1147; Matsushita, Schoenbaum and Mavroidis, above n9 at 3.

11 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1A (*General Agreement on Tariffs and Trade*) 1867 UNTS 190, art I (entered into force 1 January 1995) (‘GATT’).

12 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1A (‘GATT’) 1867 UNTS 190, art III (entered into force 1 January 1995).

13 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1A (‘GATT’) 1867 UNTS 190, art XI (entered into force 1 January 1995).

14 Matsushita, Schoenbaum and Mavroidis, above n9 at 234–41, 258–60.

15 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

16 Matsushita, Schoenbaum and Mavroidis, above n9 at 9; Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003) at 947–8.

17 Sands, above n16 at 947.

(‘TRIPs’)¹⁸ and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (‘DSU’).¹⁹ While the WTO is derived from the GATT, it must be viewed as a separate entity in that its boundaries extend far beyond the scope of its predecessor. The WTO has both increased jurisdiction and significantly expanded substantive rules to include previously unregulated areas such as intellectual property, services and investment measures.²⁰ The power of the WTO is derived from its binding dispute settlement body created under the DSU,²¹ which enables it to enforce its rulings with the threat of authorised ‘proportionate retaliatory measures’ by an injured party.²²

Specifically of interest in the area of water and sanitation services is GATS, which establishes ‘binding rules’ on the international trade of services.²³ Eric Leroux argues that this agreement is ‘somewhat complex’ as a result of the substantial challenges faced by the negotiators in achieving their goal of drafting a ‘comprehensive set of disciplines governing the multilateral trade in services’.²⁴ As a result, GATS is a mixture of mandatory and voluntary obligations, which at times creates substantial interpretative difficulties.²⁵ Interestingly, the agreement does not define the meaning of ‘services’²⁶ within its text, however it is clear that GATS applies to all forms of trade in services and ensures that the liberalisation commitments made by Member States apply to all services nominated by a member for liberalisation.²⁷ The agreement does, however, define the meaning of ‘trade in services’ as being the supply of a service:

- (a) from the territory of one Member into the territory of any other Member;
- (b) in the territory of one Member to the service consumer of any other Member;
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.²⁸

18 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) 1869 UNTS 299 (entered into force 1 January 1995).

19 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401 (entered into force 1 January 1995); Sands, above n16 at 947–8.

20 Philip Ruttley, Iain Macvay and Carol George, *The WTO and International Trade Regulation* (1998) at 35.

21 Schoenbaum in Birnie and Boyle, above n7 at 704.

22 Hunter, Salzman and Zaelke, above n10 at 1153.

23 WTO, above n2 at 5; Hunter, Salzman and Zaelke, above n10 at 1151.

24 Eric H Leroux, ‘Eleven Years of GATS Case Law: What Have We Learned?’ (2007) 10 *Journal of International Economic Law* 749 at 749–50.

25 *Ibid.*

26 The exclusion of a definition was the intention of the drafters: See Abu-Akeel, above n8 at 190–1.

27 *Ibid.*

GATS does not apply to government services.²⁹ The liberalisation of services, like the liberalisation of the trade in goods, aims to improve economic performance, increase technology transfer, enhance consumer savings and deliver greater predictability and transparency for participating states.³⁰ This desire is expressed in the Preamble to the GATS agreement, where the parties commit to

establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries.³¹

Panagiotis Delimatsis argues that each regulatory action taken by a state risks increasing the ‘fragmentation of the international economy’ and therefore may negatively impact upon the overall supply of services.³² For a number of economic and non-economic reasons, governments have a tendency to regulate heavily their service areas.³³ GATS is the agreement that aims to reduce the level of regulation and promote the aforementioned benefits of liberalisation.

The GATS document is divided into two key sections: the framework agreement containing the general rules; and the accompanying schedules which list national commitments on specific domestic access for foreign suppliers.³⁴ GATS, like GATT, contains three key provisions designed to promote equality between Member States, market access and non-differential treatment of like products. These are:

- Article II — MFN

With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than it accords to like services and service suppliers of any other country.

- Article XVI — Market Access

With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member

28 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1B (‘GATS’) 1869 UNTS 183, art I (entered into force 1 January 1995).

29 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1B (‘GATS’) 1869 UNTS 183, art I:3(b) (entered into force 1 January 1995). Article I:3(c) defines a service supplied in the exercise of government authority to be ‘any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers’.

30 WTO, above n2 at 5.

31 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1B (‘GATS’) 1869 UNTS 183, Preamble (entered into force 1 January 1995).

32 Panagiotis Delimatsis, ‘Due Process and “Good” Regulation Embedded in the GATS — Disciplining Regulatory Behaviour in Services through Article VI of the GATS’ (2007) 10 *Journal of International Economic Law* 13 at 16–17.

33 *Ibid.*

34 WTO, above n2 at 1.

treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

• Article XVII — National Treatment

In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

The MFN principle requires Member States ‘automatically and unconditionally’ to provide other Member States with treatment no less favourable than they would afford any other country. The concept of like services has not yet been fully explored by the WTO adjudication bodies, however it was determined in *Canada — Measures Affecting the Automotive Industry* (*‘Canada — Autos’*)³⁵ that ‘manufacture beneficiaries’ and ‘non-manufacture beneficiaries’ were like service suppliers ‘regardless of whether or not they have production facilities in Canada’.³⁶ Members are required to afford this access without delay and to all WTO Members.³⁷ GATS, however, allows a Member to ‘maintain a measure inconsistent with [the MFN principle] provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions’,³⁸ thus enabling members to exclude themselves from the operation of the provision for both legal and political reasons.³⁹ Similarly, art XVI, the Market Access provision, requires members wishing to liberalise a service sector to nominate specifically the sector for liberalisation and then enter into commitments under arts XVI, XVII and XVIII.⁴⁰ Once nominated, the provision operates to restrict a member from limiting the number of suppliers in the country, the value of services imported, the quantity of service output, the number of service operations, the number of persons employed, and the participation of foreign capital and certain forms of legal entities.⁴¹ However, art XVII:2 creates an exception to the rule, allowing members to meet their requirements ‘according to services and service suppliers of any other member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.’⁴² Mitsuo Matsushita, Thomas J Schoenbaum and Petros C Mavroidis argue that this allows members to make exceptions through a number of means, including the use of population

35 *Canada — Certain Measures Affecting the Automotive Industry*, WTO Doc WT/DS139/R, WT/DS142/R (2000) (Report of the Panel); WTO Doc WT/DS139/AB/R, WT/DS142/AB/R, AB-2000-2 (2000) (Report of the Appellate Body).

36 Matsushita, Schoenbaum and Mavroidis, above n9 at 619–20.

37 *Id* at 620–1.

38 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1B (‘GATS’) 1869 UNTS 183, art II:2 (entered into force 1 January 1995).

39 Matsushita, Schoenbaum and Mavroidis, above n9 at 623–6.

40 *Id* at 648.

41 *Ibid*.

42 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1B (‘GATS’) 1869 UNTS 183, art XVII:2 (entered into force 1 January 1995).

density tests to determine the number of service suppliers permitted to operate, or by limiting the operation of foreign subsidiaries to a percentage of total domestic assets in an industry sector.⁴³ Consequently, this provision, like the MFN principle, does not apply to all members in all circumstances. Finally, art XVII, the National Treatment provision, has a potentially large scope of operation with the capacity to cover all GATS measures. However, in reality its operation is limited to all areas affecting the trade in services excluding those already covered by arts XVI and VI.⁴⁴ In *European Communities — Regime for the Importation, Sale and Distribution of Bananas* ('*EC — Bananas III*'),⁴⁵ the Dispute Resolution Panel developed a four-pronged test to determine the inconsistency of a measure with the GATT National Treatment provision.⁴⁶ First, the test requires that the complainant establish that the member had taken a 'specific commitment in the relevant sector and mode of supply'. Second, the member must have adopted a measure that 'affected the supply of services in the sector and the mode of supply concerned'. Third, the disputed measure must have been 'applied to foreign and domestic like services and/or services suppliers' and finally the measure must have accorded the foreign suppliers 'treatment less favourable than that accorded their domestic counterparts'.⁴⁷ However, it remains to be seen whether this approach will be applied by a dispute resolution panel with respect to the GATS National Treatment provision.

Despite the existence of similar principles in the two agreements,⁴⁸ GATT and GATS differ as a result of the mixed approach adopted by GATS. This approach allows for the core provisions of arts XVII (National Treatment) and XVI (Market Access) to apply only to individual service sub-sectors nominated by the Member State for liberalisation, whereas arts II (MFN) and III (Transparency) apply 'horizontally' across all sectors in a similar manner to GATT.⁴⁹ Consequently, arts XVII and XVI will only apply in circumstances where a Member State has specifically nominated it for inclusion, thus making GATS an 'opt-in' agreement. Therefore, Member States are required to nominate their water sectors for liberalisation before arts XVII and XVI have national application.⁵⁰

43 Matsushita, Schoenbaum and Mavroidis, above n9 at 648–9.

44 Id at 659–60. Article VI GATS (the Domestic Regulation provision) provides that in circumstances where a member has made a GATS commitment, the Member must apply regulations that may affect the trade in services 'in a reasonable, objective and impartial manner': *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1B ('GATS') 1869 UNTS 183, art VI:1 (entered into force 1 January 1995).

45 *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/R/USA (1997) (Report of the Panel); WTO Doc WT/DS27/AB/R (1997) (Report of the Appellate Body) ('*EC — Bananas III*').

46 Matsushita, Schoenbaum and Mavroidis, above n9 at 662.

47 *EC — Bananas III*, WTO Doc WT/DS27/R/USA (1997) (Report of the Panel); WTO Doc WT/DS27/AB/R (1997) (Report of the Appellate Body) in Matsushita, Schoenbaum and Mavroidis, above n9 at 662.

48 Leroux, above n24 at 752.

49 Hunter, Salzman and Zaelke, above n10 at 1151; Rosemary Lyster, 'Assessing Australia's Ability to Regulate the Activities of Water Utilities in the Face of Free Trade Agreements' (Australian Research Council Discovery Grant Application, 2005) at 11.

There are also a number of regional, multilateral and bilateral trade agreements that aim to reduce trade barriers between Member States and have the potential to impact the water and sanitation services market. These documents include the North American Free Trade Agreement ('NAFTA')⁵¹, the Free Trade Area of the Americas Draft Agreements⁵² and the Australia-US Free Trade Agreement.⁵³ However, in light of the broad nature of this topic and the desire to discuss a number of issues in some depth, the paper will be generally limited to the operation of GATS and GATT in respect to these issues.

3. *Why Must We Consider the Impact of Trade Liberalisation on Water and Sanitation Services?*

As we have seen, free trade laws aim to remove any barrier that may hinder the free flow of goods and services across national borders. In the case of services, this generally involves the opening of a specific market to foreign (private) companies and the introduction of offshore competition. Examples of markets where this has occurred include banking, insurance and telecommunications.⁵⁴ The liberalisation of water services involves the entry into the local water and sanitation market of foreign firms to provide either whole or part of the service. Consequently, in order to determine the impact of trade liberalisation on the water and sanitation market, it is also necessary to consider the related impact of private sector participation within the market. The privatisation (and liberalisation) of water and sanitation services requires special consideration in light of the fundamental relationship between water and human health, and the potential impact of privatisation on the market responsible for supplying this essential service.

A. *What is Water Privatisation?*

The liberalisation of water and sanitation services results in the entry of private firms to local water markets. The privatisation of water and sanitation services has captured a great deal of attention and generated much debate within the international community.⁵⁵ It is estimated to be a market currently worth over US\$365 billion (American dollars).⁵⁶ Interestingly, privatisation is not a new phenomenon in this area as the private sector was responsible for the first provision of water and sanitation services in Western Europe and North America during the

50 WTO, above n2 at 6–9.

51 *North American Free Trade Agreement*, 17 December 1992, 32 ILM 289 (entered into force 1 January 1994).

52 See, for example, the *Free Trade Area of the Americas: Third Draft Agreement*, FTAA.TNC/w/133/Rev.3 (dated 21 November 2003).

53 *Australia-US Free Trade Agreement*, 18 May 2004 [2005] ATS 1 (entered into force 1 January 2005).

54 WTO, above n2 at 5.

55 Goldman Sachs Global Investment Research, *Introducing GS Sustain* (2007); Matthew S Tisdale, 'The Price of Thirst: The Trend Towards the Privatisation of Water and its Effect on Private Water Rights' (2004) 37 *Suffolk University Law Review* 535 at 535.

56 Goldman Sachs Global Investment Research, above n55 at 111.

18th century.⁵⁷ Broadly speaking, this early initiative failed to improve service provision as private firms tended to favour wealthy neighbourhoods and ignore poor communities.⁵⁸ Increasingly, during the 19th century, governments entered the market and took over responsibility for service provision and the regulation of the sector, creating a publicly dominated water sector.⁵⁹ The origins of the present cycle of privatisation may be found in the rise of neo-liberal economic thought in Western democracies during the 1970s. Neo-liberal doctrine asserts that social functions, such as the provision of public goods and economic development, are best undertaken by the private sector operating within 'free markets'.⁶⁰ Privatisation has both the potential to improve and diminish service levels within the water and sanitation sector. In terms of service improvement, private sector participation has the capacity to provide much needed investment to 'expand and rehabilitate the infrastructure' without putting an additional burden on public finances. Moreover, there is also the potential for the private sector, through an increase in efficiency and flexibility, to also improve the services of existing infrastructure.⁶¹ However, there is also the risk that the participation of the private sector in the water market may shift the focus of service provision away from the public interest in favour of profit, leaving those unable to pay excluded from the service.⁶² Potentially, the greatest concern with respect to water privatisation is how private sector operating practices will impact upon the provision of an essential service. Given their fundamental role in protecting and promoting human health and survival, water and sanitation clearly differ from other services such as banking and telecommunications. It is therefore arguable that a greater degree of care is required in the implementation of privatisation and liberalisation policies to ensure the maintenance of basic service levels.

B. Water as an Essential Service and Human Right

Water is essential to human health and survival, both individually and collectively. Water and sanitation services are 'public goods' in that the benefit of their provision extends beyond that of the individual purchasing the service, as the entire community benefits from the use of the service in terms of public health and general wellbeing.⁶³ At present, there are approximately 1.1 billion people lacking

57 James Salzman, 'Thirst: A Short History of Drinking Water' (2006) 18 *Yale Journal of Law and the Humanities* 94.

58 Jessica Budds and Gordon McGranahan, 'Are the Debates on Water Privatization Missing the Point? Experiences from Africa, Asia and Latin America' (2003) 15 *Environment & Urbanization* 87; Karen Bakker, 'Liquid Assets: How We Provide Water Depends on Whether We View Water as a Commodity or as a Public Good' (2003) 29 *Alternatives Journal* 17 at 17; Peter H Gleick, Gary Wolff, Elizabeth L Chalecki and Rachel Reyes, *The New Economy of Water: The Risks and Benefits of Globalization and Privatization of Fresh Water: Final Report* (2002).

59 Budds and McGranahan, above n58 at 90–2.

60 Ibid; Christopher Sheil, *Water's Fall: Running the Risks with Economic Rationalism* (2000) at 26–30.

61 Nick Johnstone and Libby Wood (eds), *Private Firms and Public Water: Realising Social and Environmental Objectives in Developing Countries* (2001) at 7–10.

62 Gleick, Wolff, Chalecki and Reyes, above n58 at iii–v.

access to clean drinking water and 2.6 billion lacking access to appropriate sanitation services;⁶⁴ numbers that are increasing at a rapid rate. It is estimated that by 2025 there will be over three billion people lacking access to adequate water supplies.⁶⁵ Such water shortages have a serious impact not only upon human health but also community development in terms of hygiene, physical wellbeing, economic development, poverty reduction, education and environmental health.⁶⁶ The World Health Organisation ('WHO') estimates that 1.6 million people die annually as a consequence of poor sanitation, unsafe water and poor hygiene.⁶⁷

Traditionally, the public benefit element of resources such as water has led governments to subsidise the provision of these services to ensure the maximum public benefit for the community.⁶⁸ The fundamental nature of water has also led the international community to recognise water as a human right in a number of documents including the *International Covenant on Economic, Social and Cultural Rights*,⁶⁹ *General Comment No 15* of the United Nations Committee on Economic, Social and Cultural Rights,⁷⁰ the *Declaration on the Right to Development*⁷¹ and the *Convention on the Elimination of All Forms of Discrimination Against Women*.⁷² Specifically, *General Comment No 15* provides that

[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.⁷³

63 Shiva, above n3 at 24–5; Petrella, above n3 at 12–14; Budds and McGranahan, above n58 at 92–3.

64 United Nations, *International Decade for Action: Water for Life, 2005-2015: Factsheet on Water and Sanitation* <<http://www.un.org/waterforlifedecade/factsheet.html>> accessed 7 November 2007.

65 Jennifer Naegele, 'What is Wrong with Full-Fledged Water Privatization?' (2004) 6 *Journal of Law and Social Challenges* 99 at 100.

66 Gleick, Wolff, Chalecki and Reyes, above n58 at 2–3.

67 UNDP, UN Millennium Development Goals, UN-Habitat and Unicef, *Mexico 2006: 4th World Water Forum: Water Supply and Sanitation for All* (2006) at [91] <http://www.worldwaterforum4.org.mx/uploads/TBL_DOCS_80_11.pdf> accessed 20 April 2006.

68 Budds and McGranahan, above n58 at 93.

69 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

70 *Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No 15*, UN ESCOR, 29th sess, UN Doc E/C.12/2002/11 (2002) ('*General Comment No 15*').

71 *Declaration on the Right to Development*, GA Res 41/128, UN GAOR, 41st sess, 97th plen mtg, UN Doc A/Res/41/128 (1986); Peter Gleick, 'The Human Right to Water' (1999) 1 *Water Policy* 487 at 489, 493–4.

72 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

73 *General Comment No 15*, UN ESCOR, 29th sess, [2] UN Doc E/C.12/2002/11 (2002).

The existence of such a human right places an obligation on national governments to protect and promote this right for the benefit of their citizens.⁷⁴ Consequently, national governments are under an obligation to ensure the attainment of universal basic water and sanitation services for the protection and promotion of the individual and collective health and wellbeing of their populations. Many argue that the liberalisation of such an essential service area has the potential to place basic service levels at risk and undermine the realisation of the right to water.⁷⁵ While these arguments will be considered in full below, it is clear for the purposes of this discussion that special care must be taken before a water market is liberalised given the unique and essential nature of the service. Moreover, the vital nature of water and sanitation services differentiates the issues associated with its liberalisation from those of non-essential services such as banking and telecommunications. It is the position of this paper that special consideration must be given to the liberalisation and privatisation of water and sanitation given their nature as a public good and their role in satisfying the human right to water.

4. What are the Outcomes of Service Liberalisation?

As previously mentioned, free trade has the potential to have both a positive and negative impact upon water and sanitation markets. The issues associated with trade liberalisation are extremely divisive and contentious with both sides of the debate equally committed to their opposing views; an opposition which has occasionally resulted in violence as was demonstrated during the 1999 WTO Ministerial Conference in Seattle.⁷⁶ However, in order accurately to determine the impact of GATS on a water and sanitation market such as Australia's, it is necessary to consider the advantages and disadvantages of free trade and its potential application to the water and sanitation market.

A. Advantages of Free Trade

Traditionally, the primary motivation for and benefit from trade liberalisation has been that of economic growth. Free trade has the capacity to benefit local economies as the reduction of trade barriers increases the flow of commercial transactions between countries and enables states to focus upon their areas of comparative advantage.⁷⁷ Trade protection in the form of subsidies, quotas and other mechanisms create inefficient producers who are unable to maximise the use of their resource inputs or profits.⁷⁸ Through allowing states to specialise in their areas of strength, trade liberalisation enables economies to maximise the wealth

74 Gleick, above n71; Salman M A Salman and Siobhan McInerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions* (2004) at 85–9.

75 Shiva, above n3 at 87–105.

76 WTO, *The Third Ministerial Conference* <http://www.wto.org/english/thewto_e/minist_e/min99_e/min99_e.htm> accessed 10 October 2007; Global Issues, *WTO Protests in Seattle, 1999* (2001) <<http://www.globalissues.org/TradeRelated/Seattle.asp>> accessed 10 October 2007.

77 United Nations Conference on Trade and Development, above n4.

generated from their resources and at times enables industries to develop economies of scale.⁷⁹ This ability to increase the growth rate and capacity of an economy is increasingly being viewed and used as a tool to assist governments with poverty reduction and meeting their development targets. This approach is supported by the WTO which views trade liberalisation and economic growth as mechanisms to assist governments in promoting human welfare.⁸⁰ The Preamble to the *Marrakesh Agreement* asserts that trade liberalisation can improve

standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.⁸¹

Economic growth, development and poverty reduction may also be advanced through free trade's promotion of technology and information transfer. David Hunter, James Salzman and Durwood Zaelke argue that as a result of the increased transactions between countries occurring due to the decreased barriers to trade, there will be a stimulus for nations to share ideas and technologies which may assist states to utilise better their resources and develop in a more efficient manner.⁸² Finally, trade liberalisation also has the potential to support geopolitical stability by increasing economic ties between states and diminishing the prospect of armed conflict between nations.⁸³

Specifically, the WTO asserts that there are six key benefits derived from service liberalisation:

- The improvement of economic performance;
- Development access to 'world class services' to assist producers in developing countries 'capitalise' on their competitive strengths and improve their local production and export markets;
- Consumer savings through the reduction of trade barriers in a market;
- Faster innovation;
- Greater transparency and predictability through all members being bound to the same set of rules. The WTO also believes that this certainty encourages long-term investment; and

78 WTO, *Understanding the WTO* (2008) at [14] <http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf> accessed 10 October 2007.

79 Hunter, Salzman and Zaelke, above n10 at 1127–29.

80 WTO, above n2 at 2.

81 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

82 Hunter, Salzman and Zaelke, above n10 at 1129.

83 Id at 1127–8.

- Technology transfer (as discussed above).⁸⁴

Clearly, if a service is liberalised in the correct manner, such benefits can deliver improvements to the general wellbeing and standard of living within a community. Specifically with respect to water, it can be argued that trade liberalisation has the capacity to improve infrastructure, market access, affordability and service provision. Such outcomes, if realised, would clearly benefit local communities as water quality, access and affordability would be improved and assist in meeting the needs of those presently lacking adequate water and sanitation services.

B. Disadvantages of Free Trade

Despite its potential benefits, the liberalisation of water services is a particularly divisive issue within the international community. Trade liberalisation has been strongly criticised for its focus on economic outcomes at the expense of human rights and environmental sustainability.⁸⁵ As trade liberalisation opens markets to competition, there is a real risk of foreign firms (generally in the form of multinational corporations)⁸⁶ entering the market, taking the control of the service sector away from the community and decreasing community involvement in the production process. As a result, local consumers may become less involved in deciding how the service is operated, pay a higher charge for the service and have fewer community members employed in the production process.⁸⁷ Trade laws have the potential to increase the inequality between foreign firms and local communities by providing corporations with additional rights and protections within a country.⁸⁸ Specifically, the central concerns associated with trade liberalisation relate to the interconnected concerns of human rights and national regulation.⁸⁹

In June 2002, the United Nations Commissioner for Human Rights commissioned a report entitled the 'Liberalization of Trade in Services and Human Rights'⁹⁰ as a response to growing concerns related to the liberalisation of basic services such as water, education and health, and the need to understand fully the human rights implications of this trend.⁹¹ The report identified a number of

84 WTO, above n2 at 5.

85 Hunter, Salzman and Zaelke, above n10 at 1131.

86 The private water market is dominated by a small number of multinational firms including Suez Environment and Veolia Environment (previously Vivendi Environment): See Barlow and Clarke, above n3 at 101–53; Veolia Environment <<http://www.veoliaenvironnement.com/en/>> accessed 20 August 2008; Suez Environment <<http://www.suez-environnement.com/>> accessed 20 August 2008.

87 Shiva, above n3 at 91.

88 Additional rights may be provided to foreign corporations through the operation of agreements such as bilateral investment treaties: See Barlow and Clarke, above n3 at 176–80.

89 See, for example, Erik J Woodhouse, 'The "Guerra del Agua" and the Cochabamba Concession: Social Risk and Foreign Direct Investment in Public Infrastructure' (2003) 39 *Stanford Journal of International Law* 295; Jeffery Rothfeder, *Every Drop for Sale* (2001).

90 United Nations High Commissioner for Human Rights, *Liberalization of Trade in Services and Human Rights: Report of the High Commissioner*, UN Doc E/CN.4/Sub.2/2002/9 (2002).

problems that had occurred during the implementation of service liberalisation and argued that failure or success in the water services sector would be determined by the nature and effectiveness of government regulation.⁹² However, the report also noted that international trade rules such as GATS have the potential to limit the regulatory capacity of governments and restrict their ability to fulfil their human rights obligations:

[m]any government regulations are measures that can come within the scope of GATS. While GATS acknowledges governments' right to regulate in its preamble, the question remains as to the extent to which GATS can affect government regulations that might have an impact on trade — including government regulations relevant to the protection and promotion of human rights.⁹³

While many associate human rights concerns with the developing world, such power would equally impact the ability of a developed nation such as Australia to regulate its water market and determine the availability, quality, accessibility and affordability of drinking water.⁹⁴ Andrew Lang, in his article 'The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry', notes that such regulatory measures may be viewed as discriminatory or a form of subsidy and therefore prohibited under GATS as a barrier to trade.⁹⁵ Lang notes that governments have traditionally retained control and ownership of water utilities in order to maintain quality standards and subsidise the cost of service provision.⁹⁶ Clearly, even in liberalised and privatised water markets, governments will still be required to establish and protect minimum water and sanitation service standards for the benefit of the community. However, government regulation has the potential to be viewed as a barrier to trade as health, quality, service, environmental and employment standards may create a burden on water suppliers and pose a threat of breaching the National Treatment and MFN treatment provisions of GATS.⁹⁷ Article II grants foreign service suppliers the right to be treated in the same manner as other foreign service suppliers operating in a country, while art XVII gives the foreign suppliers the right to be afforded the same treatment as domestic suppliers. Consequently, claims of discrimination may arise in circumstances where a foreign water service supplier believes that it has been treated in a manner different from either another foreign or domestic water firm.⁹⁸ For example, in a country where water standards were set on a local rather

91 Andrew Lang, 'The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry' (2004) 7 *Journal of International Economic Law* 801 at 801–2.

92 United Nations High Commissioner for Human Rights, above n90 at [50] in Lang, above n91 at 802.

93 United Nations High Commissioner for Human Rights, *Liberalization of Trade in Services and Human Rights: Report of the High Commissioner: Executive Summary*, UN Doc E/CN.4/Sub.2/2002/9 (2002) at 4 in Lang, above n91 at 802; Lyster, above n49 at 7.

94 Lang, above n91 at 806.

95 *Id* at 806–12.

96 *Id* at 807.

97 *Id* at 836–7.

98 *Id* at 810–12.

than a national basis, private firms operating in different regions may be required to comply with different standards. The difference between the standards may necessitate one foreign firm investing more capital than the other firm as a result of the differing requirements. The firm obliged to make the greater capital investment may feel it is being treated in a different manner to another foreign service supplier and claim a breach of art II.⁹⁹ Consequently, members may be required to change regulation and regulatory practices in order to comply with the agreement. This risks undermining laws put in place by national governments to promote and protect water and sanitation service standards.

5. *WTO Case Law*

At the time of writing this article, no WTO member had made a GATS commitment with respect to water and sanitation services and consequently there is no specific case law to illustrate how GATS provisions will actually apply to the sector. Moreover, GATS itself has only been considered by the dispute settlement body in a handful of cases.¹⁰⁰ From this handful, only two, *Mexico — Measures Affecting the Telecommunications Services*¹⁰¹ and *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ('*US — Gambling*')¹⁰² have exclusively examined the trade in services and only one, *US — Gambling*, has been considered at the Appellate level.¹⁰³ In *US — Gambling*, Antigua and Barbuda ('Antigua') claimed that the United States ('US') had violated paragraphs 1 and 3 of art VI through a number of US federal and state measures relating to the remote supply of gambling services.¹⁰⁴ Given the number of provisions, Antigua claimed for the 'collective effect' of the state and federal measures, alleging they amounted to a total prohibition on the cross-border supply of gaming services.¹⁰⁵ Both the Panel and Appellate Body rejected Antigua's claim, focusing on the distinction between a measure taken by a Member and its 'effect'.¹⁰⁶

The Panel and Appellate Body however found that the US had made a specific commitment with respect to gambling and betting services. In coming to this decision both bodies applied the W/120¹⁰⁷ and 1993 Scheduling Guidelines¹⁰⁸ as a 'supplementary means of interpretation' under art 32 of the *Vienna Convention*

99 Ibid.

100 Leroux, above n24 at 750.

101 *Mexico — Measures Affecting Telecommunications Services*, WTO Doc WT/DS204/R (2004) (Report of the Panel).

102 *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R, AB-2005-1 (2005) (Report of the Appellate Body); WTO Doc WT/DS285/R (2004) (Report of the Panel) ('*US — Gambling*').

103 Leroux, above n24 at 750; Delimatsis, above n32 at 13–14.

104 Leroux, above n24 at 756; Delimatsis, above n32 at 14.

105 Leroux, above n24 at 756.

106 *US — Gambling*, WTO Doc WT/DS285/AB/R, AB-2005-1 (2005) [115-128] (Report of the Appellate Body); Leroux above n24 at 756.

107 GATT Secretariat, *Services Sectoral Classification List*, GATT/WTO Doc MTN.GNS/W/120 (1991).

on the Law of Treaties ('Vienna Convention').¹⁰⁹ The Appellate Body determined that even though the US commitment schedule did not specifically refer to the Central Product Classification (and followed the W/120), both documents could be used as 'context' for the interpretation of specific Member commitments within the meaning of art 32 of the *Vienna Convention*.¹¹⁰ Consequently, the Appellate Body held that the US GATS commitment to 'Other Recreational Services (except sporting)' must be interpreted as including 'gambling and betting services' within its scope.¹¹¹ The Panel and Appellate Body also considered whether the US had acted inconsistently with paras 1 and 2 of art XVI. The Appellate Body upheld the decision of the Panel finding that the US had violated art XVI on the basis that the disputed Federal Acts prohibited the cross-border supply of gambling services in circumstances where the US had made a specific GATS commitment in the area.¹¹² The Appellate Body found that the federal acts in effect created a 'zero quota' which are prohibited under art XVI:2(a) and (c) and were therefore invalid.¹¹³ However, the Appellate Body reversed the Panel's decision with respect to the state laws as it found that Antigua had failed to establish a *prima facie* case.¹¹⁴ Also with respect to art XVI, the Appellate Body upheld the Panel's findings that the US laws had been designed 'to protect public morals or to maintain public order' within the meaning of art XIV(a) and reversed that Panel's finding that the laws had been unnecessary.¹¹⁵ However, the Appellate Body modified the Panel's decision with respect to the chapeau, determining that the US measures had not satisfied its requirements as the prohibition on the remote supply of gambling had not been applied equally to domestic and foreign suppliers.¹¹⁶

The findings of the Appellate Body in *US — Gambling* raise a number of points of interest regarding the application of GATS to the liberalisation of services. The readiness of the Panel and the Appellate Body to accept the exception claimed by the US under art XIV(a) illustrates a willingness on the part of the WTO to recognise claims made by countries under this provision. Thus if a Member State legislates for a legitimate purpose within the scope of art XIV, there is a substantial likelihood that the measure will be held to be valid. With respect to any future cases involving water and sanitation services, it would be hoped that art XIV(b)¹¹⁷ may be employed in a similar manner to protect non-discriminatory legislation

108 GATT Secretariat, *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*, GATT/WTO Doc MTN.GNS/W/164 (1993).

109 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

110 Leroux, above n24 at 761–5; WTO, *Dispute Settlement: Dispute DS285: United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2008) <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm> accessed 3 September 2008, *WTO, US-Gambling (DS285)* <http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds285sum_e.pdf> accessed 3 September 2008.

111 WTO, above n110.

112 *Ibid*; Matsushita, Schoenbaum and Mavroidis, above n9 at 652.

113 WTO, above n110.

114 *Ibid*.

115 *Ibid*.

116 *Ibid*; Leroux, above n24 at 786.

aimed at protecting basic water access, quality and affordability, as a means of promoting human health. However, the Appellate Body's inclusion of gambling and betting services within the US's 'Other Recreational Services (except sporting)' commitment demonstrates the potential uncertainty with respect to GATS commitments as the meaning and scope of a member's commitment will be ultimately determined by the dispute settlement body in circumstances where a dispute arises.¹¹⁸ Leroux argues that the *US — Gambling* decision illustrates a need for 'greater clarity, consistency, and precision in the scheduling of commitments under the GATS' and that this outcome should be pursued through negotiation between members rather than dispute resolution outcomes.¹¹⁹ However, for the present time it appears that the clarification of commitments will continue through dispute resolution channels as many members fear that a clarification process may lead to a reduction in commitments.¹²⁰

It is noteworthy that despite the case's focus on the domestic regulation, both the Panel and the Appellate Body did not consider the domestic regulation provision, art VI. Delimatsis argues that the Appellate Body highlighted the irrelevance of the provision when it asserted that '[i]t is neither necessary nor appropriate for us to draw, in the abstract, the line between quantitative and qualitative measures'.¹²¹ Consequently, *US — Gambling* does not provide any insights into how art VI will apply to domestic regulatory measures. This is unfortunate as art VI has the potential to be a central GATS provision and therefore it is important to understand how the obligation to 'ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner' will be applied.¹²² Clearly, these aspects of the *US — Gambling* decision risk creating ambiguity for Member States regarding the scope of their commitments and a potential chilling effect as members may be less willing in future to nominate a service sector for liberalisation. Therefore, despite *US — Gambling* being the first Appellate Body decision concerning GATS and its application to services, and one which respects a member's claim to protection under art XIV, much confusion still remains regarding how the agreement will be applied by the WTO and dispute resolution panels. This decision poses problems for other service areas as at present a member's liberalisation commitment will only be fully defined after it has been considered by the dispute settlement body in the context of a dispute. With respect to water and sanitation services, given the present lack of commitments and specific case law, the scope and nature of such a commitment is presently undefinable. It is however likely, following the pro-trade

117 Article XIV(b) GATS provides an exception for measures 'necessary to protect human, animal or plant life or health': *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1B ('GATS') 1869 UNTS 183, art XIV(b) (entered into force 1 January 1995).

118 Leroux, above n24 at 766.

119 *Ibid.*

120 *Ibid.*

121 *US — Gambling*, WTO Doc WT/DS285/AB/R, AB-2005-1 (2005) [250] (Report of the Appellate Body); Delimatsis, above n32 at 14.

122 Delimatsis, above n32 at 14–15.

tendency of GATT decisions, that any dispute before a dispute resolution panel will be focused on achieving a pro-trade outcome.¹²³

6. *Are Member States Required to Liberalise Their Water and Sanitation Markets Under GATS?*

In light of the uncertainty surrounding the application of GATS it is essential to determine the potential impact of the agreement on the water and sanitation services sector and whether Member States, such as Australia, are required to liberalise their water markets. In terms of water market liberalisation, the WTO in ‘GATS — Fact and Fiction’ provides that GATS does not require the ‘privatization or deregulation of any service’ in a Member State.¹²⁴ Specifically, the WTO notes that, under GATS, all Member States are free to adopt a number of approaches within their water markets including (i) maintaining a public or private monopoly, (ii) opening the water market to domestic competition, (iii) opening the water market to foreign competition without making a GATS commitment and (iv) making a GATS commitment to grant foreign companies the right to supply water services in addition to national service suppliers.¹²⁵ Clearly, under this interpretation of GATS, Member States such as Australia are free to determine the nature and composition of their water markets and in this sense, the agreement does not pose a threat to domestic service providers. Similarly, with respect to water market regulation, the WTO asserts that it views the right of a Member State to regulate its markets as being a ‘fundamental principle’ of the agreement as GATS specifically recognises ‘the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives’.¹²⁶ The ‘Fact and Fiction’ document, however is a publication of the Secretariat rather than a decision of the dispute settlement body or an agreement by Member States and while it provides some important guidance on how the WTO envisages GATS applying to the yet untested area of water and sanitation services, it is not a legally binding commitment on behalf of the WTO. Consequently, in order to create a more certain picture of how GATS will apply to water and sanitation services it also necessary to consult the text of the agreement, WTO case law and academic writings to determine how and in what circumstances a member would liberalise its water and sanitation sector under GATS.

A. *The Public Service Exception*

Article I:3(b) excludes from the definition of services ‘services supplied in the exercise of governmental authority’.¹²⁷ Article I:3(c) defines ‘services supplied in

123 See, for example, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (1991) (Report of the Panel) (*Tuna/Dolphins I*); *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) (Report of the Panel) (*Tuna/Dolphins II*); *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (1998) (Report of the Appellate Body).

124 WTO, above n2 at 9.

125 *Ibid.*

126 *Id* at 11.

the exercise of governmental authority' as 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers'.¹²⁸ It is unlikely that water and sanitation services would be included within this exception for while water markets tend towards a monopoly structure and therefore possess limited opportunities for competition, water and sanitation services are generally provided on a commercial basis. However, the differing nature of water supply and water supply structures means that certain communities will come closer to the definition of art I:3(c) than others. In Australia, water and sanitation services, while generally managed and regulated by the public sector, possess a high degree of private sector participation through the corporatisation and outsourcing of activities of water utilities. For example, in 1995, South Australia's publicly-owned water supplier SA Water entered into a contract with an international consortium, United Water International Pty Ltd¹²⁹ and granted it the right to 'manage, operate and maintain' the metropolitan Adelaide water and sanitation service system, including the obligation to perform and maintain capital works. Under the contract, SA Water agreed to pay the consortium A\$1.5 billion (Australian dollars) over 15.5 years for its operation and management of the Adelaide water and sanitation system.¹³⁰ Conversely, not all Australian states have adopted this high degree of private sector participation. In Tasmania, for example, local councils are responsible for providing water and sanitation services to consumers,¹³¹ a model that would arguably have greater potential being viewed as a public service. Consequently, given the lack of competition in the water market and the continued existence of public supply channels, there is limited scope for the exemption provided by art I:3(b) to exclude water and sanitation services from the scope of GATS. However, given the high degree of private sector participation experienced in certain parts of Australia, it is unlikely that such practices would be viewed as having been wholly 'supplied in the exercise of government authority' and therefore included within the scope of operation of GATS.

B. Unintended Liberalisation

As previously mentioned, at the time of writing this article, no WTO members had made GATS commitments with respect to water and no member has been required to liberalise its water market through the operation of GATS. However, authors such as Vandana Shiva do not share the certainty of the WTO concerning the application of GATS to water and sanitation markets. Shiva, following an extensive analysis of the Agreement, argues that once commercial activity or

127 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1B ('GATS') 1869 UNTS 183, art I:3(b) (entered into force 1 January 1995).

128 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1B ('GATS') 1869 UNTS 183, art I:3(c) (entered into force 1 January 1995).

129 United Water International Pty Ltd is made up of Compagnie Générale des Eaux and Thames Water: Sheil, above n60 at 58.

130 *Id* at 57–8.

131 LexisNexis Butterworths, *Halsbury's Laws of Australia*, vol 28 (at 8 August 2007) 440 Water, '2 Water Management' [6005]; LexisNexis Butterworths, *Halsbury's Laws of Australia*, vol 28 (at 8 August 2007) 440 Water, '4 Supply of Water' [6030].

competition is introduced to a service area, the rules of free trade may also be required to apply. Shiva asserts that the ambiguity surrounding the meaning of 'commercial basis' in art 1:3(c) creates uncertainty regarding the status of public services such as water.¹³² Shiva argues that if governments charged fees or taxes in respect of an essential service area that was then included within GATS, such an inclusion would allow companies to initiate actions against countries in circumstances where government restrictions prevent free market access.¹³³ The potential of unintended liberalisation is supported by the example of the *US — Gambling* decision, where the content of the US's commitment to liberalise 'Other Recreational Services (except sporting)' and the inclusion of gambling services was determined by the Panel and Appellate Body rather than the US. While the arguments of Shiva and the position of the Appellate Body clearly differ and apply to different components of GATS, it is clear that the limited case law and certainty with respect to the application of the agreement may lead to members being required to liberalise a service area or commit to an unintended area of service liberalisation. While such an outcome would be highly unpopular given the sensitivity surrounding water and sanitation services, further certainty is unlikely until members provide further clarification to the agreement or more GATS-related cases are decided by the dispute settlement body.

7. *How May Greater Certainty Be Achieved?*

It is possible for the WTO to create additional protections within GATS to ensure greater certainty and less ambiguity with respect to the general protection of water rights. All parties including the WTO, Member States and water consumers would benefit from greater clarity as to their respective rights and obligations and be able to operate with a greater degree of certainty. This outcome has the potential to be achieved by invoking the human rights provisions within the WTO to exclude basic human services from GATS. Lang asserts that it is possible to work within the present WTO framework and engage with existing human rights provisions.¹³⁴ For instance, Article XIV provides that

[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures ... (b) necessary to protect human, animal or plant life or health.

In *United States — Standards for Reformulated and Conventional Gasoline* ('*US — Reformulated Gasoline*'),¹³⁵ the WTO Appellate Body considered the identically worded GATT provision, art XX(b) and noted that, in order for a

132 Shiva, above n3 at 94–5.

133 *Id* at 95.

134 Lang, above n91 at 837–8.

135 *United States — Standards for Reformulated and Conventional Gasoline* 35 ILM 603 (1996) in Hunter, Salzman and Zaelke, above n10 at 1167–8.

government successfully to invoke the provision, it would be required to satisfy three requirements. First, the Member State would be required to show that the policy in question fitted within a range of policies designed to protect human, plant and/or animal life or health and second, that the 'inconsistent policy measure' was necessary to achieve the policy objective. Third, the measure must have been applied in conformity with the introductory clause of the article.¹³⁶ The Panel and Appellate Body in *US — Gambling* considered the similar provision of art XIV(a) which has the power to exclude measures 'necessary to protect public morals or to maintain public order'.¹³⁷ The Appellate Body found that the legislative actions of the US had been 'necessary to protect public morals or to maintain public order' as legislation to address activities such as money laundering, fraud and activities which risked exposing children to online gambling were appropriately addressed by art XIV(a).¹³⁸ However, the Appellate Body also found that the US had applied the measures in a discriminatory fashion and therefore was not entitled to avail itself of the protection provided by art XIV.¹³⁹ Consequently, there is limited potential for art XIV(b) to be used as a justification for government regulation creating and maintaining water and sanitation standards as a means of protecting human life and/or health in circumstances where it is applied in a non-discriminatory manner. The benefit of this approach is that it does not rely upon the reform of the WTO for a successful outcome as this can be a very slow and tortuous process as has been demonstrated during Doha rounds of negotiations.¹⁴⁰ The success of this approach would however depend upon the interpretation of the provisions by the dispute settlement body.

The second and more ambitious alternative is to reform GATS and specifically remove water and sanitation services from its scope, in a similar manner to 'services supplied in the exercise of government authority'. Such an approach would only be appropriate in circumstances where there was general agreement amongst the members of the WTO that trade liberalisation would generally damage rather than benefit water and sanitation services markets. If adopted, this process would clearly require the reform of GATS and therefore the consent of WTO members. It may be possible to achieve this exclusion on the basis of the existence of the right to water and the relationship between water and the existence of other human rights such as the right to life and the right to food.¹⁴¹ However, in

136 Lang, above n91 at 832.

137 *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1B ('GATS') 1869 UNTS 183, art XIV(a) (entered into force 1 January 1995); Matsushita, Schoenbaum and Mavroidis, above n9 at 638.

138 Matsushita, Schoenbaum and Mavroidis, above n9 at 638.

139 Id at 638–40.

140 Evan Davis, 'The Death of the WTO's Doha Talks' (25 July 2006) BBC News <<http://news.bbc.co.uk/2/hi/business/5215318.stm>> accessed 7 November 2007.

141 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 6(1) (entered into force 23 March 1976); *ICESCR*, opened for signature 16 December 1966, 999 UNTS 3, art 11 (entered into force 3 January 1976); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, [71], art 25, UN Doc A/Res/217A (III) (1948).

view of the existing exceptions to GATS, this argument may not find much traction. The benefit of this approach would be that there would be complete certainty as to the exclusion of water and sanitation services from the operation of GATS. Equally, it would eliminate any potential benefits that may occur by virtue of the application of GATS.

8. Conclusion

Trade liberalisation has the potential to be both a positive and negative force within the water and sanitation service sector. GATS is a powerful mechanism through which Member States may choose to open their domestic water markets up to competition and foreign investment. While the assertions of the WTO remain to be tested in a dispute concerning the liberalisation of water services, it appears that Member States such as Australia will not be required to liberalise their water markets under the agreement without a specific 'opting in'. The existence, however, of continuing debate and uncertainty as to the interpretation of the agreement means that the power and impact of GATS will not be wholly known until it is applied to the water and sanitation market in a real world situation. Central to any decisions regarding the operation of GATS must be the recognition of the human right to water and the acknowledgement of its essential nature as a human need and service. While it appears at present that Member States are not obliged to liberalise their water markets under the agreement, greater certainty may be gained in this area if the WTO (via the dispute settlement body) were to adopt an approach favouring non-discriminatory human rights protections in line with the *US — Reformulated Gasoline* and *US — Gambling* decisions. Alternatively, greater certainty may be achieved through specifically excluding water and sanitation services from the scope of the agreement. The essential nature of water and sanitation for human health and survival sets this service area apart from many others when discussing liberalisation of a service area, and the existence of a human right to water means that extra care must be taken before water in any form is subject to free trade obligations.