Water Pressure

The Implications of the General Agreement on Trade in Services for Water Supply in New Zealand

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Introduction

Water supply in New Zealand and around the world has traditionally been provided by the public sector. As a resource essential to all humans, water has been supplied on a non-profit basis. In the New Zealand context, local government has performed this vital role. Increasingly however, water is coming to be treated not as one of the fundamentals of life, but as an economic commodity. Two related dynamics in the global water industry are informing this paradigm shift. The first is the privatisation of water supply, which has seen a small number of large water transnational corporations dominate the global water industry. The second is the rise of international trade agreements, which limit the ability of national governments to regulate in certain areas. This paper will examine the implications of one such agreement, the General Agreement on Trade in Services, for water supply in New Zealand.

The privatisation of water supply in New Zealand has already begun. Reflecting the trend in the global water industry, in 1997 the Papakura District Council contracted out of its water supply responsibilities, by way of a 'public-private partnership'. As such, Papakura awarded a 30 year contract to United Water International Pty Limited, a company owned by two of the largest water transnationals in the world. Although the Council retains ownership of the water infrastructure under this arrangement, United Water now controls Papakura's water supply. Since the commencement of this paper, Ruapehu District Council has entered into a similar agreement with United Water. In implementing these arrangements Papakura and Ruapehu are not alone - the 'public-private partnership' is the most common form of privatisation in the global water sector.

The loss of public control over water to transnational corporations has been the subject of fierce debate, both globally and in New Zealand. The resistance to this privatisation has been informed, in part, by a concern over the implications of international trade liberalisation and the agreements that promote this agenda. Argument has focussed in particular on the General Agreement on Trade in Services (GATS), which potentially has significant ramifications for governmental control over water supply, water supply being regarded as a 'service' in international trade terms. The Agreement seeks to liberalise trade in services, by placing restrictions on how

governments may act in relation to those services. Citizens the world over have expressed the concern that GATS will result in the entrenchment of corporate power over a resource as crucial as water.

Because of the presence of United Water in Papakura and Ruapehu, these concerns are equally relevant for New Zealand. As a Member of GATS, New Zealand is bound by the obligations that Agreement imposes. Those obligations pertain to international trade in services. Given that United Water is a foreign company providing water services in New Zealand, GATS potentially restricts the actions of the New Zealand government, insofar as they affect trade in water services. This paper attempts to determine whether, and how, these restrictions actually apply to New Zealand.

The first chapter then, will discuss the current water supply situation in New Zealand, focusing on the developments in Papakura, and will place these developments in the wider context of the global water industry. It will then consider the New Zealand government's suggested response to this privatization, and conclude that this response is both ineffectual and ill-informed, in light of global trends in water privatisation.

Chapter 2 will outline the context in which New Zealand's international trade obligations arise, and will thus give an overview of the World Trade Organisation, as the body from which GATS emanates. An overview of the Agreement itself is then provided. The GATS is a two-tiered agreement, which includes both general and specific commitments. The most onerous obligations would only apply to New Zealand if our government made water supply the subject of a specific commitment under the Agreement. However, if GATS applies at all to water in New Zealand, more general obligations already apply. Chapter 3 then, will consider whether this is indeed the case. The combined effect of United Water's presence in New Zealand and the definition of certain terms in GATS make it probable that GATS applies, at least in general terms, to water supply in New Zealand. On the basis of this conclusion, the chapter will then consider the potential consequences of the New Zealand taking an action which breaches its GATS obligations, which may involve harsh penalties at the WTO.

The next two chapters consider the more immediate consequences of the application of GATS to New Zealand's water supply. Chapter 4 then, looks at the obligations which arguably already apply to New Zealand. In other words, this

chapter will consider the way in which the general obligations of GATS restrict the ability of the New Zealand government to control water supply. While such restrictions are important, arguably the most significant consequence is the obligation contained in GATS to subject those sectors covered by GATS, namely water services, to progressive liberalisation. Such liberalisation is to occur by way of Members specifically committing sectors to the more onerous obligations under the Agreement. Chapter 5 then, looks at the constraints such a commitment would place on New Zealand, were the government to commit water services under GATS. The possibility of New Zealand taking such a step is then discussed.

Informing this paper is a concern that the consequences of water privatisation and the related effects of GATS have not been seriously considered, let alone debated, in New Zealand. Chapter 6 then, is something of a warning flag, and begins by outlining some of the problems experienced with water privatisation around the world. Environmental protection of water resources is one potential concern that may arise in a context of privatised water services, however previous cases suggest that the WTO will not give such concerns significant weight, were New Zealand to attempt to defend a measure affecting trade in water services on environmental grounds. Finally, the chapter will argue that the experiences of privatisation in the electricity and telecommunications industries in New Zealand suggest that New Zealand would be prudent to retain the ability to regulate the water industry, an ability that would be constrained by the provisions of GATS.

The paper concludes on a cautiously optimistic note. Although steps have been taken towards the privatisation of New Zealand's water supply, and although GATS already applies in respect of such supply, we are not yet locked in to continuing down this path. The New Zealand government, as representatives of the New Zealand people, still has the ability to govern our water. Before this capacity is further relinquished, much greater consideration and debate of the actual consequences of such a step needs to occur. This paper is an attempt to contribute to such a debate.

Chapter 1

At the present time, water in New Zealand is generally supplied as a public service, managed by local authorities. Water consumers have access to water as part of the rates they pay to their local council. However in recent years this has begun to change, particularly in the Auckland region. This chapter will look at the water situation in Auckland, in particular the Papakura District. It will then place this situation in the wider context of the growing global 'water industry'. Finally, the response of the New Zealand government to this situation will be considered.

Water Supply in New Zealand

Auckland's water supply comes, in the first instance, from Watercare Services Ltd. It was formed in 1992 as a Local Authority Trading Enterprise (LATE), and in 1998 ownership passed from the Auckland Regional Services Trust (which was dissolved by Parliament) to Auckland's six district Councils. The allocation of shares is based on the number of retail water connections of each Council.[1] New Zealand's largest company in the water and wastewater industry, it is the bulk supplier to the local network operators (LNOs), who then supply water to about 1 million Auckland citizens. Watercare owns dams in the Waitakere and Hunua Ranges, small underground sources in Onehunga and Papatoetoe, and will also soon be sourcing water from the Waikato River.[2]

Watercare's 'Water Business Unit' collects, treats, and supplies the water to these LNOs, whose structures vary. In Manukau, North Shore, Waitakere City, and Rodney District the Councils themselves are responsible for supplying water to consumers. In Auckland City water is provided by MetroWater Ltd, which is owned by the Auckland City Council.[3] In Papakura, water supply is further removed from Council involvement, with water services being franchised out to United Water Ltd.[4]

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[1] Watercare Services Limited. *Watercare Profile.* Online. http://www.watercare.co.nz/p005.html Accessed 23/08/02.
[2] Watercare Services Limited. *Water Supply.* Online. http://www.watercare.co.nz/p007.html Accessed 23/08/02.
[3] Metrowater. *Welcome to Metrowater*. Online. http://www.metrowater.co.nz/ Accessed 23/08/02.
[4] For further information on how Auckland's District Councils manage their water supply, see Auckland Region Water, Wastewater and Stormwater Review. *What is the Review?* Online. http://www.aucklandwaterreview.co.nz/whatis-nf.htm. Accessed 20/08/02.

It is the situation in Papakura which is most interesting in terms of GATS implications, given that United Water is not a New Zealand-owned company.

The Papakura District Council has effectively removed itself from the supply of water to Papakura citizens. In 1997 the Council entered into a 30 year franchise agreement with United Water International Pty Limited, who are now solely responsible for supplying Papakura's water and wastewater services.[5] The contract has a 20 year extension option with no extra fees. The Council has retained ownership of the assets that include 13,000 water services, 10,500 sewer connections, 270km of water mains, 205km of wastewater sewers, 1,700 fire plugs and hydrants, 23 sewer pumping stations, 1 water pumping station and 360Kl storage tank, the Drury Wastewater Treatment Plant,[6] with United in charge of managing, maintaining and operating these assets.[7] This agreement is the first of its type in New Zealand.[8]

This withdrawal from the management and delivery of public services can be understood in the context of a changing perception of local government's role in New Zealand. The 2002 Report of the Controller and Auditor-General on Local Government discusses these changes, describing the influences (legislative and otherwise) which have increasingly affected the delivery of essential services over the past seven years. These are described as: an emphasis on better asset management; a trend towards either the outsourcing of services, or their delivery at an 'arm's length' basis; and the pressures (economic and otherwise) on both fast-growing and declining localities to provide first-class essential services. The Report cites two influences which have steered the outsourcing of service delivery, namely: mandatory competitive processes emanating from the Transit New Zealand Act 1989; and the statutory option to use in-house resources or contract out. If the matter is significant, and contracting out is opted for, the local authority is obliged to decide whether to put the task out to tender. If it decides not to tender, the local authority must record its reasons for the decision. Many local authorities have passed functions to LATEs, however a few have fully contracted out some of these functions. Papakura is one

[5] Indeed, the Council's website advises citizens that all questions and comments should be directed to United Water, rather than to the Council itself.
[6] Papakura District Council. *Water and Sewerage.* Online. http://www.pdc.govt.nz/services/index.html Accessed 23/08/02.
[7] United Water. *United Water in Papakura.* Online. http://www.uwi.com.au/frames_pap.php Accessed 23/08/02.
[8] Since the commencement of this paper, United Water has won a similar contract to supply water for the Ruapehu District Council.

such council, another example being Queenstown Lakes District Council, which has contracted out of its regulatory functions. The Report goes on to discuss these outsourcing contracts, noting that they tend to be of long duration, are structurally complex, and for high value. Now that large firms are dominating the market for these services contracts, the Report warns that Councils must ensure that they are able to protect both the Council's and its constituents' interests.[9] These warnings become especially pertinent when international obligations are considered.

The Auckland Region Water, Wastewater and Stormwater Review was, in part, a response to these new pressures and influences on local government. Local Government took over the Review from the previous government, and in October 1999 the six Auckland Councils agreed to undertake the Review. It was intended to identify options that would address environmental, infrastructure, supply reliability, and cost issues. In early 2001 the Review went through a period of public consultation regarding options for management of Auckland's water, and in March 2002 it released its findings and recommendations to Councils. Emphasising potential cost efficiencies, the Review recommended as a minimum that the 'status quo' be modified, meaning greater regional coordination, the establishment of an Auckland Region Water Industry Commissioner, and increased scrutiny on local water operators. The Review also recommended 'strengthening governance', which would occur by the establishment of business units or Council-owned companies for water and wastewater, separated from other Council activities – in other words, the further devolution of control over water supply. However, 'significantly greater efficiency' could be achieved by significant structural change, which would entail regional amalgamation as one Council-owned company for water and wastewater, a strengthened regulatory role for the Auckland Water Industry Commissioner, and that user-pays become the main method of charging for water services.[10]

The primary focus on cost-efficiency and the 'business-like approach'[11] recommended by the Review would not accord with the views of all Auckland

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[9] Controller and Auditor-General. *Local Government – Looking Back and Looking Forward: Report of the Controller and Auditor-General*. 3 May 2002. Online. http://www.oag.govt.nz/HomePageFolders/Publications/Looking_Back/HTML/LookingBack.htm Accessed 23/08/02.

[10] Auckland Region Water, Wastewater and Stormwater Review. *Findings & recommendations to Councils*. Online. http://www.aucklandwaterreview.co.nz/pdf/findings&recommendations.pdf Accessed 24/08/02.

[11] Ibid. p.5.

citizens however. In the past few years, at least three citizens' groups have formed to oppose what they see as the privatisation of water services. The Water Pressure Group was formed in August 1998, in Auckland City.[12] The group is opposed to the corporatisation of water supply, and is angry that water is now provided by Metrowater, a LATE, rather than by the Council. High charges (on a user-pays basis rather than as part of rates) and numerous water disconnections have led the group to call for a boycott on bill payment to Metrowater. The group has been involved in reconnecting water supply to households in the region, as part of its campaign to shut down Metrowater and return water supply to more direct Council control. One of the founding members, Jim Gladwin, went to the High Court regarding Metrowater's claimed right to charge for water services. [13] This case will be discussed further below.

Groups have also formed in Waitakere City (Citizens Against Privatisation), and in Papakura (Papakura Water Pressure Group[14]). Dissatisfied with the options put forward by the Auckland Water Review, these groups, in conjunction with various individual citizens, prepared an alternative named 'The People's Option'. The comprehensive Option proposes, inter alia, that there remain one regional bulk supplier, which would be disestablished as a LATE, and would be a non-commercial body run as an essential public service. Water services would be provided by Councils, either as Stand Alone Business Units (SABUs), or by Council departments, and corporatisation and franchising out would be forbidden. Water services would be funded by general rates based on property value/annual rental value, and user-pays would be prohibited. Regarding Papakura, the franchise would be ended after an adequate notice period, and the operations would return to Council control. Rather than seeing water management as a commercial operation, the Option treats water as an essential service that should be available to all.[15]

Thus there is significant, well-organised opposition to the corporatisation and gradual privatisation of water services in Auckland. Papakura is no exception – a

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[12] Water Pressure Group. *Welcome to the Water Pressure Group.* Online. http://www.water-pressure-group.org.nz/index.htm Accessed 25/08/02.

[13] For an outline of the history of the anti-privatisation movement in Auckland, see The Water Pressure Group. *History of the Water Pressure Group*. Online. http://www.water-pressure-group.org.nz/history.htm. Accessed 24/08/02.

[14] See their home page, online at www.papakurawaterpressuregroup.pl.net

[15] Water Pressure Group *et al*. *Water Pressure Group NetNews*. Online. http://www.water-pressure-group.org.nz/waterreview01.html Accessed 25/08/02.

2001 postcard poll with 1160 returns showed that 96.7% of citizens were opposed to the franchise with United Water. Popular unrest stems from water charges which have proved unaffordable to many, with United staff reportedly intimidating customers and threatening to cut off supply. Indeed, United Water, along with the Papakura District Council, received special comment by the judges of the Roger Award for the Worst Transnational Corporation operating in Aotearoa/New Zealand in 2001. The judges explained:

> United's ongoing policies under the contract, [which are] oblivious to popular unrest about its actions…and its successful pressure on the Council to reverse a tiny $500 award to Papakura Water Pressure Group in 2001 make it a worthy recipient of this award. …Varied options for charging have been resisted or made unaffordable – changes are unfair to those who use much of their supply for gardening, which makes an assumed 80% of wastewater unreasonable, but a second meter to assess this has been priced way beyond cost. Monopoly power has allowed such exploitation, as well as over pricing to commercial customers.[16]

The Auckland experience shows that a significant group of citizens are opposed to essential services being removed from public control and being managed on a commercial basis. Opposition to the franchise situation in Papakura is particularly understandable, once the situation is viewed in its wider global context.

Papakura in the Global Context

To most New Zealanders, water supply is no more complex than the payment of rates or fees in exchange for running water. However, the global water services industry is huge business. In 1999, the value of the global market for environmental goods and services was US$453 billion, environmental services comprising approximately half that total. Water-treatment services ($115.6 billion) and water utilities ($73.2 billion) were the largest environmental components.[17] The water services sector is dominated by a handful of large transnational corporations, the top

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[16] The Roger Award 2001, organised by CAFCA (Campaign Against Foreign Control of Aotearoa) and GATT Watchdog. Online. www.cafca.org.nz Accessed 25/08/02.

being Vivendi (aka Compagnie Generale des Eaux Societe Anonyme (CGE)), Suez Lyonnaise, RWE Entsorgung, Bouygues, United Utilities, Severn Trent, Anglian, and Kelda Group. The two largest (Vivendi and Suez Lyonnaise) control more than 50 per cent of the global water market.[18] Both are highly diversified into many different services and are expanding rapidly.

With the ultimate goal of increased revenue and profits in mind, water corporations are pursuing two avenues of control. The acquisition of water rights is the first key area, which often entails water being transformed from a public natural resource into a commodity subject to proprietary claims. The second area into which water corporations are extending is the delivery of water services. It is this area which forms the subject matter of this paper. Thus far, most of the growth in this sector has been achieved through the consolidation of private utilities and water companies. CGE, for example, is a conglomeration of more than 3000 companies worldwide. However, the water corporations have not contented themselves with the completed consolidation of the private sector. Given that water services are for the most part still provided as public services, water corporations have turned their eye to the 'new frontier' of privatisation schemes.[19]

To avoid public opposition to the loss of control involved with traditional privatisation, the water corporations have developed an incremental strategy, known as 'public-private partnerships' (PPPs). Dubbed 'the French model', it is by far the most common form of privatisation in the water industry. It is typically concluded between a transnational water corporation and a local government, and involves a concession or lease under which the private contractor operates and maintains the service, while collecting all the revenues for this, and retaining the surplus as profit. Thus the local authority effectively has no role in the provision of water, even though ownership of the water infrastructure typically remains in their hands. Only in the United Kingdom has the complete system been sold to the private sector.[20] The strategy has proved successful for the corporations, providing the method by which

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[17] OECD Joint Working Party on Trade and Environment, *Future Liberalisation in Environmental Goods and Services*, COM/TD/ENV(98)37/FINAL, 3 March 1999.

[18] Steven Shrybman. *Thirst for Control: New Rules in the Global Water Grab*. (Council of Canadians, 2002), p.23. Online. www.canadians.org. Accessed 30/04/02.

[19] Ibid. p 24. Also, WTO Council for Trade in Services, *Environmental Services: Background Note by the Secretariat*, S/C/W/46, 6 July 1998.

[20] David Hall. *Water in Public Hands.* (PSIRU, 2001), p.10. Online. http://www.psiru.org/reports/2001-06-W-public.doc Accessed 17/04/02.

the obstacle of government's traditional role as suppliers of essential services has been overcome. However, these arrangements have not been completely unproblematic, and consumer opposition has emerged in many places to this 'backdoor' form of privatisation.

The franchise agreement between Papakura District Council and United Water is Auckland's very own PPP. With a franchise fee of $13,100,100,[21] it has brought the global water services industry to New Zealand. Established in 1996, United is based in Australia and is a consortia of three companies – Vivendi/CGE (47.5%), Thames Water (47.5%), and Halliburton KBR (5%).[22] With the exception of Halliburton KBR, United's parent companies are no small players. Vivendi Water is the world's largest water services company, whose activities encompass the 'full range of water production and distribution and collection and treatment of wastewater'.[23] Thames Water was acquired by the German RWE in 1999, and is now the third largest water company in the world, and the largest in the United Kingdom.[24]

New Zealand's Response

Given the essential nature of water, its privatisation will inevitably be controversial. The New Zealand government has taken steps to deal with public fears concerning privatisation, however it appears that the nature of water privatisation in the global water industry has been misunderstood. As described above, the public-private partnership is the primary way in which water companies achieve a foothold in previously public water services, and only in the United Kingdom have complete water systems been sold. Thus, in the water industry, privatisation occurs not by the traditional method of sale of assets (such as water pipes and mains), but through PPPs. While the water infrastructure remains in public ownership, local government surrenders any control over the supply of water to the contracting water transnational.

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[21] CAFCA. *June 1997 Decisions*. Online. http://canterbury.cyberplace.co.nz/community/CAFCA/cafca97/jun97.html Accessed 25/08/02.
[22] United Water. *About United Water*. Online. http://www.uwi.com.au/frames_occ.php Accessed 25/08/02.
[23] Ibid.
[24] John Tagliabue. "As Multinationals Run the Taps, Anger Rises Over Water for Profit", *New York Times.* 26 August 2002. Online. http://www.nytimes.com/2002/08/26/international/americas/26WATE.html?ex=1031389635&ei=1&en=443e1418421082a9 Accessed 27/08/02.

This fundamental distinction seems to have been lost on many of our politicians,[25] a disturbing fact given the potential implications of private sector involvement in water services.

This misunderstanding is evident in the Local Government Bill 2001, put forward by the then-MP Sandra Lee.[26] Apparently attempting to respond to public concerns regarding water privatisation, clause 129 was included in the Bill.

129 Restrictions on exit from delivery of water supply and wastewater services

(1) A territorial authority that provides, at the commencement of this section, water supply and wastewater services within its district must continue to do so and must maintain its capacity to do so.

(2) A territorial authority must not –

(a) transfer ownership or control to a person that is not a council-controlled organisation of significant assets involved in providing water supply and wastewater services; or

(b) divest to another person that is not a council-controlled organisation any significant asset that is owned by the territorial authority or a council-controlled organisation and that is involved in providing water supply and wastewater services; or

(c) divest to another person that is not a council-controlled organisation or interest in a council-controlled organisation that is involved in providing water supply and wastewater services.

(3) This section does not prevent –

(a) the sale or divesting of assets that are no longer required to maintain the capacity to provide water supply and wastewater services; or

[25] The Auckland Water Review also asserted that the Review would not result in privatisation, as the assets would be kept in public ownership. Auckland Water, Wastewater and Stormwater Review. Online. http://www.aucklandwaterreview.co.nz/faqs.htm#q9 Accessed 24/08/02. Laila Harre is reportedly the only politician who has acknowledged that the Papakura contract is a form of privatisation. Scoop Media. "European Water Multinationals Are Already in New Zealand!" *Scoop*. Online. http://www.scoop.co.nz/mason/stories/PO0204/S00147.htm Accessed 26/08/02.

[26] Local Government Bill 2001, no 191-1. At time of writing, the Bill was still in the Select Committee stage.

(b) *contracts for the management of parts of the system for water supply and wastewater services if –*

(i) *the contract is not for the management of the system as a whole; or*

(ii) *the contract is for the management of the system as a whole, but not for a term longer than 15 years;* or

(c) a joint venture for the construction or management of reticulated water supply, sewerage, or sewage treatment networks if the ownership of the assets remains with the territorial authority; or

(d) 2 or more territorial authorities or council-controlled organisations arranging to combine the management and operation of services for reticulated water supply, sewerage, or sewerage treatment.

(4) In this section, -

wastewater services includes sewerage, sewage treatment and stormwater drainage

water supply means the supply of drinking water to households and businesses.

(Italics mine)

Presenting her Bill to Parliament in December 2001, Lee claimed that this clause would prevent privatisation of water. She said she would not agree to allowing Councils to sell 'what is not a commodity – access to clean water – but a fundamental human right'.[27] There was no specific debate on this clause in Parliament, and the issue of PPPs was not considered at all. Local Government is opposed to the clause, claiming that the restriction on exiting water services is inconsistent with the qualified power of general competence provided by the Bill and its shift toward general empowerment.[28]

Local Government need not be concerned - given the nature of privatisation in the water industry, clause 129 will be virtually ineffective. While the sale of water infrastructure is prohibited, 'contracting out' is expressly allowed (clause 129(3)(b)).

[27] New Zealand Parliamentary Debates, 18 December 2001, pp.14126-14140.

Some conditions are placed on such contracting, but these could be easily satisfied, with little to no real effect on the agreements. For example, to comply with clause 129(3)(b)(ii), a PPP contract would simply have to be for a term of less than 15 years. Presumably this time limit was included to give a local authority the chance to opt out of the contract if it was dissatisfied with the arrangement, however the accountability achieved by a 15-year term is minimal. Nothing is said about terms of renewal, such as exist in the Papakura agreement, which provide an option for renewal for a further 20 years. After this period there may be a strong incentive for a local authority to renew with the existing company, rather than go through the inconvenience of negotiating anew with another party.

The Local Government Bill then, is relevant for two reasons. Firstly, it shows that the government has given at least superficial thought to the water privatisation issue which has arisen in Auckland, and that there is at least some impetus to prevent this. However, also manifest in the Bill is a misunderstanding of how water privatisation occurs. By expressly providing for exactly the type of privatisation that is primarily used in the water industry, namely the 'public-private partnership', while at the same time claiming to oppose privatisation, the government has shown its ignorance of the issue. While this conclusion gives cause for concern in itself, it becomes even more significant when GATS obligations are considered. GATS places restrictions on governmental activities dealing with offshore corporations. Where privatisation involves such corporations, GATS may restrict the options of the New Zealand government in future. Given this fact, it is disheartening to see that even the basic issues have not been understood. More disturbing still is the possibility that the issues have been understood, and that they have been ignored.

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[28] Local Government New Zealand, *Initial Analysis of the Local Government Bill 2001*, p.9.

Chapter 2

The involvement of transnational companies means that New Zealand is now a participant in the global water market. This international trade means that international trade agreements, enforced by the World Trade Organisation (WTO), may also become relevant in a context of privatised water services. This chapter will give some background to the WTO and the General Agreement on Trade in Services (GATS).

The World Trade Organisation

The WTO came into being on 1 January 1995, as a result of the Uruguay Round of trade negotiations (1986-94). It emerged as the successor to the General Agreement on Tariffs and Trade (GATT), an international agreement concerning the rules for conducting international trade.[29] GATT had arisen in a post-WWII context, in which international trade was almost solely for goods. It was ad hoc and provisional, and was never ratified by the parliaments of its 'contracting parties'. By the early 1980s however, international trade was changing, and pressure arose to develop a new supranational infrastructure. The result was the WTO.

The WTO Agreement has been ratified by 144 'Members',[30] and provides for the creation and function of the Organisation, which has an independent personality under international law. The WTO has the power to approve retaliatory sanctions, and 'constitutes a formal layer of authority beyond the nation-state, although its decisions are still ultimately controlled by the member governments'.[31] Through the imposition of obligations, disciplines, and restraints on governments it attempts to promote the principles of international free trade.[32] It has four specific functions. First is to facilitate the implementation and operation of the agreements on goods, services and

[29] Trade Observatory. *Fast Facts: World Trade Organisation*. Online. http://www.tradeobservatory.org/FAQ/faq.cfm?faq_id=1#284 Accessed 28/08/02.

[30] Chinese Taipei became the 144th member of the WTO on 1 January 2002. More than three-quarters of WTO members are developing countries or countries with transition economies. Many other countries are at various stages of the accession process, notably Russia and Saudi Arabia. Acceding countries are able to attend WTO meetings as observers but are not involved in WTO decision-making. Ministry of Foreign Affairs and Trade. *New Zealand and the World Trade Organisation.* Online. http://www.mfat.govt.nz/foreign/tnd/wtonz/about.html Accessed 04/09/02.

[31] Jane Kelsey, *Reclaiming the Future: New Zealand and the Global Economy*. (Wellington: Bridget Williams Books, 1999), p.246.

[32] Fiona Macmillan, *WTO and the Environment*. (London: Sweet & Maxwell, 2001), p.7.

intellectual property, which also emerged as a result of the Uruguay Round.[33] Secondly, the WTO provides a forum for negotiations on new or existing issues, without the need to initiate a formal new round. The administration of the dispute settlement and the trade policy review mechanisms form the third function. Finally, the WTO is to cooperate with the World Bank and the International Monetary Fund (IMF) to achieve greater coherence in global economic policy-making.[34]

Within the WTO are separate councils, in turn composed of numerous committees, which oversee the three agreements. In theory, decisions at the WTO are made either by consensus, or by voting on a 'one country one vote' basis. However, formal voting is rare, and the major powers dominate decision-making processes and outcomes,[35] with the so-called QUAD countries (U.S., Canada, Japan and the European Union) frequently making key decisions in closed meetings.[36] The lack of real democracy and accountable decision-making at the WTO has been widely criticised. Negotiations are confidential, and no-one other than member governments may participate, meaning potential voices of dissent from citizen's groups such as non-governmental organisations (NGOs) or trade unions are never heard.[37] A government's commitments are generally not disclosed until after they have been made. In the Dispute Settlement Process, documents, hearings and briefs are kept secret, with no outside appeals allowed. The secrecy at the WTO is explicable when one considers the object of the negotiations, namely to push governments further towards free trade that they would otherwise go, and to ensure no regression occurs.[38] Ensuring that governments tie their own

[33] GATT was updated in the Uruguay Round, and covers trade in goods. Services are covered by GATS, while intellectual property is dealt with in the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs).
[34] Kelsey, *Reclaiming the Future*, p.246.
[35] Only ten of the 29 very poor member states had permanent offices at Geneva, where the main work is carried out. With only one or two staff and limited resources, they cannot hope to have anything near the same input the countries that can afford to have large teams of staff in Geneva. Kelsey, *Reclaiming the Future*, p.247.
[36] Duncan Green, *The Rough Guide to the WTO*. Online. http://www.wtowatch.org/library/admin/uploadedfiles/Rough_Guide_to_the_WTO_The.htm Accessed 28/08/02.
[37] Kelsey points out however, that 'most governments maintain formal or informal relationships with corporate lobbies whose interests the WTO serves to promote'. Kelsey, *Reclaiming the Future*, p.247.
[38] B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System: From GATT to WTO*. (Oxford: Oxford University Press, 1995), p.24.

hands in this manner is of course made easier by the absence of any involvement from domestic pressure.

Thus, the WTO is arguably 'the world's most significant and powerful supranational organisation'.[39] With its ideological commitments to international free trade, combined with the machinery to enforce them, the WTO has the power to impact significantly in economic, political and environmental spheres, both globally and domestically. It is from this organisation that the GATS emanates.

The General Agreement on Trade in Services

The extension of GATT to services through the General Agreement on Trade in Services (GATS) has been described as 'the greatest revolution of the Uruguay Round'.[40] Services were included largely due to pressure from the United States, who sought a comprehensive agreement whose obligations would be binding and general.[41] Many developing countries were strenuously opposed to this, concerned by the resulting increased dominance of transnational corporations, and the diminished ability to support their domestic service industries.[42] While they did not succeed in removing services from the talks, they did manage to put services on a separate footing from talks on goods.[43] The E.U. also disagreed with the United States' proposition, and argued that the agreement should only apply to sectors that individual countries opted to cover (the 'bottom-up' approach). The result was something of a compromise.

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[39] Macmillan, *WTO and the Environment*, p.7.
[40] Graham Dunkley, *The Free Trade Adventure: The WTO, the Uruguay Round and Globalism – A Critique.* (London: Zed Books, 2000), p.71.
[41] Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, 2nd ed. (London: Routledge, 1995), p.278. Dunkley identifies three sources of pressure for service trade liberalisation during the 1980s: Free Trade economists, large corporate service interests, and governments of countries with substantial service export sectors. Dunkley, *The Free Trade Adventure*, p.175.
[42] Kelsey, *Reclaiming the Future*, p.260.
[43] Bernard Hoekman and Pierre Sauve, *Liberalizing Trade in Services*. (Washington: The International Bank for Reconstruction/THE WORLD BANK, 1994), p.42.

How GATS works

GATS is a complex agreement, which reflects the differing negotiating stances at its inception. It has two main tiers of obligations. The first is a set of general concepts, principles, and rules that apply generally to measures affecting trade in services. The key concept that applies in this manner is the 'Most Favoured Nation' rule, which requires a Member to give services and service suppliers of all other Members the best treatment it gives to any one of them. In other words, a Member may not discriminate between the service suppliers of two different Members. The second tier applies only to those sectors which countries have specifically committed, and is concerned with the more onerous obligations of 'National Treatment' and 'Market Access.' National Treatment requires that service suppliers from other Members receive no less favourable treatment than domestic service suppliers, thus targeting discrimination against foreign suppliers. Market Access specifies certain non-discriminatory measures which Members may not maintain or adopt, concerning the market in which a service is supplied. Under this positive listing system, countries can make sector-specific or cross-sectoral qualifications and conditions to their commitments, for example by limiting commitment in a particular sector to only certain modes of supply.[44]

Not only was GATS ground-breaking in that it included services in trade talks, but it also defined trade in a novel way. Whereas GATT had dealt only with cross-border exchange, GATS also covers 'sales by affiliates of foreign companies that have established a commercial presence in a host country, purchases of services made by non-residents who have moved to the location of their provider, and the sale of services by natural persons made possible by a temporary presence in a host country'.[45] This extended reach was one of the reasons some countries were concerned to retain the ability to commit on a limited, incremental basis. Indeed, this expansive definition has been criticised, as it encompasses 'even the most local transactions when the interests of foreign corporations are involved'.[46] This is mainly achieved via the 'commercial presence' mode (Art I.2(c)). The provision is in essence

[44] These 'modes of supply' are defined in Article I.3, and are discussed below.
[45] Bernard Hoekman, *Towards a More Balanced and Comprehensive Services Agreement*. (World Bank, 1999), introduction. Online. http://www.wtowatch.org/library/admin/uploadedfiles/Towards_a_More_Balanced_and_Comprehensive_Serv.htm Accessed 28/08/02. These 'modes of supply' are contained in Article I.2.
[46] Shrybman, *Thirst for Control*, p.32.

an investment measure, entitling foreign companies to establish local service businesses, and once established, to enjoy the protection of this 'trade' agreement.[47]

Because the most severe constraints apply only where a member government voluntarily submits to GATS disciplines,[48] the schedules of commitments constitute the 'pith and substance' of GATS.[49] While the sectoral coverage of the specific commitments has been described as 'limited',[50] another key feature of GATS is the understanding that members will periodically undertake negotiations with the goal of achieving progressively higher liberalisation. GATS, then, is a 'work in progress'.[51] Because the scope of its complex obligations is dependent on the specific, voluntary commitments of its members, it has been criticised as uncertain and potentially inconsistent.[52] However, it is the voluntary and specific nature of GATS that provides the potential for retaining control over services such as water supply. The specific articles of GATS will be examined in greater detail below, in relation to their consequences for water supply in New Zealand.

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[47] Ibid. The WTO response to this has been to argue that GATS can be used by governments to attract foreign investment in sectors where needed. WTO. *Misunderstandings and scare stories: The GATS and investment.* Online. http://www.wto.org/english/tratop_e/serv_e/gats_factfiction5_e.htm Accessed 29/08/02. The focus of this paper however, is to examine the restrictions on getting out of this sort of foreign investment situation.

[48] This 'positive list' approach is different to many other trade agreements. The North America Free Trade Agreement (NAFTA), for example, applies to all services unless explicitly exempt or subject to reservation.

[49] Trebilcock and Howse, *The Regulation of International Trade*, p.281.

[50] World Bank economist Bernard Hoekman describes the 'status quo': 'The majority of country schedules list a variety of measures that continue to restrict or limit either market access or national treatment. As of the end of the Uruguay Round, high-income countries had made specific commitments on about half of their services, of which only one-half entailed "free access."… Subsequent to the Uruguay Round, successful negotiations on basic telecoms and financial services expanded the coverage of specific commitments. …Not only is the coverage of specific commitments limited for many countries, in many cases the commitments are less liberal than the status quo policies that are actually applied. That is, many governments have refrained from binding the status quo'. He then goes on to recommend expanded coverage. Hoekman, *Towards a More Balanced and Comprehensive Services Agreement,* para.1.

[51] Shrybman, *Thirst for Control*, p.33.

[52] Hoekman, *Towards a More Balanced and Comprehensive Services Agreement*, para.5.

Chapter 3

Despite the enthusiastic approach the New Zealand government took to the Agreement, there has been little public debate about how GATS will affect either our service industries or the everyday lives of the public.[53] Given the Agreement's potentially far-reaching provisions, the fact that most New Zealanders have little or no idea what GATS is should be of concern in a democracy. As Kelsey explains, New Zealand went further than most countries in its GATS 'offer', guaranteeing non-discriminatory access for foreign countries in various sectors,[54] and pledging that there would be no tightening of the overseas investment regime. The current government remains enthusiastic about free trade generally.[55]

What does all this mean for New Zealand's water supply? This chapter will consider whether GATS pertains to water services in New Zealand at all. If water services are covered, governmental action is potentially restricted with regard to such services. Further, water services will be open to negotiation for specific commitments, which will entail more onerous obligations, as discussed above (and in more detail below). The following consideration of the application of GATS to New Zealand's water supply, in this and the following chapter, is informed by the situation in Papakura. There has been opposition expressed by both local and overseas citizens' groups to the current global trend in water supply management, a trend which in New Zealand manifests itself in Papakura.[56] Members of Parliament have also expressed

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[53] New Zealand became a founding member of the GATT on 30 July 1948, and became a WTO member when it was created on 1 January 1995. We have a permanent mission in Geneva representing New Zealand on WTO issues. Ministry of Foreign Affairs and Trade. *New Zealand and the World Trade Organisation*. Online. http://www.mfat.govt.nz/foreign/tnd/wtonz/about.html Accessed 04/09/02.

[54] Kelsey, *Reclaiming the Future*, pp.261-262. These included telecommunications, banking, professional services, tourism, audio-visual, construction, transport, and private education.

[55] The Ministry for Foreign Affairs and Trade website, for example, discusses only the benefits of New Zealand's membership of the WTO (apart from a neutral mention of the cost involved with membership), ignoring any adverse effects on New Zealand, and any more general criticism of global free trade. Online. www.mfat.govt.nz Accessed 04/09/02. Further, in June 2001 New Zealand tabled a document at the WTO Council for Trade in Services which stated: 'First and foremost, New Zealand will actively encourage Members to explore ways in which existing commitments in all services sectors, in terms of both market access and national treatment, can be progressively liberalised.' GATT Watchdog. *GATT Watchdog media release*, 22 April 2002. Online. www.arena.org Accessed 02/09/02.

[56] Aside from the Auckland groups already mentioned, groups such as the Council of Canadians have done a lot of work in this regard. In June 2002, 16 civil society groups from around the world signed a document calling for 'all governments to keep water and water services out of the WTO and all other regional and international trade negotiations and investment agreements'. By August 2002

objections to the privatisation of New Zealand's water supply.[57] Given such opposition, in future the New Zealand government may want to adopt a more restrictive regulatory approach to water services. My purpose then, is to examine whether, and how, such an approach may be restricted by GATS, in light of the presence of a foreign service provider in Papakura.

The approach taken in GATS, as in most other WTO agreements, is to outline how governmental action should be restricted. The biggest potential threat to free trade in services is seen as lying in governmental market controls. Corporate behaviour is thus not dealt with by the agreement, ignoring the substantial power large corporations can also exert over trade. Indeed Shrybman describes the GATS as 'little more than an extensive catalogue of 'measures' that governments may neither adopt or maintain'.[58] Regardless of one's feelings about trade liberalisation, this assessment is basically accurate, in that the basis for 'freer trade' is seen to be fewer governmental restrictions on such trade.[59] Thus, Article I.1 provides:

> This Agreement applies to measures by Members affecting trade in services.

As previously mentioned, the 'Members' are the signatory countries to the Agreement. 'Measure' is defined in Article XXVIII(a) as:

> any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.

Thus any legislation, regulation, judicial decision, or indeed any decision taken by the New Zealand government would be covered. The definition is augmented by Article XXVIII(c), which states that measures by Members affecting

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approximately 120 more groups had signed, including the Auckland Water Pressure Group. *A Civil Society Call to Governments at the World Summit on Sustainable Development.* Online. http://www.waterobservatory.org/library/uploadedfiles/KEEP_WATER_AND_WATER_SERVICES_OUT_OF_THE_WTO.doc Accessed 28/08/02.

[57] While Sandra Lee's objectives may be unclear, others, such as Green Party Co-Leader Jeanette Fitzsimmons, and former Alliance MP Laila Harre, clearly oppose water supply privatisation.

[58] Shrybman, *Thirst for Control*, p.31.

[59] There is much criticism of the idea of 'free' trade, both in theory and in practice. Indeed, even if this liberal theory is accepted as valid, the reality is that international trade is far from 'free'. Most poorer countries seek to protect their key industries and producers, often facing pressure to do the opposite from global institutions such as the International Monetary Fund. Large global players, such as the

trade in services include measures in respect of the purchase, payment or use of a service; the access to and use of services which are required by the Member to be offered to the public generally (i.e. water supply); or the commercial presence of the service supplier. This incredibly wide definition would thus cover any action the government might take regarding the Papakura situation.

Any action taken by the Papakura District Council, such as cancellation or alteration of the contract, would also be covered. Article I.3(a)(i) provides that 'measures' means measures taken by central, regional or local governments and authorities.[60] Pryles discusses this 'subordinate application', explaining that the Agreement can only indirectly regulate these other bodies, given that only central government is technically bound. However, it would be 'unsatisfactory' if GATS only applied to national laws, given that the actions of local and regional government may also affect trade in services.[61] There is thus an obligation on Members (i.e. central government) to 'take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities…within its territory' (Article I.3(a)). Thus, central government is responsible for the compliance of the Papakura District Council.

The next fundamental issue concerning the application of the Agreement is whether there is 'trade in services' in New Zealand's water supply. As previously mentioned, GATS defines trade in an incredibly broad way. Article I.2 provides that 'trade in services' means 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;

United States, the European Union and Japan, are actively interventionist in many sectors, while accusing each other of breaking multilateral trade rules.

[60] Measures taken by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities are also covered by Article I.3(ii). This is an important departure from the traditional GATT practice of only binding governments, and reflects the fact that in some countries, various professional services are often self-regulating. Trebilcock and Howse, *The Regulation of International Trade*, p.282.

[61] This is especially the case in federal jurisdictions, where federal governments exercise a high degree of autonomy over certain matters affecting trade in services. An exclusively State-focussed agreement would have only a limited application in such a situation. Michael Pryles, Jeff Waincymer and Martin Davies, *International Trade Law: Commentary and Materials.* (Sydney: LBC Information Services, 1996), pp.853-854.

(c) by a service supplier of one Member, through commercial presence in the territory of another;
(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

This definition goes well beyond the traditional concept of international trade as cross-border exchange (as provided for in paragraph (a)). The 'mode of supply' that represents perhaps the largest departure from the traditional concept of trade is contained in paragraph (c), covering 'commercial presence.' Such an expansive approach can in part be understood due to the nature of international service trade, as compared to that of goods. Pryles *et al* describe the difference as being that the former are 'regulated through non-tariff barriers and do not necessarily move across borders. Thus the notion of a customs barrier or a definition of importation and exportation that is based on crossing that barrier is inappropriate'.[62] The WTO asserts that because 'the supply of many services is possible only through the simultaneous physical presence of both producer and consumer', trade commitments must be extended for them to be 'commercially meaningful'. [63] However, as Pryles *et al* point out, while international trade in services may well occur in ways that differ from trade in goods, these methods do not necessarily have to be dealt with in an international agreement. They argue that while there is an international element in the establishment of a foreign service supplier in the territory of another Member, once a consumer becomes involved, the entire contract is domestic.[64] Shrybman also disputes that international trade covers such transactions, and sees the definition of trade used by GATS as a 'fundamental distortion' of the concept of trade. He argues that 'commercial presence' mode is in fact an investment measure, entitling foreign service suppliers to establish local businesses.[65] Trebilcock and Howse reiterate this point, albeit less critically, stating that I.2(c) directly bears upon the treatment of foreign investment, including the right of establishment.

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[62] Ibid. p.851.
[63] WTO. *The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines.* Online. http://www.wto.org/wto/english/tratop_e/serv_e/gatsqa_e.htm Accessed 04/09/02.
[64] Pryles *et al*, *International Trade Law*, p.852.
[65] Shrybman, *Thirst for Control*, p.33. Some claim that the provision is a 'backdoor' attempt to include investment in an international agreement, after the failure of the Multilateral Agreement on Investment. Indeed, according to Shrybman, the WTO website previously boasted that the GATS was the first multilateral agreement on investment.

In any case, the definition of 'trade in services' covers the PPP in Papakura, by way of I.2(c). United Water is the service supplier of another Member who is providing service through their commercial presence in Auckland. Presumably, the 'other Member' concerned would be Australia, where United Water is based, however it is possible that both France and Germany could also be included, given that Vivendi (France) and RWE (Germany) are the major shareholders of United Water.

The other component of 'trade in services', namely, 'services', is not defined by GATS.[66] Pryles *et al* see this as unproblematic, arguing that because the 'real commitments' are those that are expressly committed by each Member, any potential uncertainty is inconsequential.[67] For the purposes of water supply, it seems generally accepted that water transnationals are providing a 'service'.[68] Further, United Water can be considered a 'service supplier' for the purposes of I.2(c), given the definitions contained in Article XXVIII. Paragraph (a) states that the 'supply of a service includes the production, distribution, marketing, sale and delivery of a service'; a 'service supplier' is any person that supplies a service (XXVIII(g)).

It thus appears that, prima facie at least, water supply in New Zealand is subject to GATS, given the 'trade in services' involved in the Papakura PPP.

In the Exercise of Governmental Authority?

By way of Article I.3(c), services which are 'supplied in the exercise of governmental authority' are held to be exempt from the scope of the Agreement. It is this provision which is often cited by 'free traders' in answer to the claim that the GATS is a threat to essential public services such as water supply.[69] However this argument is rather weak, given the incredibly narrow way this exemption is defined. Thus I.3(c) states that a service supplied in the exercise of governmental authority:

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[66] Except in opposition to 'services supplied in the exercise of governmental authority'. This issue is discussed below.

[67] Pryles *et al*, *International Trade Law*, p.851.

[68] The opposition to WTO involvement in water services is based largely on the concern that, should GATS apply to water, transnational control over water will be significantly increased. Such concern is premised on the classification of water transnationals' activities as the provision of 'services'. The other principal participant in this debate, the WTO, bases its arguments on the same interpretation, claiming that such transnational power will not result, as GATS will only affect water supply where Members specifically commit this service sector.

[69] None other than the then- Director General of the WTO, Mike Moore, argued exactly this is in June 2002. WTO. "Director-general of WTO and chairman of WTO services negotiations reject misguided claims that public services are under threat." Online. http://www.wto.org/english/news_e/pres02_e/pr299_e.htm Accessed 09/04/02.

means any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers.

Although this clause is potentially crucial for public services, its interpretation is far from certain. The principal issue raised by this definition is whether a PPP contract renders Papakura's water as supplied on a 'commercial basis'. The term is not defined in GATS, and it is unclear how it may apply. Macmillan opines that because I.3(c) juxtaposes commercial and competitive bases, a commercial basis would be something other than a competitive basis. She concludes that this would likely mean services supplied 'at arm's length in the marketplace, that is, at the full commercial cost'.[70]

In the New Zealand context, this interpretation would cover even the situation in Auckland City, where water is supplied by the Council-owned business, MetroWater, on a user-pays basis. This lesser form of privatisation was dealt with in 1999 by the High Court, in the case of *MW v Gladwin and Others.*[71] In this case, MetroWater sought confirmation of their right to charge Auckland residents for water. The judge granted this, and went on to say that '…there is no doubt in my mind that the supply of water is a commercial activity'. This case did not concern the application of GATS, and as a decision of the New Zealand courts, would not be binding in a dispute at the WTO. However, it is interesting to see that even this lesser form of privatisation (i.e. water supply by a LATE) has been interpreted by a judicial body so decisively as commercial. If this is the conclusion arrived at for a LATE, it follows that where a completely private company is contracted to supply water, this too will be held to be 'on a commercial basis'. Any other conclusion seems counter-intuitive.

Even the WTO is unclear on this issue. In a 1998 paper on environmental services, the Council for Trade in Services admitted that:

it is not completely clear what the term "commercial basis" means. Nevertheless, if services were deemed to be supplied on a commercial basis, then, regardless of whether ownership was in public or private hands, the

[70] Macmillan, *WTO and the Environment*, p.203.
[71] *Metrowater v Gladwin & Others* unreported, HC Auckland, CP/260/99, 8 December 2000, Salmon J.

sector would be subject to the main GATS disciplines and to the negotiation of commitments under Articles XVI and XVII.[72]

While there has been no definitive ruling at the WTO on the term, it is difficult to see how water supplied in a for-profit PPP situation, such as exists in Papakura, would not be classified as supplied on a 'commercial basis'. Given that water is increasingly supplied on a PPP basis, WTO reassurances that public services such as water are beyond the ambit of GATS are rather worthless. Even lesser forms of privatisation, such as the introduction of a user-pays system of charging, may be enough to render the exemption in I.3(c) ineffectual.

Given that, in Papakura at least, it is so clear that water is being supplied on a 'commercial basis', whether water supply is supplied 'in competition with one or more service suppliers' is a moot point.[73]

It seems, then, that water supply is covered by GATS. This mean that at least the general obligations apply to the New Zealand government in respect of such supply.

Consequences of a Breach

Assuming water services in New Zealand are subject to GATS, governmental action in respect of such services is potentially limited by the general obligations and disciplines contained in Part II of the Agreement. While the obligations contained in the Agreement in theory prohibit New Zealand from taking or maintaining certain measures, these obligations really only restrict our options once a measure is challenged.

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[72] WTO Council for Trade in Services, *Environmental Services: Background Note by the Secretariat*, para.53. The Council goes on to discuss the equally ambiguous situation in which a government has privatised services as local monopolies and the private firms receive payment from government rather than from individual users. This issue, while interesting, is beyond the scope of this essay.

[73] Assuming that this component did need to be shown, it is possible that the competitive tendering process that United Water went through in order to win the contract with Papakura may suffice.

Article XXIII.1 provides for such challenge, stating that should any Member 'consider that any other Member fails to carry out it obligations or specific commitments under this Agreement, it may with a view to achieving a mutually satisfactory resolution of the matter have recourse to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)'. The threshold requirement for access to the DSU procedures is thus violation of GATS, rather than actual nullification or impairment of a benefit, as is required by the corresponding provision of GATT.[74]

Article XXIII.3 goes further than this, and provides for access even where there has been no breach of GATS provisions ('non-violation' cases[75]) in relation to specific commitments. Thus:

> If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU.

Morrison states that the specific commitment itself would constitute the 'reasonable expectation', so that no further proof would be required by a challenging party.[76]

Once this threshold has been met, the dispute is adjudicated by a WTO panel,[77] with a right of appeal to an Appellate Body. Panel and Appellate Body

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[74] If a measure is found to be in violation of GATS provisions, nullification or impairment is presumed. Thus, Article 3.8 of the DSU states: 'In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge'. Thus, if a measure taken by the government were found to be inconsistent with GATS, there would be a presumption that such a breach harmed the complaining Member, whether or not it in fact did. The onus would then be on New Zealand to rebut this presumption, by showing that no 'nullification or impairment' of another Member's entitlements had resulted.[74] The EC in *Bananas* (dealt with below) attempted such a rebuttal in terms of GATT, on the basis that the United States had never exported a single banana to the European Community, and therefore, could not possibly suffer any trade damage.

[75] Peter K. Morrison, "WTO Dispute Settlement in Services: Procedural and Substantive Aspects," in *International Trade Law and the GATT/WTO Dispute Settlement System.* Ernst Ulrich Petersmann (ed.)(London: Kluwer Law International, 1997), p.381.

[76] Ibid.

[77] Panellists should have experience in GATS and/or trade in services, according to the Ministerial Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services.

'recommendations' are dealt with in Article 19 of the DSU. Thus, were a measure taken by New Zealand found to be inconsistent with GATS, the Panel or Body must recommend to New Zealand that the measure be brought into conformity. The Panel or Body may also suggest ways to implement the recommendations.[78] New Zealand would have to comply promptly,[79] and implementation of the recommendations would be kept 'under surveillance' by the Dispute Settlement Body (DSB).[80] If New Zealand did not comply within the time determined under Article 21, it would be required to enter into negotiations for compensation with the complaining Member. Although such compensation is 'voluntary',[81] if no agreement was reached, the complaining Member could request DSB authorization to suspend concessions or obligations owed to New Zealand under GATS.[82] As previously discussed, measures taken by the Papakura District Council are also covered by GATS. Thus, were a Council measure, cancellation of the PPP contract for example, found to be in breach, New Zealand would be responsible for ensuring the Council complied with the DSB recommendations. Were central government unable to achieve such obedience, Article 22.9 provides that the compensation and suspension of concession provisions of the DSU would be applicable to New Zealand. So, New Zealand would be liable to strong sanctions should it take a measure in breach of GATS.

Generale des Eaux v. Argentine Republic

Water companies in PPP arrangements will not hesitate to use international agreement to bring claims against a state. Although brought under a bilateral investment treaty (BIT) rather than GATS, the case of *Generale des Eaux v. Argentine Republic* is a key example of this.[83] The case involved a concession contract made in 1995 between Compania de Aguas del Aconquija (CAA, the Argentinean affiliate of CGE) and the provincial government of Tucuman to privatise

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[78] Article 19.2 provides that 'the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements'.

[79] Articles 21.1 and 21.3 DSU.

[80] Article 21.6 DSU.

[81] Article 22.1 DSU

[82] Article 22.2 DSU. Article 22.8 goes on to say that the DSB shall continue to keep the implementation of its recommendation and rulings under surveillance, even where compensation has been granted or a concession or obligation has been suspended.

the water and sewage systems of the province. Problems concerning the company's rights and obligations soon arose, and the governments of France and Argentina were brought in to resolve the issue. After failed negotiations, in August 1997 CGE notified Tucuman that it was rescinding the contract due to the alleged default of Tucuman. Tucuman rejected this, and terminated the contract a month later.

CGE then sued for more than $300 million in damages, under a BIT between France and Argentina,[84] invoking the jurisdiction of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention[85]), to which both France and Argentina are parties. The concession contract itself made no reference to the BIT or the ICSID Convention, or to the remedies available to a French foreign investor in Argentina under these treaties. CGE were claiming a breach of Articles 3 and 5 of the BIT, which provide that each of the Contracting parties shall provide 'fair and equitable treatment according to the principles of international law to investments made by investors of the other party', that investments shall enjoy 'protection and full security in accordance with the principle of fair and equitable treatment', and that Contracting Parties shall not adopt expropriatory or nationalising measures except for a public purpose, without discrimination and upon payment of 'prompt and adequate compensation'. Article 8 of the BIT provided for recourse to ISCID arbitration where a dispute could not be resolved through amicable consultations.

The concession contract provided expressly that any contractual disputes would be under the exclusive jurisdiction of the administrative courts of Tucuman. The core issue of the case was therefore whether this forum selection meant that the jurisdiction of the ISCID was ousted, despite the remedial provisions of the BIT and the ISCID Convention. Because of the close relationship between the jurisdictional issue and the underlying merits of the claims, the Tribunal decided it needed to hear full presentation of the factual issues relating to the merits.

Throughout the long-running dispute, CGE's basic claim had been that the Provincial Government in Tucuman was trying to interfere with it performance of the contract. They divided this claim into four categories: acts that resulted in a fall of the

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[83] *Compagnia de Agua del Aconquija S.A. & Compagnie General des Eaux, Claimants v. Argentine Republic, Respondent.* International Centre for Settlement of Investment Disputes (ISCID). ARB/97/3. Online. www.worldbank.org/icsid Accessed 11/09/02.

[84] The Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments, 1991.

recovery rate, acts that unilaterally reduced the tariff rate, abuses of regulatory authority, and dealings in bad faith. The disputes between the parties had concerned methods for measuring water consumption, the levels of tariffs to customers, the timing and percentage of any increase in tariffs, the remedy for non-payment, the right of CGE to pass certain taxes on to customers, and the quality of water delivered. More specifically, the claims included allegations that an Ombudsman had improperly intervened to prevent CGE from cutting off service to non-paying customers, and that the province had failed to allow adequate increases to the rates CGE could charge. Tucuman had claimed that the actions of their public authorities were in response to failings in the performance of the contract which affected the delivery of water.

However, as the claim was for a breach of the BIT, rather than for a breach of the concession contract per se, it was Argentina, not Tucuman, who had to answer the case. As such, Argentina firstly attempted to argue that it was not responsible for the provincial government's actions. While Argentina conceded that generally Tucuman's actions would be attributable to it under the BIT, since it was not a party to this contract, such responsibility would not be applicable here. The Tribunal rejected this argument, affirming that under international law the actions of provincial government are attributable to central government.[86]

Dealing with the jurisdictional issue, the Tribunal noted that while it did not have jurisdiction over claims arising from breaches of the contract, it did have jurisdiction over claims based on a breach of the BIT (i.e. the claimed breaches of Articles 3 and 5). A distinction therefore had to be made between actions taken by Tucuman in the exercise of sovereign authority, which would have been attributable to Argentina, and actions taken as a party to the contract. The Tribunal held that the complexity of the contract meant that it could not determine violations of the BIT without interpreting the terms of the contract, a task the parties had specifically left to the administrative courts of Tucuman. As such, the Tribunal held that Argentina could not be held liable unless and until CGE had asserted their rights in the administrative courts. Were the company then denied their rights, either procedurally or substantively, a possible breach of the BIT would have occurred, on which the ICSID could adjudicate. Because CGE had never been denied justice by the administrative

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[85] The International Centre for the Settlement of Investment Disputes, part of the World Bank.
[86] Note that this would not be an issue under GATS, as it expressly includes the actions of local government.

courts, there was no basis to hold Argentina liable under the BIT. The claim was thus dismissed. CGE is now trying to annul the Tribunal's findings, rather than be forced to go before the Argentinean courts.[87]

Although the case was brought under a BIT and not GATS, this case is noteworthy for a number of reasons. Firstly, it brings to attention the fact that domestic contracts can in fact be subject to international agreements, a fact many public authorities may be unaware of. In this case, neither the BIT nor the ICSID Convention were mentioned in the contract – in fact the contract specifically provided for dispute resolution to take place in the domestic courts. Secondly, the case clearly shows that transnational water companies will not hesitate in using these international agreements to enforce their asserted rights under a contract. More specifically, the case shows that CGE/Vivendi, one of the major parent companies of United Water, is willing to undertake such a course of action. Finally, the case provides an example of the loss of public autonomy experienced once a PPP relationship is entered into. Where issues of water quality and rate regulation are involved, it is perhaps understandable that the Tucuman authorities wanted to intervene, although once water services are contracted out in a PPP situation, such intervention may well be prohibited.

Thus, water supply seems to fall under the scope of GATS. This means that at least the general obligations of the Agreement apply to the New Zealand government; further, that water services are open for negotiation for the more onerous specific commitments.[88] Should the government breach its GATS obligations, it may be liable to answer a challenge at the WTO. As *Generale des Eaux* shows, such a challenge is not unfathomable. The next chapter then, will look more closely at these obligations.

[87] Shrybman, *Thirst for Control*, p.60.
[88] Article XIX deals with the commitment of progressive liberalisation, and is discussed below.

Chapter 4

One way to look at the effect of GATS on water services would be to outline in detail a possible measure New Zealand might take in respect thereof, and to consider whether, and how, such a measure would breach the GATS were a challenge to be brought. However, as my task is to broadly consider the constraints on New Zealand's policy and legislative options resulting from GATS, such an approach would be too narrow. Rather than take a retrospective approach, as outlined above, I propose to consider GATS in a more prospective manner. Given that incompatible measures are only problematic once challenged, I will look at the provisions that are most likely to give rise to a challenge at the WTO, and the issues raised by these provisions. In other words, I will discuss which provisions could constrain New Zealand's legislative and policy options, and how such restriction could occur. Again, informing this discussion is the situation in Papakura, and the possibility that in future the New Zealand government may wish to alter this state of affairs. This chapter then, will look at the general provisions which arguably already apply to New Zealand in respect of water supply. The obligation of 'Most-Favoured Nation' is important; other more minor obligations also apply. However, the most significant is the obligation of progressive liberalisation in respect of water supply services.

It should be noted at the outset that the interpretation of these obligations is difficult to predict. As Shrybman points out:

> Many of the international trade, investment and services provisions of …the World Trade Organization that might give rise to such disputes and claims are unprecedented and have yet to be considered by either trade tribunals or the courts…Accordingly, it is extremely difficult to anticipate the views of trade dispute panels or tribunals that will be called upon to address the novel issues that are certain to arise in a trade challenge…. [89]

[89] Steven Shrybman, *A Legal Opinion Concerning Water Export Controls and Canadian Obligations Under NAFTA and the WTO*. (West Coast Environmental Law, 1999) Online. http://www.wcel.org/wcelpub/1999/12926.html Accessed 07/09/02.

While Shrybman was referring to water export control measures, the same uncertainty applies in terms of water services.

Most Favoured Nation

A 'fundamental'[90] general obligation is dealt with in Article II, which requires 'Most Favoured Nation' (MFN) treatment. Article II.1 thus states:

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

In other words, Members may not discriminate between services and service suppliers of foreign origin.[91] The obligations thus imposed on New Zealand are not particularly onerous, but nonetheless potentially restricting. In terms of water services, New Zealand would have to ensure it gave as favourable treatment to any other water services company as it gives to United Water, United being the only water service supplier from another Member state in New Zealand at present.[92] MFN does not prohibit preferential treatment of a New Zealand supplier over a foreign one – this sort of situation is only prohibited by the specific obligation of National Treatment, dealt with below. Currently there seems to be no reason not to comply with the MFN obligation, but if in the future New Zealand wanted to give more favourable treatment to a water company from a certain country, it would be prevented from doing so.

An issue may arise in the definition of 'like services and service suppliers'. Pryles *et al* point out that questions of market differentiation for services are more difficult than in the case of goods. Given that services transactions are essentially contracts, it is more ambiguous whether two services or suppliers are 'like', and therefore arguably more open to legal challenge.[93] Thus United may be able to argue that they are significantly similar to another foreign service supplier present in New

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[90] Hoekman and Sauve, *Liberalizing Trade in Services,* p.30.
[91] Macmillan, *WTO and the Environment*, p.201.
[92] Morrison explains that the issue turns on whether the distinction made by a government between two services or suppliers can be accepted, Morrison, *WTO Dispute Settlement in Services*, p.387.
[93] Pryles *et al*, *International Trade Law*, p.854. Morrison makes the same point, ibid.

Zealand, who may, for example, supply electricity.[94] If the analogy were accepted, the government would be obliged to give United as favourable treatment as it did to the electricity company. This would prevent for example, price regulation of water supply, given that electricity companies are not regulated in such a manner. While such a comparison seems far-fetched, given the trade-liberalisation objective of GATS and the WTO, it is not inconceivable.[95] The cases discussed below show that GATS is likely to be interpreted broadly, in line with this objective.

Measures that are inconsistent with MFN may be maintained however, if they are listed in, and meet the conditions of, the Annex on Article II Exemptions (Article II.2). If New Zealand wanted to give more favourable treatment to a certain foreign water supplier, it could make an exemption for water services. Because such an exemption was not made when the WTO Agreement entered into force, the exemption would be dealt with under paragraph 3 of Article IX of that agreement. This provision allows for waivers to obligations (i.e. MFN) in 'exceptional circumstances', provided that the waiver is agreed to by 75% of Members.[96] Were New Zealand to overcome these onerous prerequisites and succeed in gaining approval for a waiver, there is an expectation that such an exemption would be temporary only. As such, the Council for Trade in Services would periodically review the exemption if it were for longer than five years, examining whether the conditions which created the need for the exemption still prevailed.[97] Further, the exemption should not be for longer than 10 years, and will be subject to negotiation in subsequent trade-liberalising rounds.[98] Thus were New Zealand to attempt to use the exemption process to avoid MFN obligations to United, even if it succeeded, such protection would be constantly under pressure.[99]

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[94] Such an argument would perhaps focus on the fact that both water and electricity are essential services supplied to the general population, on a 'user pays' basis, and are first supplied in bulk from the government.

[95] This issue is more pertinent when the more onerous 'national treatment' provision is considered (Article XVII).

[96] Article IX.3(b) WTO Agreement also specifies that a request for a waiver shall be submitted to the Council for Trade in Services, for a consideration period not exceeding 90 days.

[97] Annex on Article II Exemptions, provisions 3 and 4.

[98] Ibid. provision 6.

[99] Kelsey explains that this system of periodic review of exemptions came about in response to the long list of country-specific reservations made at the time GATS was signed. Kelsey, *Reclaiming the Future*, p.260.

GATS Interpretation at the WTO

How the Disputes Tribunal will interpret the MFN obligation, and indeed any of the GATS provisions, is far from clear. There have only been two WTO cases that have called for the interpretation of GATS rules, the first of which was *Bananas*.[100]

Bananas dealt with the importation of bananas into the European Communities (EC). In this case, the EC appealed a decision concerning their importation regime, which had been challenged by a number of Members, most notably the United States.[101] The EC had been giving preferential market access to bananas produced by former colonies in the Caribbean. This arrangement had been previously negotiated between the EC and its former African and Caribbean colonies under the Lomé Treaty. The United States, which does not itself produce any bananas, argued that the European trade preferences for bananas from former European colonies in the Caribbean unfairly discriminated against bananas grown by U.S. companies (principally Chiquita) in Central America.[102]

While the case dealt with many issues, the first GATS matter concerned the application of the Agreement to the EC import licensing procedures, which embodied the preferential treatment to the former colonies. The Appellate Body considered Article I.1, which states that GATS applies to 'measures by Members affecting trade in services'. The Body held that the use of the term 'affecting' reflected the intent of the drafters to give GATS a broad application. They augmented this interpretation by reference to previous cases, which had held that 'affecting' in the context of Article

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[100] *European Communities – Regime for the Importation, Sale and Distribution of Bananas* - AB-1997-3 - Report of the Appellate Body. Online. http://docsonline.wto.org Accessed 09/09/02.

[101] Ecuador, Guatemala, Honduras, Mexico and the United States were appellants/appellees in this case; Belize, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Japan, Nicaragua, Saint Lucia, St. Vincent and the Grenadines, Senegal, Suriname and Venezuela, had 'Third Participant' status.

[102] Chiquita produces bananas in Latin America on huge plantations that are notorious for exploiting cheap farm labour and using environmentally damaging techniques. Chiquita and the other agribusiness giants grow two-thirds of the world's bananas, and at the time of this case already controlled 50% of the EU market. In the Caribbean, which Europe was favouring, banana producers tend to be small-scale farmers who own and work their own land (an average of three acres), often incurring higher production costs. These Caribbean growers had a mere 8% of the EU market; the economies of most of the Caribbean islands aided by the tariff breaks depend solely on bananas. The case threatened to erupt into a 'trade war', however in April 2001, the U.S. and E.U. reached an agreement to begin to dismantle the barriers to which the U.S. banana companies object. In July 2001, the U.S. was satisfied with Europe's implementation of the agreement and the Bush administration lifted $191 million worth of retaliatory trade sanctions the U.S. had imposed on the E.U. Peter Costantini. "Chiquita Banana Case," *What's wrong with the WTO? Online.* http://www.speakeasy.org/~peterc/wtow/wto-case.htm#bana Accessed 30/09/02.

III of the GATT was wider in scope than such terms as ‘regulating’ or ‘governing’. The Body also thought that I.3(b), which renders GATS applicable to all services except those supplied in the exercise of governmental authority, meant a wide scope was intended for GATS.[103] The Body then concluded that the EC banana import licensing procedures were subject to both the GATT 1994 and the GATS, and that the GATT 1994 and the GATS may overlap in application to a particular measure. Thus were a New Zealand measure concerning water to be challenged, the application of GATS would be reasonably unproblematic to establish. Whether that measure ‘affected’ trade in water services would not be subjected to a particularly strict standard of proof, given the interpretation that GATS is to have a ‘broad application’.

The next GATS issue was whether Article II.1 (MFN) of the GATS applied only to de jure, or formal, discrimination or whether it applied also to de facto discrimination. It had been argued that because Article II did not include paragraphs similar to Article XVII (National Treatment), which specify that ‘treatment no less favourable’ encompasses de facto discrimination, Article II was only intended to cover de jure discrimination. However the Body held that there was more than one way to write a general non-discrimination provision, and that the absence of these paragraphs did not necessarily signify an intention of solely de jure application. If the drafters had intended as much, the Body continued, they would have expressly provided for this. Further, there was nothing in Article II to displace the ordinary meaning of ‘treatment no less favourable’, which includes de facto discrimination. Finally, the provision could be easily circumvented if interpreted as only applicable to de jure cases.[104] Thus a measure taken by New Zealand could be challenged if it resulted in de facto discrimination, regardless of whether it had such an effect in law.

The Body then considered whether the EC licensing procedures were in fact discriminatory under Articles II (MFN) and/or XVII (National Treatment). The EC argued that import regime pursued legitimate policies and was not inherently discriminatory in design or effect. The Body rejected this reasoning, holding that the ‘aims and effects’ of a measure were irrelevant in determining inconsistency with the provisions of GATS.[105] Given the previous finding that de facto discrimination was

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[103] *Bananas,* para.220. Reference was also made to additional commitments made by the EC under Article XXVIII, which were likewise held to imply a broad application of the GATS.
[104] Paras 229-234.
[105] Para.241.

included, the prohibition on arguing that a measure did not have a discriminatory effect seems strange. Such a prohibition seems to be based on a undefined distinction between different 'effects', as the Body then goes on to uphold the findings of the Panel, who base their findings of discrimination on an examination of the effects of the system. One aspect of the system was the allocation of hurricane licences.[106] The EC argued that their purpose was to compensate those who suffered damage caused by tropical storms. Even this purpose did not satisfy the Body, again holding that the purpose of a measure is irrelevant. [107] It seems then, that the odds are against a Member successfully defending a challenged measure, given that the not only the objective, but also possibly the effects of the measure are 'irrelevant'.

The second case concerned a Canadian measure, which provided a duty exemption for the importation of certain automobiles.[108] In this case, Canada appealed from the Panel's findings, which had held, inter alia, that Canada's measure 'affected trade in services', and that the measure breached Article II of GATS (MFN).[109]

Canada argued that the Panel erred in finding that the measure was within the scope of GATS. In Canada's view, the Panel mistakenly concluded that whether a measure is within the scope of the GATS is determined by whether that measure is consistent with certain substantive obligations, such as Article II, and not by whether the measure falls within Article I of the GATS. The Appellate Body agreed that the Panel had failed to examine whether the measure was one 'affecting trade in services' as required under Article I:1. They held that 'at least two key legal issues must be examined to determine whether a measure is one "affecting trade in services": first, whether there is "trade in services" in the sense of Article I:2; and, second, whether the measure in issue "affects" such trade in services within the meaning of Article I:1'.[110]

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[106] The other parts of this regime complained about in this context were: the 'Operator Category Rules', which established the machinery for dividing the import tariff quota among the different categories of traders concerned; and the 'Activity Function Rules', which aim to correct the position of all ripeners vis-à-vis all suppliers of bananas.
[107] Paras 247-248.
[108] *Canada – Certain Measures Affecting the Automotive Industry* - AB-2000-2 - Report of the Appellate Body. Online. http://docsonline.wto.org Accessed 08/09/02.
[109] The Panel also found (again, inter alia) that the Article II breach was not justified by Article V (which deals with economic integration), and that Canada had acted inconsistently with Article XVII (National Treatment) of GATS. Canada was the initial appellant in this case, with the European Communities and Japan joining the proceedings soon after (also as appellants). Korea and the United States acted as third participants.
[110] Para.155.

With regard to water in New Zealand, it is clear that there is 'trade in services', however the second issue identified by the Body could become relevant. On this point the Body referred to *Bananas*, again holding that the term 'affecting' was to have a broad application.[111]

Notwithstanding that the Panel had failed to examine whether the measure was one 'affecting trade in services' as required under Article I:1 of the GATS, the Appellate Body went on to consider the issue of MFN treatment (Article II.1). The Body found that the Panel (after already having failed to establish the threshold determination of I.1), failed to render its interpretation of II.1, failed to make factual findings on the case, and thus could not apply an interpretation of II.1 to these facts. The Panel's findings were therefore held to be 'pure speculation', and were reversed.[112] However, citing the importance and newness of GATS, the Body declined to give its own interpretation of II.1, leaving such interpretation to 'another case and another day'.[113] Thus, we are left with no guidance as to how one of the key GATS provisions might apply to New Zealand's water supply.

Although GATS has only come up for interpretation in these two cases at the WTO, it seems likely that the Agreement will be given a very wide interpretation, in line with the GATS goal of trade liberalisation. The expansive interpretive approach taken to issues such as the application of the Agreement and MFN obligations suggests that a Member attempting to defend a challenged measure will face an uphill battle.

Other Obligations

A further, if slightly less important, obligation contained in Part II relates to transparency. By way of Article III then, New Zealand is obliged to publish promptly any 'measures of general application which pertain to or affect' trade in water services. Further, the government would have to respond promptly to any requests from other Members for information regarding the measure. While this would not be an onerous obligation in itself, it is significant in that it would alert United to

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[111] Canada also argued that the measure related solely to goods, and therefore that only GATT was applicable. Again referring to Bananas, the Body held that both agreements could apply to the same measures.
[112] Para.174.
[113] Para.184.

initiatives it may wish to lobby against, or persuade a sympathetic government to challenge.[114]

Article VI deals with domestic regulation, and most of its provisions only apply where a specific commitment has been made. However VI.2 requires that New Zealand maintain or institute 'tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services'. Although New Zealand has not yet been subject to requests from other Members for revisions of administrative decisions affecting trade in services, 'as a matter of good regulatory practise New Zealand maintains a range of judicial and administrative tribunals/procedures which the government would consider appropriate for such purposes. These would include, if the need arose, recourse to the domestic court system'.[115]

Progressive Liberalisation

Perhaps the most important consequence of the inclusion of water services in GATS derives from Part IV. Article XIX commits Members to periodic negotiations, 'with a view to achieving a progressively higher level of liberalisation'. Although XIX states that this process will take place with 'due respect for national policy objectives', a 'policy objective' of halting liberalisation would not withstand the overriding thrust of GATS. This objective is to be realised by 'increasing the general level of specific commitments'.[116] Thus, although the general obligations imposed by GATS are not overly burdensome, once water services are prima facie covered by the Agreement, as I believe they are, they are open to negotiation for specific commitment. If this happens, much more restrictive obligations will apply. It is to this possibility that the next chapter is directed.

[114] Shrybman, *Thirst for Control*, p.34.
[115] Clare Kelly, Ministry of Foreign Affairs and Trade, email correspondence of 16/09/02.
[116] Article XIX.4

Chapter 5

As previously explained, the most severe constraints only apply where specific commitments have been made. Through the listing process, Members can assume commitments of three types in relation to a sector: Market Access, National Treatment, and Additional Commitments. Commitments must be set out in a schedule, which is then annexed to the Agreement.[117] If a commitment is made, further obligations, contained in Part II, also apply. The most important of these relates to Domestic Regulation (Article VI). Article VIII, which deals with Monopolies and Exclusive Service Suppliers, may also be relevant. New Zealand has not yet made specific commitments regarding water. However, there is pressure to take this step. This chapter will examine the constraints which would be imposed were New Zealand to commit water services, and the likelihood that this will occur.

Market Access

Article XVI is unusual in terms of traditional trade liberalisation rhetoric, which calls for a 'level playing field' as between foreign and domestic goods and services, and therefore discourages discrimination against foreign goods and services. This Article, however, also covers *non-discriminatory* quantitative restrictions. This means that the measures set out in the provision are prohibited, regardless of whether they are discriminatory against foreign service suppliers. Article XVI.1 provides that:

> 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 treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[118]

While Members can thus place limitations on the extent of their market access commitment in a specified sector, the commitment in GATS to progressive liberalisation must be kept in mind.

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[117] Article XX.

[118] Article XX.1(a) requires such 'terms, limitations and conditions' on market access to be specified in a Member's Schedule.

'Market Access' is not actually defined in the Article; instead six market access restrictions are listed, which Members are prohibited from adopting or maintaining. Accordingly, were New Zealand to make a full Market Access commitment for water services, a range of regulatory controls would be forbidden. For example, limitations on the value of transactions performed by the companies would be prohibited, so that government could not regulate the prices charged by water companies. The types of controls proposed in Parliament in 1999 in respect of electricity line companies would therefore be prohibited. These included a price ceiling, in an attempt to stop the companies, which were unfettered by competition, from consistently raising their charges to consumers.[119] Given that water supply companies enjoy a similar 'natural monopoly' position, an inability to regulate their prices could be problematic.

New Zealand would not be able to limit the number of water companies supplying water. Limitations on the value of the assets held by water companies would also be proscribed. The government would not be able to regulate the type of legal entity or joint venture through which water was supplied. This would therefore preclude, for example, legislation prohibiting the type of PPP present in Papakura. Moreover, a specification that water services be provided by government or public agencies would apparently be prohibited by this paragraph.[120]

Finally, and importantly from an accountability perspective, no limitations on the participation of foreign capital would be allowed. The suppliers of New Zealand's water could therefore be wholly owned by offshore parties, with no connection to the consumers of this essential service. A commitment to Market Access could thus represent the most significant restriction on a future government that wanted either to prevent further privatisation, or to reverse the progress towards that end which has already occurred.

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[119] Commerce (Controlled Goods or Services) Amendment Bill 1999. The supply of electricity is dealt with in more detail in Chapter 6.
[120] Shrybman, *Thirst for Control*, p.71. Shrybman cites this as one reason supporting his claim that despite WTO claims to the contrary, the GATS is actually focussed on privatisation, rather than trade per se.

National Treatment

Article XVII states that in committed sectors, Members must provide treatment 'no less favourable' to service suppliers of other Members than that accorded to its own like service suppliers. Ostensibly, National Treatment fits more easily with traditional liberalisation speak than Market Access, in that it applies to measures which are discriminatory against foreign service suppliers, and thus aims at the creation of a 'level playing field' for such suppliers. However the approach taken by the Article goes beyond a ban on intentionally discriminatory measures, and 'reflects the view that equal treatment implies adjustment of regulatory regimes so that foreign suppliers have substantively equal competitive opportunities'.[121] Therefore, Article XVII.2 provides that national treatment does not necessarily prohibit foreign and domestic firms receiving 'formally different' treatment. The crux of the obligation is whether the treatment modifies the conditions of competition in favour of domestic suppliers compared to like foreign firms.[122] As such, 'formally identical' may well violate national treatment.[123]

Conditions and qualifications on National Treatment may be included in the scheduled commitment; an unrestricted commitment however, would be a significant restraint on governmental action. Not only would National Treatment prohibit preferential treatment of a New Zealand-owned firm, the Article makes no distinction between public non-profit service suppliers and private for-profit suppliers. As both a local council and a private water company would be supplying essentially the same service, these two entities may be regarded as 'like service suppliers' in terms of the Article. New Zealand would therefore be prevented from treating foreign private companies any less favourably than local councils engaged in the supply of water to their constituents. In fact, given the de facto approach to national treatment taken by GATS, more than this may be required. A private water company could potentially argue that the 'conditions of competition' in New Zealand somehow favoured councils, perhaps because of councils' traditional role as water suppliers. Were this argument accepted, the government may have to make positive legislative changes so that the conditions of competition were more favourable for these private companies.

[121] Trebilcock and Howse, *The Regulation of International Trade*, p.289.
[122] Article XVII.3

Domestic Regulation

Although not included in Part III, Article VI contains further obligations once a specific commitment has been made. The basic obligation is that measures affecting trade in services in a committed sector are administered in a 'reasonable, objective and impartial manner'.[124] The key paragraphs are 4 and 5, which provide the framework for scrutiny of technical barriers to trade, which may take the form of qualification requirements and procedures, technical standards, and licensing requirements. Where a sector has been committed, any such requirements must be based on objective and transparent criteria, and must be no more burdensome than necessary to ensure the quality of the service. Further, where licensing procedures are concerned, these may not in themselves constitute a restriction on the supply of the service.

Article VI therefore would prohibit these sorts of regulation,[125] even where this was on a non-discriminatory basis, unless such regulation was 'objective and transparent',[126] and 'necessary'.[127] Thus, were a foreign water company to disagree with a domestic regulatory measure taken by New Zealand, they could use this 'necessity' test to force the government to prove the need for such a measure. As will be seen by the environmental cases, the WTO has interpreted this test strictly against governments.

Monopolies and Exclusive Service Suppliers

Article VIII requires that Members ensure that monopoly service suppliers in their territory do not act inconsistently with their GATS obligations.[128] Where such a service supplier competes in an area outside the scope of its monopoly rights and which is subject to a specific commitment, the Member must ensure the supplier does not 'abuse' their monopoly position in a manner inconsistently with their

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[123] Hoekman and Sauve give the example of a requirement for insurance firms that reserves be held locally, which would place disproportionate hardship on a foreign firm. Hoekman and Sauve, *Liberalizing Trade in Services*, p.32.
[124] Article VI.1
[125] That is, measures relating to qualification requirements and procedures, technical standards, and licensing requirements.
[126] Article VI.4(a)
[127] Artilce VI.4(b)

commitments. Trebilcock *et al* give the example of a telecommunications company that has monopoly rights over the domestic market but that competes with respect to long distance and other services.[129]

While this paragraph is unlikely to prove problematic for a tighter regulatory approach, Article VIII.4 may. It provides that if, after the entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, the Member must notify the Council for Trade in Services. Further, paragraphs 2, 3 and 4 of Article XXI apply, apparently meaning that the grant of monopoly rights would be treated as a modification of a scheduled commitment. Article XXI provides that any such modification may eventually require compensation to be paid to any 'affected Members'.

Once again, the implications of a commitment on water, arising from this provision, are unclear. Article VIII.4 does not appear to make a distinction between the granting of monopoly rights to a private or public service provider. How would this provision apply where a privatised service, previously supplied by the public sector, was returned to the public sector? For example, if New Zealand decided to return water supply to the public sector in Papakura, would this be seen as the 'granting of monopoly rights' to the Papakura District Council? If so, New Zealand could ultimately be liable to pay compensation to any 'affected Members'.[130]

Will New Zealand Commit?

No country, including New Zealand, has made a specific commitment on water supply services.[131] The WTO argues that GATS therefore does not affect the Members' policy options regarding water. Responding to claims that public services were under threat from GATS, Mike Moore, the then Director-General of the WTO asserted that WTO negotiations 'were no threat to government services and that such

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[128] Article VII.5 provides that these provisions also apply to cases where a Member authorises a small number of service suppliers and substantially prevents competition among those suppliers. Given that water supply is a natural monopoly, this situation is unlikely to arise.
[129] Trebilcock and Howse, *The Regulation of International Trade*, p.284.
[130] In this case the companies with an interest in United Water come from Australia, France and Germany, who would thus constitute the 'affected Members'. Where a return to public sector provision was carried out for reasons owing to the poor performance of a private company, New Zealand may be able to raise these reasons in defence. Nothing in either Articles VIII or XXI refers to such defences however.
[131] A full list of New Zealand's commitments can be found online at www.docsonline.wto.org They are GATS/SC/62 and supplements.

sectors of the services economy were in fact excluded from the negotiations'. Ambassador Jara bolstered this point, stating:

> Government services supplied on a non-commercial basis by each of the 144 WTO Member Governments are explicitly excluded from the scope of the negotiations. This is a principle to which all Member Governments attach great importance and which none has sought to reopen.

After emphasising that each Member had the right to choose which services to commit, he then made the bold assertion that even for services provided by governments on a commercial basis, there is nothing in the WTO rules which requires that they be privatised or liberalized.[132] Given that GATS specifically provides that 'governmental services' does not include services provided on a commercial basis, this statement is strange. Further, the obligation in GATS of progressive liberalisation directly contradicts Jara's reasoning.

These assurances from the WTO ignore the current push for water supply commitments, principally emanating from the European Communities (EC). Firstly, the EC has proposed a new classification relating to environmental services, ostensibly in an attempt to simplify the classification of water-related commitments.[133] Thus far, specific commitments have generally been classified on the basis of the United Nations Central Product Classifications Code. While there is no legal obligation to use this code,[134] which is specific to products, it has been adopted as a way to describe the sectors that are being committed. Ten categories are specified

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[132] Ambassador Alejandro Jara of Chile, Chairman of the Special Session of the WTO Services Council. WTO. "Director-General and chairman of WTO services negotiations reject misguided claims that public services are under threat," 28 June 2002. Online. www.wto.org Accessed 15/09/02.

[133] The EC argues that the current classification of 'environmental services' is too narrow, and that it no longer reflects economic reality. They argue that it is problematic in that it does not explicitly reflect the main environmental services by reference to their environmental medium (water, solid waste, air, and noise); it does not reflect changes in the environmental industry; further, the current classification is mainly focussed on the provision of services by public bodies to the public, and overlooks the provision of environmental services directly to the industry. European Communities. *Communication from the European Communities and Their Member States*, *Classification Issues in the Environmental Sector*. S/CSC/W/25, 28 September 1999. Online. http://www.unctad.org/p166/modules/mod8/W25.pdf Accessed 07/08/02. Also, *Communication from the European Communities and Their Member States, GATS 2000: Environmental Services.* S/CSS/W/38, 22 December 2000. Online. http://www.esf.be/docs/GATS%20Negotiating%20proposals/EU%20Environmental%20services.doc Accessed 07/08/02.

[134] Trebilcock and Howse, *The Regulation of International Trade*, p.286.

in the Code. Water seems to come under Category 1, which includes ‘Ores and minerals; electricity, gas and water’. This Category also references another United Nations statistical code, the ISICRev.3, which includes a classification for the ‘Collection, purification and distribution of water’. As yet, no commitments have been made under Category 1. However, Category 9, encompassing ‘Community, social and personal services’ is also relevant to water services, as it covers environmental services, including sewage treatment. Several countries have made commitments under this Category.[135]

Thus, currently ‘environmental services’ include sewage services but not those concerning water supply. By taking a cluster approach to environmental services, the classification proposed by the EC, ‘Water for Human Use and Wastewater Management’, would change this. This new classification would include ‘potable water treatment, purification and distribution, including monitoring’. Given that the major water transnationals come from Europe, such a proposal is not surprising. While a new classification in itself has no effect, Shrybman argues that the cluster approach would ‘dramatically accelerate the expansion and application of GATS disciplines’.[136] This is particularly pertinent, given the results of the negotiations in Doha in November 2001. At this meeting, Members committed to negotiations on the ‘reduction, or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services’.[137] If ‘environmental services’ are to include water supply services, New Zealand may face pressure to make a specific commitment on such services.

More overt pressure from the EC was made apparent earlier this year, when the EC negotiating requests were leaked. In the lead-up to a negotiating round, Members may make requests of each other, outlining the commitments they wish to extract from other Members.[138] Requests for the current round were to be submitted by June 30 of this year, with submissions of offers in response to these requests due in

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[135] The European Commission website lists 27 Members that have made such commitments. European Commission. *Info-Point on World Trade in Services*, “Opening World Markets for Services”. Online. http://gats-info.eu.int/gats-info/swtosvc.pl?&SECCODE=06.A Accessed 04/10/02.
[136] Shrybman, *Thirst for Control*, p.41.
[137] *Doha Ministerial Declaration*, para.31. Adopted on 14 November 2001.
[138] Requests made by New Zealand, apparently focus on ‘key exporting sectors’ such as business services, communications services, construction and related engineering services, education services, environmental services, tourism services, transport services, and recreational, cultural and sporting services. New Zealand Government. “New Zealand files its services requests,” 9 July 2002. Online. www.beehive.govt.nz Accessed 08/08/02.

March 2003. Such requests are ordinarily kept confidential, however in April the draft requests of the EC to 28 other Members were leaked. The 1000-page document detailed restrictions the EC wanted Members to drop, aiming at the 'opening up of sensitive sectors of its trading partners' economies including water, energy, sewerage, telecommunications, post and financial services'.[139] This demand for 'full-scale privatisation of public monopolies' is reportedly being leveraged as the price for the EC dismantling its common agricultural policy.[140]

In its requests of New Zealand, the EC first notes that New Zealand has not made any specific commitments in environmental services. The EC then lists a number of sub-sectors it wants New Zealand to commit, based on the EC proposal for classification of environmental services. At the top of the list is 'Water for human use and wastewater management,' specifically 'Water collection, purification and distribution services through mains, except steam and hot water.'[141] Kelsey describes the requests as an attempt 'to lock open New Zealand's services…to the ownership and dominance of European transnationals'.[142] She reiterates the point that if New Zealand agrees to EC requests, we will thereby be forced to open our services to all countries, given that concessions cannot be country-specific under GATS.

In response to the leak, the EC claimed that concerns that the negotiations would undermine the provision of public services were 'completely wrong'. Emphasis was placed on the ability under GATS for Members to determine which services would be committed to national treatment and market access, GATS being 'the most flexible agreement in the WTO system.'[143] While this may be true, once commitments are made there is no flexibility for change at a later date.

Further, what this argument ignores is the reciprocal nature of trade negotiations. New Zealand has a strong economic interest in gaining better access to European agricultural markets. The EC is New Zealand's second most important trading partner for economic transactions when two-way trade and investment are considered. Agricultural exports dominate this trade, with primary produce making up

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[139] Charlotte Denny, Larry Elliott and John Vidal. "Secret documents reveal EU's tough stance on global trade," *Guardian Unlimited*, 17 April 2002. Online. www.guardian.co.uk Accessed 31/06/02.
[140] Ibid.
[141] European Communities. *GATS 2000 Request from the EC and its Member States to New Zealand*, p.14. Online. http://image.guardian.co.uk/sys-files/Guardian/documents/2002/04/16/NZ.pdf Accessed 31/06/02.
[142] Jane Kelsey. *Digging NZ in Deeper*, May 2002. Online. http://www.arena.org.nz/gatseuop.htm
[143] European Communities. *Reaction to the leak of EC draft requests,* 22 April 2002. Online. http://www.gatswatch.org/docs/GATS%20leaks.pdf Accessed 31/06/02.

72% of New Zealand's total exports to the EC.[144] Further, New Zealand is one of 18 agricultural exporting countries that are part of the Cairns Group, started in Uruguay in 1986 by Australia, New Zealand, Argentina, Brazil and Uruguay. One third of the world's agricultural exports coming from Cairns Group members. The Cairns Group negotiated as a group at Doha, and one of their key points was that free trade should extend to agriculture. Specifically, the Group called for a complete phase-out of EC agricultural support subsidies, with a mere reduction labelled unacceptable by our own Jim Sutton, Minister of Agriculture and Minister for Trade Negotiations.[145]

With such a high value being placed on achieving access to European agricultural markets, it is possible that a commitment in a sector such as water may seem relatively unimportant. However, as outlined above, the consequences of such a step are significant indeed. A commitment in water services will involve crucial further obligations under GATS, and will therefore place considerable restrictions on the New Zealand government's ability to exercise control in this area. The following chapter considers some of the reasons that suggest it may be prudent to retain such an ability, and therefore to refrain from making a specific commitment.

[144] Arena. "No lamb for water privatisation deals!" (Statistics sourced from Ministry of Foreign Affairs and Trade) Online. http://www.arena.org.nz Accessed 15/09/02.

[145] Ibid.

Chapter 6

At issue in this paper are the potential restrictions on the New Zealand government deriving from our commitments under GATS, should the privatisation of our water supply continue. The related questions thus arise – why might this process potentially be undesirable, and why might the New Zealand government want to retain some control over water supply? These are pertinent questions, given the general trend in New Zealand since 1984 towards deregulation, corporatisation, and privatisation,[146] and given that some impetus for such regulation has already been shown, albeit ineffectively, by government. This chapter will look at some of the problems other countries have experienced as a result of water privatisation. To an extent, some of these problems have already arisen in Auckland. These problems, and an awareness of those experienced overseas, inform much of the opposition that has already been expressed in Auckland.

One of the areas of concern in a context of privatised water services is environmental protection. Because private companies generally depend on increased consumption for profit, depletion of water resources may be encouraged at unsustainable rates. The second part of this chapter will look at how measures motivated (at least ostensibly) by environmental concerns have been treated by the WTO.[147]

Finally I will bring the focus back to New Zealand, and look at two sectors that have undergone whole or partial privatisation. I contend that the experiences in these sectors highlight the importance of retaining the governmental ability to have some regulatory role over privatised services. This role could be significantly constrained by GATS commitments.

The Problems of Privatisation

Privatisation of water services is enthusiastically encouraged by such organisations as the World Bank,[148] the International Monetary Fund,[149] our own

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[146] For a comprehensive account of this trend in government, see Kelsey, *Reclaiming Our Future.*

[147] Although the cases discussed below do not arise out of problems with a privatised sector, the rulings concerning the environmental exception would apply in the same manner here.

[148] One example of this is the case of Argentina. Alex Loftus and David A McDonald. *Lessons from Argentina: The Buenos Aires Water Concession* (Municipal Services Project, 2001) Online. http://qsilver.queensu.ca/~mspadmin/pages/Project_Publications/Series/2.htm Accessed 26/08/02.

Business Roundtable,[150] and of course water transnationals. However there is a growing literature opposing this view, citing the problems involved with privatisation of this essential service.

In a comprehensive report, commissioned by Public Services International, David Hall examines the problems with privatised management of water systems through all forms of public-private partnerships, whether concessions, leases, management contracts, or build-operate-transfer contracts.[151]

These are, first, that while privatisation often is heralded as the path to greater competition, the water industry is characterised by a distinct lack of competition. Aside from the fact that water systems are natural monopolies, the industry is dominated by two huge transnationals, Vivendi and Suez-Lyonnaise, with Thames Water emerging as a challenger to this French dominance.

Second, efficiency gains from privatisation have not generally eventuated, thus price-savings to consumers have not been achieved. With privatisation come the new demands of the company for profits and dividends, which may then be globally redistributed for investment in other company activities,[152] rather than invested in the

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Indeed, Finger and Allouche describe the World Bank as 'without doubt one of the most, if not the most important actor in the global water sector, be it in terms of financial aid or in terms of general policy-making in the developing countries'. Matthias Finger and Jeremy Allouche, *Water Privatisation: Trans-National Corporations and the Re-Regulation of the Water Industry*. (London: Spon Press, 2002), p.62.

[149] Sara Grusky, *IMF Forces Water Privatization on Poor Countries.* (Globalization Challenge Initiative, 2001) Online. http://www.waternunc.com/gb/ProblemofWater.htm Accessed 28/08/02.

[150] In 1996 the New Zealand Business Roundtable commissioned a report justifying this view, concluding in favour of complete privatisation, but recommending franchising and contracting out 'if there is a strong political preference to retain ownership'. "Water, sewerage services 'should be in private hands'", *Press*, 12 February 1996, p.5.

[151] Hall, *Water in Public Hands*.

[152] As previously mentioned, the water transnationals are generally highly diversified entities. Profits from privatised water systems are often used to finance other activities of the parent transnationals, and both the UK and the French water companies have taken advantage of this. A 1996 UK study into the regulatory and financial situation of the private water companies concluded that: 'The cash surplus has been drained by the parent companies which have given generous dividends to the shareholders; made spectacularly unsuccessful acquisitions which have resulted in huge losses; and finally recycled the remaining surplus cash as interest bearing loans back to the core water business'. Richard Schofield and Jean Shaoul, *Regulating the Water Industry: Swimming Against the Tide or Going Through the Motions?* (University of Manchester, 1996) Online. http://idpm.man.ac.uk/idpm/ppm_wp5.htm Accessed 29/08/02.

Vivendi has also engaged in this practice. In January 2000, Vivendi loaded its entire debt (Euro 16.5 billion) onto its 'Environment Division' (which includes water). This left the Communications Division, which has received most of Vivendi's investment in recent years, virtually debt free. Based on the 1999 sales in the Environment Division of Euros 22.2bn, this is equivalent to a surcharge of about 4% on the bills of every user of Vivendi's water, waste and transport in the world, in order to subsidise the communications division. Vivendi Universal. Online. www.vivendiuniversal.com. Accessed 23/08/02. Also discussed in Hall, *Water in Public Hands*, p.13.

renewal of water infrastructure.[153] Public authorities may see the water system as a means of boosting their own finances. In the United Kingdom, water prices have risen far faster than inflation since privatisation – partly to pay for investment, and partly to fund dramatic increases in dividend payments. In France, where some water is managed by municipalities, and some by private companies (or joint ventures or PPPs), figures from 1994 to 1999 consistently show the private or PPP concessions charging higher prices – 13% higher in 1999.[154] Other reports cite this figure as currently being between 16% and 44%.[155] Buenos Aires also experienced price increases after Aguas Argentinas took over water delivery in 1993. Despite an initial 27% reduction, the cost of water since privatisation has increased by as much 20% in real terms due to subsequent price hikes and surcharges.[156] In Buenos Aires, these prices increases are generally borne disproportionately by the poor, with service cut-offs becoming increasingly common. This experience has also been felt in Britain, where legislation has just been passed to deal with this problem.[157]

Papakura has not escaped such price hikes. Between 1998 and 2002, Auckland's publicly owned bulk supplier of water, Watercare, increased its prices by an average of 15.3%. In the same period, United Water increased charges by an average of 80.3%. Further, the increases have disproportionately affected those who can least afford them. From 1997 (when United Water took over from the Council), those with

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[153] In the U.K., 70% of all the investment made since privatisation has been paid for by consumers, and there has been public criticism of the lack of investment in renewing the infrastructure. CAFCA, *June 1997 Decisions.* Online. http://canterbury.cyberplace.co.nz/community/CAFCA/cafca97/jun97.html Accessed 25/08/02.

[154] Hall, *Water in Public Hands*, p.11.

[155] Even the *Economist* has reportedly acknowledged this trend: 'When water management passes from the local waterworks to a private company the price often goes up'. Cited in Gordon Campbell, "Troubled Waters: Privatising the water supply will mean higher prices." *The Listener* 26 April 1997. Online. http://www.papakurawaterpressuregroup.pl.net/articles/troubled_waters.htm Accessed 25/08/02.

[156] Moreover, the initial price decrease itself was somewhat misleading, with critics arguing that prices were artificially inflated by the government prior to privatisation in order to make the private company look more efficient. Loftus and McDonald, *Lessons from Argentina: The Buenos Aires Water Concession.*

[157] The Water Industry Act 1999 amended the 1991 Act, removing water companies' ability to disconnect household customers for non-payment of charges. It also outlawed the use of budget payment units that cut off customers' water supplies where customers had insufficient credit on their payment cards. It also limited the circumstances in which companies can compulsorily meter customers. Office of Water Services. *Privatisation and the history of the water industry*. Online. http://www.ofwat.gov.uk/infonotes/info18.htm Accessed 26/08/02.

land valued at $50 000 had an almost 100% increase, while the charges for those with land valued at $150 000 have marginally decreased.[158]

Hall notes that another core argument made in favour of privatising municipal services is that it generates better public accountability. Again, this argument is not supported by experience. First, commercial operations invariably prefer confidentiality and secrecy, as it protects their ability to manage financial affairs to maximize profits for their owners.[159] Companies frequently insist that the contract itself be kept secret.[160] Further, regulation of these concession contracts is rarely an effective and independent control. While regulation could provide a means for representation of the public interest, local authorities often do not have the resources to perform this role. Private water concessions are usually given because of lack of funds to run water supply, and in this situation it is highly unlikely money and resources will be available to regulate the private partner.[161]

Accountability becomes even more important when corruption is considered, which Hall describes as 'a systematic feature of privatisation processes, in water as in other areas'. This has been discussed in a World Bank paper, which explains that corruption is most often associated with the process of awarding contracts.[162] Indeed, corruption in the water industry is notorious. Both Vivendi and Suez Lyonnaise have been convicted of paying bribes to obtain water contracts in France, and have been investigated for corruption practiced by their construction divisions.[163] Corruption allegations have also been made against Vivendi surrounding the awarding of

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[158] *Papakura District: Water and Wastewater Charges from 1993 to 2003*. Received from email communications with Papakura Water Pressure Group, 05/09/02.

[159] For example, Aguas del Tunari, the privatised water concession in Cochabamba, Bolivia, refused to disclose the financial model behind its price rises on the grounds that the model itself was a commercial secret. Hall, *Water In Public Hands*, p.14.

[160] In Fort Beaufort, South Africa, the contract prevents any member of the public from seeing the contract without the explicit approval of the company WSSA (owned by multinational, Suez-Lyonnaise): '2.2.2: Confidentiality: the documentation contained herein has been developed exclusively by the operator (WSSA) and shall not be disclosed to third parties without the written approval of the operator.' Hall, *Water in Public Hands*, p.14.

[161] In fact, a recent study of public-private-partnerships in South Africa concluded that 'lack of public sector capacity is, as the BOTT experience demonstrates, an important reason not to privatise, rather than a justification for public-private sector partnerships'. Hall, *Water in Private Hands,* p.14.

[162] 'A firm may pay to be included in the list of qualified bidders or to restrict their number. It may pay to obtain a low assessment of the public property to be leased or sold off, or to be favoured in the selection process …firms that make payoffs may expect not only to win the contract or the privatisation auction, but also to obtain inefficient subsidies, monopoly benefits, and regulatory laxness in the future'. Susan Rose-Ackerman, *The Political Economy of Corruption: Causes and Consequences, World Bank Public Policy for the Private Sector Note No. 74*. (Washington DC: The World Bank, 1996) In Hall, *Water in Public Hands,* p.15.

[163] *Le Monde*, 10 Dec 1998. In Hall, *Water in Public Hands*, p.15.

contracts in the United Kingdom and in South Australia (the latter involving a joint venture with Thames Water).[164] In Lesotho, subsidiaries of a dozen multinationals are being prosecuted for paying bribes to obtain contracts in the Lesotho Highlands project, a huge water supply scheme.[165]

In many cases, private management has not delivered a better service than the previous public provider. There are many examples of water quality and service deteriorating once private companies take over;[166] Hall's analysis shows that public sector water undertakings are often both more efficient and more effective than their private counterparts.[167] A report on the Buenos Aires water concession concludes that Buenos Aires has done little that a rejuvenated public sector provider could not have done, and has in fact exacerbated some of the worst socio-economic and environmental problems of the city.[168]

Finally, these contracts are typically difficult to terminate, due to their long-term nature (usually 20-30 years), and the legal constraints and administrative procedures involved. This is so even where performance is unsatisfactory. For example, in Tucuman (Argentina), Szeged (Hungary) and Cochabamba (Bolivia), the companies involved have pursued legal claims for compensation which could make ending these contracts impossibly expensive. In developed countries the situation is similar. In Valencia, Spain, the local council tried to retender the water concession which was expiring after 99 years with the same company, a SAUR subsidiary. The company threatened to sue for damages if any competitor was allowed to take over the system. In Grenoble, France, even when a Suez-Lyonnaise executive had been convicted of paying a bribe to get the water concession, it still took 5 years of intensive

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[164] CAFCA. *April 1999 Decisions.* Online. http://canterbury.cyberplace.co.nz/community/CAFCA/cafca99/Apr99.html Accessed 25/08/02.

[165] *Business Day* (South Africa), 29 July 1999, in Hall, *Water in Public Hands*, p.15.

[166] For example in Buenos Aires, Argentina. See Tagliabue, 2002. In West Yorkshire, the public water supply system failed within five years of the privatisation of the water and sewerage industry in 1989. Supplies were only maintained by means of a mass road tankering operation. Schofield and Shaoul, *Regulating the Water Industry.* The experience in Tucuman, Argentina, is another prominent example, involving Vivendi. This case will be discussed further below.

[167] See Hall, *Water in Public Hands*, ch 3. In the United Kingdom, water privatisation, effected in 1989 by the Thatcher government, has 'produced little or no improvement in services, but huge increases in directors' fees, options and perks, financed partly by mass sackings of staff'. Campbell, "Troubled Waters".

[168] Loftus and McDonald, *Lessons from Argentina.*

campaigning before the council finally replaced the company with a municipal service.[169]

In the New Zealand context, issues concerning the Treaty of Waitangi may also arise. The Treaty commitments apply to the Crown, and not generally to private parties. There is the potential for those commitments to conflict with the Crown's obligations under GATS. One example may be a potential conflict concerning the Crown's duty to actively protect Maori in the use of their resources, where the source of the objection by Maori is the use of water resources by a transnational.

Environmental Exceptions

Of further concern are environmental issues. Water management is a complex task, and involves 'balancing the demands of domestic, industrial and environmental water use, while maintaining adequate access' to the population.[170] Profit for water corporations depends largely on increased consumption of water, and thus issues of water conservation will inevitably take a backseat. It is conceivable then, that environmental reasons lead the government to want to regulate a privatised water supply. Such a situation could arise, for example, where water sources were being expended at an unsustainable rate, and high levels of water consumption needed to be curbed. Because of the profit/consumption link for private water companies, it is unlikely that these companies would discourage unsustainable consumption levels. As such, regulation may be needed to limit the amount of water being supplied.

Where such a regulation breached either the general or specific obligations of New Zealand under GATS, it may nevertheless be permitted under Article XIV(b). This provides that as long as the regulation is not applied 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination…or a disguised restriction on trade in services', GATS does not prevent measures which are

> (b) necessary to protect human, animal or plant life or health.

The provision mimics the environmental exception found in Article XX(b) of GATT.

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[169] Hall, *Water in Public Hands,* p.11.
[170] Sholto Macpherson and Melita Grant, *Money from Water: The perils of privatisation.* (AID/WATCH, 2002) Online. http://www.watermagazine.com/jc/melita2.doc Accessed 26/08/02.

However, that agreement also contains a more general environmental exception, which permits measures:

> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

The reason for omitting this wider general exemption from GATS is unclear.[171] The matter is dealt with briefly in a WTO Ministerial Decision in 1994, which asserts that:

> since measures necessary to protect the environment *typically* have as their objective the protection of human, animal or plant life or health, it is not clear that there is a need to provide for more than is contained in paragraph (b) of Article XIV.[172] (Emphasis mine)

The fallibility of this argument is perhaps recognised by the WTO, as it notes that environmental measures will only 'typically' be included under paragraph (b). Where the measure concerns the conservation of a natural resource, such as water, it is not obvious that the above reasoning would apply. In such a case, GATS would leave no room for the protection of the resource. Aside from the broader subject matter covered by paragraph (g), the different drafting of the two paragraphs implies a more narrow application for paragraph (b). Thus, a measure must be 'necessary' to protect human, animal or plant life or health, while a measure need only 'relate to' the conservation of natural resources.

The interpretation of paragraph (b) in GATT cases has meant that any potential room for environmental protection afforded by the exemption in GATS has been significantly limited. The WTO has constructed the word 'necessary' in XX(b) of GATT very restrictively. Rather than the measure needing to be necessary to

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[171] Macmillan suggests that: 'Perhaps it is something to do with the fact that GATS is a bottom-up agreement, so it was thought that members could adjust their level of commitments to fit in with other national policy objectives without having to rely heavily on the general exceptions. Of course, if this reasoning was accurate the there would be no need for general exceptions at all. Presumably, however, the general exceptions exist to allow governments to pass measures that have become necessary or desirable only after specific commitments have been undertaken'. Macmillan, *WTO and the Environment*, p.208.

[172] *Decision on Trade in Services and the Environment*, Adopted by the Uruguay Round Trade Negotiations Committee, Geneva, 15 December 1994.

achieve the environmental goal, various external requirements have been read into the word. These include that the measure must be the least GATT-inconsistent measure reasonably available, so that multilateral solutions must be exhausted before unilateral action can be taken;[173] and that a measure is not 'necessary' if it depends on other countries changing their environmental policies in order to be effective.[174] Assuming a water conservation measure meets this onerous necessity requirement, it still must fulfil the 'chapeau' contained in the preamble to Article XX, which is mirrored in Article XIV of GATS. This states that a measure must not be applied in such a way that would constitute 'arbitrary or unjustifiable discrimination', or a 'disguised restriction on trade'.[175]

While Article XIV(b) has not yet arisen as an issue under GATS, the likelihood of this occurring increase as more commitments are made. It is unclear, in any case, whether this provision would be of any use to New Zealand, should it need to defend a water conservation measure which otherwise breached its GATS obligations.[176] At this point the omission of a conservation exemption, such as that of Article XX(g) of GATT, would become most apparent.[177] Shrybman sees this omission as a 'deliberate action to subsume conservation goals to those of trade liberalization'.[178] Whether such motives can be attributed to the GATS negotiators or not, it is clear that any attempt to justify a measure which breaches GATS on environmental grounds will be an onerous task indeed.

Electricity and Telecommunications

New Zealand's experiments with privatisation in other services previously provided by the government suggest that if water continues down the privatisation path, some regulation is likely to be needed. The privatisation process in New Zealand

[173] *United States – Restrictions on Imports of Tuna*, Panel Report: August 16, 1991(not adopted). The case referred to the interpretation of 'necessary' in *Thailand – Restrictions on Importations of and Internal Taxes on Cigarettes*, Panel Report: 37S/200, DS10/R, adopted November 7, 1990, which held that 'necessary' implied that no alternative measures existed.
[174] *United States – Restrictions on Imports of Tuna*, Panel Report: DS29/R, June 16, 1994 (not adopted).
[175] There is also an assumption that multilateral solutions will be preferred. *United States -- Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report: WT/DS58/RW/AB/R, adopted 15 June 2001.
[176] Were New Zealand to commit water supply, a conservation measure of this kind would, for example, breach Article XVI.2(b), which prohibits limitations on the value of service transactions.
[177] While this broader conservation exception in GATT has yet to be successfully invoked, the WTO has accorded it at least theoretical support. Shrybman, *Thirst for Control,* p.51.
[178] Shrybman, *Thirst for Control*, p.51.

has largely been carried out by tender, rather than by share floats. This has made the involvement of transnational corporations much more likely, and in fact this situation has resulted. Two sectors where such a process has occurred are electricity and telecommunications. In both these cases, the need for at least some regulation of the sectors has been recognised after privatisation has occurred.

The process of privatising electricity supply began in 1986, when the state electricity department was corporatised. Transmission and generation functions were split, and the state-owned generator was divided into competing companies, Contact and ECNZ, with ECNZ later being split again into three.[179] By 1993 the elected non-profit power boards had been converted into profit-driven supply companies. A 'rash of hostile takeover bids and friendly mergers followed',[180] in which the American based companies TransAlta and Utilicorp played a significant role. By 1998 the government moved to regulate this situation, because of concerns that the electricity companies were abusing their monopoly over the power lines and supply contracts in order to exclude any new competitors. The Electricity Reform Act 1998 prohibited any company from owning both electricity line businesses and retail or generation businesses.[181] Section 17 thus provided:

> **17. Cross-ownership prohibition** – (1) No person involved in an electricity lines business may be involved in an electricity supply business.
> (2) No person involved in an electricity supply business may be involved in an electricity line business.

The need for regulation was again felt in 1999. Despite the proclaimed cost savings that these changes were to have brought, electricity charges to consumers in fact rose. Energy Minister Max Bradford blamed the line companies for abusing their monopoly position and not passing on savings from the transfer of metering costs to

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[179] Contact was publicly floated in 1999, and although there was huge local interest in the shares, the government opted to give a 40 per cent share to the American-based Edison Mission Energy. Contact ended up being 62 per cent foreign-owned, with 18 per cent being reserved for offshore institutions. 14.4 per cent went to Australian/New Zealand institutions, with only 27.6 per cent left for the New Zealand public.

[180] Kelsey, *Reclaiming the Future*, p.183.

[181] The structure of the New Zealand electricity industry is quite complex, with the national grid operated by the state-owned Transpower. Transpower's customers are the retail and distribution (line) companies. For an overview, see Transpower. *What is Transpower?* Online. www.transpower.co.nz Accessed 03/09/02.

the retail companies, and claimed that as competition among the supply companies would eventually force prices down, only the line businesses needed regulation. Thus, in May 1999 Bradford introduced the Commerce (Controlled Goods or Services) Amendment Bill 1999, which included provisions relating specifically to electricity line businesses.[182] Thus clause 54A provided:

> 54A. **Purpose** – The purpose of sections 54B to 54M is to subject, as far as practicable, electricity line businesses to similar pressures and incentives to improve efficiency and services, and to set efficient prices, as those applicable in competitive markets.

Clause 54B declared the activities of line businesses to be 'controlled' under the Act, unless the Commission granted an exemption on the basis that such a cessation of control would be efficient, and that control was no longer desirable in the interests of consumers or users.[183] Because of this 'controlled status', the line companies would not be permitted to supply electricity unless in accordance with an 'authorisation', issued under clause 70.[184] The Commerce Commission, by clause 54D, was required to make such authorisations in respect of the line companies.[185] Clause 70 dealt with the actual controls that could be imposed by the Commerce Commission:

> 70. **Authorisations may be made in respect of prices, revenues, or quality standards, or quality standards** – (1) The Commission may authorise, as it considers appropriate, the prices or revenues, and the quality standards, the apply in respect of the supply of controlled goods or services.
>
> (2) An authorisation may address prices or revenues by means of all or any of the following:
>
> (a) Maximum, actual, average, or minimum prices for those controlled goods or services:

[182] Commerce (Controlled Goods or Services) Amendment Bill 1999, no 295-2.
[183] Clause 54E.
[184] Clause 55.
[185] The authorisation was to be made by 31 December 1999 for the large line companies, 31 March 2000 for smaller ones, and by 30 June 2000 for Transpower and its subsidiaries.

(b) Methods or formulae by reference to which, or by calculation from which, such prices may be ascertained by the Commission or the supplier of the controlled goods or services:

(c) Maximum, actual, average, or minimum revenues that may be derived from those controlled goods or services:

(d) Methods or formulae by reference to which, or by calculation from which, such revenues may be ascertained by the Commission or the supplier of the controlled goods or services:

(e) Any other method that the Commission considers appropriate.

(3) An authorisation may also impose quality standards applying to those controlled goods or services.

Thus the Commission would have been required to impose direct price controls on the line companies, and would have been empowered to impose 'monetary conditions for the benefit of users, consumers, or suppliers' if the terms of the authorisation were breached. These penalties included 'the payment to users, customers, consumers, or suppliers of refunds, specified amounts, compensation or the making of deductions from the prices charged in future to users, customers, or consumers'.[186] These conditions on the line companies could have been backdated to 1 April 1999, as if the authorisation had had effect during that period.[187]

The minority National government could not push the Bill through Parliament, with Labour calling for regulation of retail company pricing as well, and Act being against any regulation at all. Although this Bill never became law, it is indicative of the possible kinds of controls the government might want to place on the provision of water, controls which would be barred by GATS. The price ceiling envisaged by the Bill for example, would be prohibited under the Article XVI Market Access obligations.

Telecommunications is another instructive example. Following the break up of the Post Office, Telecom New Zealand was formed as a state-owned enterprise in

[186] Clause 70C.
[187] Clause 70D.

1986, and was sold in 1990 to Bell Atlantic and Ameritech for $4.25 billion.[188] Despite the huge profits reaped from Telecom, thousands of staff were laid off, and 1995 saw a spate of telephone exchange problems and slipping service standards. Furthermore, Telecom was able to maintain an effective monopoly over local services. Long-running legal battles, principally with Clear Communications ensued, centred around alleged abuses of Telecom's dominant market position.[189]

These disputes led to a major review of New Zealand's competition laws, with the final paper recommending a more competition-focused test for acquisitions, in line with other OECD countries.[190] This involved 'strengthening the control of business acquisitions by replacing the existing "dominance" test with the better targetted and stronger "substantially lessening competition" test',[191] so that mergers and acquisitions would be only permissible under section 47 of the Commerce Act 1986 if the effect of such an event would not substantially lessen competition. Although this amendment was minimalist, resting on competition rather than direct regulation of prices and behaviour, again the need for some regulation of a privatised sector was recognised.

These two sectors then, provide examples of previously state-run services facing problems once privatised, and consequently requiring at least some governmental intervention. In both these sectors, transnational corporation involvement has been substantial. Regardless of whether these problems were caused by the fact of offshore ownership, the fact remains that regulation of some kind has been deemed necessary. However, once foreign companies are involved, GATS may prevent such regulation.[192] Thus, if New Zealand makes a specific commitment on water, and continues down the privatisation route, the involvement of transnational corporations may render regulation impossible.

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[188] Apart from these two American companies, New Zealand companies Fay Richwhite and Freightways took 5 percent each.

[189] Allegations by Clear and others focussed on the portability of telephone numbers when customers changed telephone companies, consolidated billing of accounts for customers supplied by other companies, and aggressive price-matching by Telecom. The Commerce Commission, however, found that this was not an abuse of Telecom's market power. Kelsey, *Reclaiming the Future*, pp.181-182. 'The Clear/Telecom disputes over the use of the nationwide telephone cable system have led a lot of people to think that it might have been better for the government to have run the cable network, and sold line space to competing companies'. Email communication from Roger Toleman, 17/09/02.

[190] New Zealand Government, *Review of the Competition Thresholds in the Commerce Act 1986 and Related Issues: A Discussion Document*, April 1999.

[191] Ministry of Economic Development, *Backgrounder on the Commerce Act Reforms*. 5 April 2000. Online. http://www.med.govt.nz/buslt/bus_pol/comref/backgrounder.html Accessed 07/10/02.

Conclusion

This paper has attempted to highlight some of the issues involved in New Zealand's water supply, more specifically those raised by the interplay between privatisation and New Zealand's obligations under GATS. The broad objective was to consider how the binding provisions of that Agreement might restrict New Zealand's future policy and legislative options regarding water supply.

The first chapter, then, set out the current context of water supply in New Zealand, in particular focussing on the involvement of water transnationals in such supply. Such involvement forms part of the trend that is taking place in the global water services sector, towards private sector provision of water services, principally in 'public-private-partnerships' with the public sector. The concern expressed over this global trend of privatisation, as manifest in Papakura, led to an ineffective (deliberate or ignorant) governmental response.

By way of background, the next chapter explained the context in which New Zealand's GATS obligations exist. It therefore described the WTO, and gave an overview of the workings of GATS. The following chapter considered whether water services in New Zealand are prima facie covered by GATS. The combined effect of United Water's presence in Papakura and an incredibly restricted definition of 'governmental authority' led to the conclusion that, despite WTO assurances to the contrary, water services are most probably covered by the Agreement. This means that, were New Zealand to breach its obligations under GATS, the government could face potentially harsh penalties. The case of *Generale des Eaux v. Argentine Republic* showed that water transnationals will not hesitate to invoke international trade agreements to enforce domestic water supply contracts.

The following two chapters looked more specifically at the provisions of GATS, and how these might act as restraints on governmental measures. Chapter 4 dealt with the general obligations, which, assuming I am correct in my conclusion that GATS covers water supply in New Zealand, impose obligations on New Zealand at present. This chapter then looked at how the WTO has interpreted certain GATS provisions, concluding that these cases provide little guidance as to the ambiguous

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[192] It is noteworthy that this has even been recognised by a centre-right National government, in the case of electricity.

provisions of the Agreement. Perhaps the most important consequence of the application of GATS to water supply however, is the obligation to engage in negotiations for further liberalisation, which would occur through making specific commitments in various service sectors. Chapter 5 dealt with the hypothetical consequences of New Zealand making a specific GATS commitment in water supply. Clearly, the most onerous obligations apply in this context, and hence would prove the most restrictive on governmental options. The second part of the chapter looked at the possibility of New Zealand taking on these obligations.

After this consideration of the various constraints GATS could have on governmental action, the next chapter looked at some of the reasons why New Zealand might want to retain some public control over water supply. The potential problems arising from the privatisation of water were discussed. One such problem arose from environmental considerations; discussion followed on how measures motivated by environmental concerns have been dealt with by the WTO. Finally I looked to New Zealand, where the experiences of privatisation in other sectors suggested that government may well want to retain the ability to regulate water supply – an ability which GATS seeks to constrain.

By way of conclusion I will reflect on the current state of water supply, and argue that space still remains for governmental control over New Zealand's water supply.

The privatisation of water supply in Papakura could be seen as the beginning of an inevitable process in New Zealand of increasing transnational control over this precious resource. Indeed, since beginning this paper, United Water has also won a contract to manage the water supply of Ruapehu District Council. Finger and Allouche argue that transnational involvement in the water sector is an 'irreversible trend', and that rather than lamenting this fact, the focus should now turn to

> re-regulating the water sector, so that the worst effects of privatisation – namely, inequities between the rich and poor, between the urban and the peri-urban and rural areas, as well as the negative environmental consequences – can be stemmed. So far, perhaps with the exception of the United Kingdom's regulatory authorities, most governments, and above all the World Bank, have

been mainly interested in promoting private sector involvement without worrying much about how to re-regulate the dynamics they have unleashed.[193]

They go on to argue that changes must be made to the current dynamics in the water sector, and that these changes will inevitably involve private sector participation. The challenge, then, is to develop an institutional framework whose aim would be to regulate the global water sector with a view to sustainable management of water resources.

Kelsey takes a slightly different approach. While she does not advocate retention of the status quo as such, she does argue that much more debate needs to occur before the privatisation process runs to its conclusion, especially in light of New Zealand's international obligations. She argues that privatisation is not inevitable, and that the New Zealand government still has the ability to act. At this early stage of the privatisation process, the contracting out of these services can still be reconsidered - local authority trading enterprises and state-owned enterprises have shown that they can remain publicly owned and be highly profitable.[194] At present the government still has the power to regulate transnational investment; price regulation can still be enacted to curb potential abuses of water suppliers' monopoly position; and environmental regulation could prevent profit-driven unsustainable use of our water resources.[195]

Underlying both these approaches is a recognition of the dangers of unfettered private control over a resource as essential to life as water. In both cases, a need for regulation is admitted. In the current New Zealand context, such regulation is most likely to come from government.[196] The problem set out in this paper however, is that international trade agreements such as GATS potentially place onerous restrictions on the ability to perform such a role. Such restrictions may not be as problematic were it not for the binding nature of such international obligations. Agreements such as GATS bind both current and future governments. As Kelsey points out, a domestic law that attempted to entrench current positions for the future would 'face complex requirements for a two-thirds or three-quarters majority in Parliament and /or

[193] Finger and Allouche, *Water Privatisation*, p.211.
[194] Kelsey, *Reclaiming the Future,* p.377.
[195] Kelsey, *Reclaiming the Future,* pp.378-379.

referendum'.[197] Despite this binding nature, there is very little public, or even parliamentary involvement in the treaty-making process. This 'democratic deficit' in respect of GATS is compounded by the secrecy with which commitments are negotiated, leaving the public no chance to debate the merits of locking themselves in to a path of increasingly privatised and liberalised services.

However, even accepting that GATS currently applies to water supply in New Zealand, the option to retain public control remains. The most important way New Zealand can retain this ability is to refrain from making water supply the subject of a specific commitment under GATS. Equally important will be the retention of a regulatory role for government over water supply, especially vital if transnational involvement in New Zealand continues. There is no reason to accept the free trade rhetoric that 'there is no alternative'. Water does not have to be treated as an economic commodity, available only to those who can afford it. New Zealand's commitments to privatisation, and the consequences that GATS therefore has, remain limited. Water is an essential element to human life, which should be available to every person. Water can, and I believe should, be managed as a public trust, by those mandated to represent the public interest.

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[196] Finger and Allouche argue that an institutional framework for water must be built at a variety of levels, from local to global. In the absence of such a framework, arguably the most obvious source of regulation would come from government. Finger and Allouche, *Water Privatisation,* ch. 7.
[197] Kelsey, *Reclaiming the Future*, p.383.

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