



# Trading Away Our Water

**How Trade Agreements  
Promote Corporate  
Water Profiteering**

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*And What Citizens  
Can Do to Stop the  
Corporate Attack*

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# What's Going On with Water and Why Should We Care?

Do you think twice when you turn on your faucet? Where does the water come from? Who laid the pipes? Who owns your water? Is the water safe to drink?

If you draw water from a well, do you know its source? Do you know whether other property owners have plans to draw on this underground water for commercial sales or how these withdrawals are regulated? Are permits required?

Even if you can answer these questions today, do you know that international trade agreements, negotiated without any public participation, could determine how your water is provided, how much may be available, and what standards are permissible to regulate the quality of your water in the future?

Do you know that these trade agreements take away basic democratic rights?

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*Don't leave your right to safe, sufficient, affordable drinking water up to corporate water privatizers who are working closely with their governments to write trade and investment agreements that promote their ability to profit from provision of water.*

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Water must be safeguarded for all peoples and for all life on this planet. This will not happen when global rules about water use which affect us all are negotiated behind closed doors without any accountability to public officials and citizens.

This guide gives you the basic facts relating to water and trade. Other resources listed at the end provide more background information about these agreements and about the global water crisis.

## Global Water Crisis

- 70% of the world is covered by water but less than 1% of the earth's water is available for human consumption. The rest is salt water (97%), glaciers, polar ice and inaccessible groundwater.
- This precious sliver of the earth's surface, along with the waters beneath the surface, is being polluted by industry, the military and agribusiness and by lack of adequate sanitation made worse by migration to cities.

- Agriculture currently uses "a global average of 70% of all water withdrawals from rivers, lakes and aquifers" but much of this water never reaches the crops because of evaporation, leakage during transport, and growth of weeds.<sup>1</sup>
- As billions of dollars are poured into military conquest and as the IMF and World Bank debt repayment policies require government programs in developing countries to be slashed, fewer and fewer public funds are available to provide people with safe drinking water and sewage treatment.
- In 2001, 2 million people, mostly children under 5, died from infectious diarrhea due to unsafe drinking water, according to the United Nations.<sup>2</sup>

## Blue Gold

With water in short supply and demand very high, water has a market value. Corporations and investors now see water as "Blue Gold" which can be mined for great profits.

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*"Water is the last infrastructure frontier for private investors."*

– John Bastin of the European Bank of Reconstruction and Development

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The World Bank places the value of the world water market at close to \$800 billion. If this market develops, corporations will sell clean water to those who can afford it.

There are also profits to be made from providing water and sewer services. The World Bank projects the private water management business could reach \$1 trillion by 2021.

## Water as a Human Right

In 2002, UN Committee on Economic, Social and Cultural Rights declared:

*"The human right to drinking water is fundamental to life and health. Sufficient and safe drinking water is a precondition for the realization of human rights."*

Unfortunately, this is not what the trade and investment agreements promote. Quite the opposite!

## Preparing to Take Action

As you read this guide, you will learn about the many ways in which corporations can use trade and investment agreements to help them profit from “Blue Gold.” You will also learn what transnational corporations (TNCs) like Vivendi and Suez and trade associations like the Coalition of Service Industries, the Business Roundtable and the International Chamber of Commerce want out of new trade negotiations.

With the information in this guide, you will have the basic facts you need to take action, alert local officials, and mobilize others before it is too late. Specific suggestions for action are included in the GATS, FTAA, WTO and final sections of the report.

Be Forewarned: The information which follows is very detailed. Remember that the corporations know these provisions like the back of their hand. This report should help put us all on an equal footing so we can mobilize to keep water in public hands.

# Trade Agreements: Corporate Rights Not Human Rights

Corporations consider water to be a commodity controlled by market forces from which they can profit rather than as a human right to safe, sufficient, affordable drinking water which must be available to all people.

## Two-Pronged Attack

These corporations are mounting a two-pronged attack. One is to export bulk and bottled water and the other is to take over municipal water and sewer services either directly or through long-term contracts. Provisions in international trade agreements, both existing and under negotiation, will help corporations open up and profit from these markets.

**Water as a commodity.** When water is sold in bulk or in bottles, it is gets classified as a commodity. Trade laws can hinder the ability of governments to regulate the withdrawal of water from rivers and aquifers once such waters are transported for sale across international borders.

**Water as a service.** The collection, treatment, and distribution of water and the treatment and disposal of sewage are services. Long-distance transportation of water necessary for trade in bulk water is also a service. Trade rules can affect the ability of governments, even local governments, to regulate the provision of all such services.

## Every Round Gets Higher, Higher

This two-pronged attack is carried out by corporations and their friends in government. They are making sure that each trade agreement which

gets negotiated gives corporations more rights to our water than the one before.

This guide will take you through each major agreement and show you how it takes away more of your rights and give corporations more rights. Corporations and their trade associations follow every word that gets put into these agreements. Often they write the language. We, too, must take the time to understand the nitty-gritty of how they get their way if we want to stop them from getting more rights to profit from water and water services.

At first trade agreements were just about reducing tariffs for goods. This is the General Agreement on Tariffs and Trade or GATT. But when NAFTA was negotiated and approved in 1993, it went far beyond goods to cover services and investments and to give corporations vast new power. This set a precedent which is being followed in the current negotiations on the Central America Free Trade Agreement (CAFTA) and the Free Trade Agreement of the Americas (FTAA) for almost the whole Western Hemisphere.

Meanwhile, the very next year after NAFTA was approved, an agreement on services was negotiated and adopted as part of the newly-formed World Trade Organization (WTO). The General Agreement on Trade in Services (GATS) has provisions that help corporations profit from the privatization of water services and that make it more difficult for governments to regulate these essential services.

Here, then, is how it all works — from **GATT** to **NAFTA** to **GATS** to the **FTAA** and **CAFTA** and finally on to **WTO investment and competition**.

# GATT: Can't Turn Off the Tap

The **General Agreement on Tariffs and Trade** (GATT) originated in 1947 and deals with trade in goods. The original purpose was to encourage international commerce by encouraging countries to lower their tariffs on imported goods. Industrialized countries had used tariffs very effectively to develop and protect domestic production. The new emphasis on tariff reduction meant that as developing countries created domestic industries, they were pressured not to use tariff protections.

GATT, which once had very weak enforcement mechanisms, is now part of the World Trade Organization (WTO) created in 1994. The WTO uses secret "dispute resolution panels" and appeal panels backed up by economic trade sanctions to enforce the trade rules. Such rulings can be overturned only by consensus of all member countries. This has never happened!

When the WTO was established, the GATT was updated and 27 new trade agreements were made part of the WTO. As of April 2003, the WTO had grown to include 146 member countries, with more awaiting entry.

## Is Water Covered by GATT?

Even though GATT refers to products which seems to imply manufactured goods, water is clearly covered by GATT. This is because water is listed as a commodity in what is called the "Harmonized Tariff Schedule" which says under tariff designation 2201.90.0000:

*"Other waters, including natural or artificial mineral waters or aerated waters, not containing added sugar or other sweetening matter nor flavored; ice and snow."*

It almost reads like just bottled water is being referred to until you come to "ice and snow." Clearly this is a very broad definition. Seawater is not mentioned because it is listed separately.<sup>3</sup>

## GATT and Bulk Water Exports: Limiting Government Authority

### Quantitative Restrictions.

No GATT member country can prohibit or limit the export or import of any product between member countries, except through duties or other charges. See GATT Article XI, "General Elimination of Quantitative Restrictions." This means, according

to Peter H. Gleick in the New Economy of Water:

*"Once bulk water transfers are initiated by domestic industry, Article XI plays a significant role in constraining WTO member governments' ability to establish policies, programs, or legislation that regulate, curtail, or eliminate such transfers."*<sup>4</sup>

This inability of the government to limit bulk water transfers may apply to exports from any state or province once one location has begun commercial exports or it may just apply to the quantity related to a specific export. GATT is unclear.

Further, while GATT refers to the obligations of "contracting parties" which are countries and does not mention state or local government, if a state or municipality were to limit the export of water in violation of the quantitative restrictions, such a limitation could well be found to be GATT illegal.

GATT does provide two general exceptions to this ban on restricting exports.

1. *Unless... a country can show that restrictions are "necessary to protect human, animal or plant life or health."* — GATT Article XX(b)

Unfortunately, this exception has been rejected by secret WTO trade dispute panels when countries have used it in an effort to protect endangered dolphins and turtles. How cases relating to bulk water export will be judged has not yet been tested. In California, where there have been requests for permits to export bulk water from rivers along the coast, there are federal and state laws requiring sufficient in-stream flow to protect fish and wildlife. Will laws like this be upheld by a WTO tribunal?

2. *Or Unless...such measures relate "to the conservation of exhaustible natural resources" and "are made effective in conjunction with restrictions on domestic production and consumption."*

— GATT Article XX (g)

Unfortunately most fresh water sources are categorized as renewable. For water such as ancient "fossil" water which is not renewed, there would also have to be restrictions on domestic use. This would be politically very difficult.

## **GATT: Can't Turn Off the Tap** continued

International mining companies in Chile, including Phelps Dodge based in the U.S., are placing great pressure on Bolivia to provide the Chilean mines with underground fossil water from Bolivia's dry high desert plateau, home to many indigenous peoples. The mining companies are pushing for a bilateral agreement on exporting water. The "catch 22" for activists who might try to use the GATT XX(g) exemption is that reduction in the already very small use of this water by indigenous peoples would also be required. This is hardly fair.

Nearer to home, the Great Lakes Commission (U.S. and Canada), hoping to qualify for this exemption, has classified the Great Lakes water as nonrenewable. If the WTO agrees, they would still have to meet the requirement of imposing domestic restrictions on consumption required by GATT.

Proposals for bulk water exports are just beginning to be received by state and local governments. If such proposals appear profitable and begin to increase, the pressure on trade tribunals to decide

against GATT exemptions will also increase threatening the environmental protection of shorelines, estuaries, rivers and aquifers.

### **National Treatment: Is it fair?**

National treatment (GATT Article III) means countries have to treat imported goods at least as favorably as domestic goods. So if water is being imported, then the laws and regulations governing its "sale, purchase, transportation, distribution, or use" must be at least as favorable as those applying to domestic producers.

It is easy to see how national treatment of water as a good encourages the export of water in bulk or bottles. While the bulk water market has not yet taken off, the sale of bottled water is increasing rapidly and allows those who can afford the high price to opt out of advocating for safe municipal drinking water. The fact that bottled water is self-regulated by the industry does not inspire confidence, but that is another matter.

## **NAFTA: Giving Corporations More Power to Control Our Water**

Negotiations on the **North American Free Trade Agreement** (NAFTA) between Canada, U.S. and Mexico were completed in 1993, more than a year before the WTO came into being. This regional agreement greatly expands GATT by including services and investment, in addition to goods. Corporations are given significantly more power than they had under GATT and even more than they would be given the next year under the WTO. This has significant repercussions for water exports and water services.

As a result, NAFTA has created great anxiety among citizens in the U.S., Mexico and Canada about its interference with the ability of governments to regulate bulk water exports and water pollutants. NAFTA's complicated rules governing exports could constitute an immediate threat to protecting water supplies, while its investment power tools could make it difficult for nations and states to protect their water quality.

But first, an essential question.

### **Does NAFTA cover water?**

This question has been much debated. A joint declaration signed in 1993 by the U.S., Mexico and Canada states:

*"Unless water, in any form, has entered into commerce and becomes a good or product, it is not covered by the provisions of any trade agreement, including the NAFTA. And nothing in the NAFTA would obligate any NAFTA party to either exploit its water for commercial use, or to begin exporting water in any form. Water in its natural state, in lakes, rivers, reservoirs, aquifers, water basins and the like is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement."*<sup>5</sup>

Unfortunately, neither NAFTA nor any agreement between three or more countries can take precedence over the GATT. Nor can a joint declaration outside of the NAFTA text create legal obligations on the countries to exclude water from NAFTA.

## NAFTA: Giving Corporations More Power to Control Our Water continued

Further, the statement is not internally consistent since the first sentence says that once water has entered into commerce it will be covered by trade agreements including NAFTA. Then it asserts that water is not a good or product and is not traded. This categorical statement ignores proposals and existing plans to sell water from aquifers and coastal streams in the U.S. to water hungry cities or the selling of bottled water. The statement was also contradicted at the time by U.S. Trade Representative Mickey Kantor who wrote in 1993

*“..when water is traded as a good, all provisions of the agreements governing trade in goods apply.”<sup>6</sup>*

The bottom line is that when commercial interests intent on selling bulk water become powerful enough, this feel-good language is unlikely to hold much water.

### Proportionality Rule: Even Harder to Turn Off the Tap

Once commercial export of water has started between any of the three NAFTA countries, it is still more difficult to turn off the tap than under GATT even if there is a critical need for conserving water in times of drought.

Under NAFTA, commercial water exports can be restricted only under very limited conditions. First, in compliance with GATT, any restriction must either be

1) *“temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party”* – GATT Article XI-2(a)

OR

2) *“relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;”* – GATT XX (g)

Then NAFTA uses a “proportionality rule” to limit the amount of water which can be restricted under these provisions. So if there is a critical shortage of water in a NAFTA country, then the exports can be

temporarily restricted, as long as the exports are reduced in the same proportion to total supply available over the previous three years.

To take a more specific example, say the U.S. was having a severe drought for the past two years, but had lots of rain the year before. The water supply over the three years must be averaged. This could make the drought seem less severe than it really was and prevent the U.S. from limiting exports based on the past year’s drought conditions.

The specific rule says that one of these restrictions can be applied as long as:

*“the restriction does not reduce the proportion of the total export shipments of the specific good made available to that other Party relative to the total supply of that good of the Party maintaining the restriction as compared to the proportion prevailing in the most recent 36 month period for which data are available prior to the imposition of the measure, or in such other representative period on which the Parties may agree;”*

NAFTA Article 315-1 (a)

Whew, that’s trade language for you, but if anyone challenges you, you can quote it word for word.

Since there has been much confusion around this rule, here it is visually where “x” is the amount of water exports that can be reduced.

### Proportionality Rule

$$\frac{x}{\text{total supply of water in current year}} = \frac{\text{bulk water exports for previous 36 months}}{\text{total water supply for previous 36 months}}$$

There is more. If a NAFTA country wants to restrict the export of bulk water beyond a critical shortage, the bulk water must be determined to be exhaustible, e.g., fossil water, as opposed to renewable which is how most surface and groundwater are categorized. There still must be restrictions on domestic consumption based on the proportionality rule. It makes no ecological sense to export nonrenewable water resources in the first

place, and if they are exported, the additional NAFTA proportionality requirement would create further ecological havoc. This could be a serious problem in Latin American countries such as Bolivia if the NAFTA proportionality rule is extended to the Free Trade Area of the Americas (FTAA).

The final constraint on domestic efforts to conserve water resources is that NAFTA provisions on goods apply to a state or province as well as to a country, creating a further intrusion on democratic governance.

### NAFTA's Power Tools: Guaranteeing Corporate Profits for Investors

NAFTA goes far beyond GATT by including trade rules to protect investors and their investments. (NAFTA Chapter 11). NAFTA also introduces “**non-tariff barriers**” to trade which refer to all the rules and regulations by which governments protect the environment, workers, human rights. Now the goal is not just to reduce tariffs for importing goods, but to get rid of those pesky “non-tariff barriers” which interfere with trade.

**Investor-to-State: Allowing Corporations to Sue Countries.** The first NAFTA power tool gives corporations from one NAFTA country the right to sue other NAFTA countries directly to protect their investments in that country. Under the WTO, they have to depend on their country to represent them.

So under NAFTA, if a corporation believes their “right” to a secure profit or to engage in “fair” competition has been violated by local, state or federal regulations, they can go directly to a secret NAFTA dispute panel and demand compensation.

**Tantamount To Expropriation.** The second NAFTA power tool allows corporations to sue for compensation when a wide variety of national, state or local regulations threaten their profits. This greatly expands their right to be compensated for the taking of property granted by the U.S. Constitution.

The U.S. Constitution requires that when private property is “taken” or “expropriated” by the government for public use, the private owner must be fairly compensated. NAFTA expands “takings” to include any “measure tantamount to nationalization or expropriation,” requiring that compensation be paid equal to the full market value of the investment.<sup>7</sup>

“Tantamount” is not defined in NAFTA, so it remains unclear how broadly the concept can be applied to

protect corporate/investor rights. Such definitions will only come through the NAFTA dispute panel rulings. In the Methanex case described below, the corporations has even claimed that this market value includes their lost future profits due to a government regulation.

Even though the NAFTA investment chapter specifically covers states and provinces, sub-federal governments and regulatory agencies cannot respond directly if corporations challenge their regulations. Instead they must rely on the national government to represent them, which may or may not have their same interests.

While there is an exemption if regulations are “for a public purpose,” which could cover the environment or public health, this principle was severely eroded by the decision by a NAFTA dispute panel in a case brought by the U.S.-based Metalclad corporation against Mexico.

Metalclad wanted to expand and reopen its waste disposal operations in the Mexican state of Luis Potosi despite local opposition. When a geological study showed that the local water supply would be contaminated, the town refused to provide a permit. Metalclad, using these power tools, prepared to bring a case before a NAFTA dispute panel. The governor of Luis Potosi responded by designating the area as an ecological preserve, preventing Metalclad from reopening its facility. Metalclad, a U.S. corporation, then filed for compensation and won a \$16.7 million settlement which must be paid by Mexico.

Using these same power tools, Methanex, a Canadian corporation, sued the United States for \$970 million over California’s executive order to phase out the toxic gasoline additive MTBE which was polluting drinking water. This case is not yet resolved.

### National Treatment

Investor rights are further enhanced by the very broad definition of National Treatment in the investment chapter. Investors and their investments must be treated at least as favorably as domestic investors “with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments” within the country or within the state/province. — NAFTA Article 1102

So if T. Boone Pickens, the junk bond dealer living on a ranch in Texas over the Ogallala aquifer, or Ric Davidge, the James Watt protégé interested in northern California rivers, is granted permission by



## NAFTA: Giving Corporations More Power to Control Our Water continued

the state or local jurisdiction to withdraw and sell bulk water, then any foreign corporation or investor from Canada or Mexico must be treated “at least as favorably.” This is whether or not the foreign corporation sells the water outside of the country where it is obtained.

To date Davidge has failed to receive approval to withdraw water from the northern California coast where environmental activists have raised strong objections, but Pickens has fared better in Texas which lacks state laws regulating its groundwater. Pickens has formed a consortium of ranchers, Mesa Water Inc., which has received permission from the Panhandle Groundwater Conservation District to pump water from the Ogallala. Foreign investors could buy up land over the aquifer and demand more favorable treatment than given to Mesa Water or other domestic landholders. If the government were to give these foreign land owners more favorable terms for withdrawing and selling the water, this would NOT be a violation of NAFTA.

While this rule just applies to the U.S., Mexico and Canada, it is an indicator of what could be included in the FTAA for the Western Hemisphere or even more broadly in all the WTO countries if investment negotiations are started as discussed below.

### Environmental Exception

While the investment chapter does not have a general exception for the environment, it does refer to environmental measures in Section 1114 which says environmental measures are allowed if they are consistent with other provisions in Chapter 11. Further such regulations cannot be relaxed to encourage investment. The only remedy for such a violation is a

consultation between the parties. Taken together this is very weak protection for the environment.

### NAFTA Expands Trade Agreements To Cover Services

Not as much attention has been paid to the NAFTA chapter on services because the very next year, in late 1994, the General Agreement on Trade in Services (GATS) was finalized with very strong provisions. These are discussed in the next section.

NAFTA covers all services, including public services provided by the government such as water and sewer services. However, NAFTA does not cover local government regulations. The services chapter is silent on exception to protect the environment.

Perhaps most important, investments in water services are included under the investment chapter to be sure they will benefit from the NAFTA investment power tools for corporations.

### NAFTA: Looking Ahead

NAFTA's power tools will become an even greater threat to the U.S. if they become part of a new WTO agreement on investment since the major transnational water corporations aimed at the U.S. market are based in Europe. Meanwhile, U.S.-based Bechtel, which has been entering the Latin American market, will clearly benefit if these rules become part of the FTAA.

But before turning to the FTAA and WTO new issues, we must understand how the WTO agreement on services, GATS, has increased the power of corporate water privatizers.

## GATS: Serving the Water Privatizers

### What Is GATS?

The **General Agreement on Trade in Services (GATS)**. At the behest of American Express and other U.S.-based corporations, the U.S. lobbied successfully to have GATS included as one of the new WTO agreements. GATS is designed to capture the rapidly expanding service sector and to cover “non-tariff barriers” to trade which interfere with corporate profits.

The stated goal of GATS is “**progressive liberalization of trade in services**” which means removing more and more “non-tariff barriers” to

such trade. This road can lead to the deregulation of services at national, state and community levels and to privatization of government-provided services.

Other countries resisted this effort at privatization and deregulation of services. They would only agree to GATS if they could choose which domestic services would be covered by key rules. The result is that “market access” and “national treatment” rules explained below only apply to those services which countries put on their “**schedule of commitments.**” This is called the “bottom up” approach. Still, GATS is a one-way street: once commitments are made, countries cannot realistically turn back.

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*“Without the enormous pressure generated by the American financial services sector, particularly companies like American Express and Citicorp, there would have been no services agreement.”*

– David Hartridge, Director of Services Division, WTO

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GATS covers not just water and sewer services, but also a wide variety of services relating to water including transportation, distribution, marketing, advertising, wholesale and retail sales.

GATS rules apply to government at every level: local, state/provincial and national. On top of this, GATS applies not just to regulations relating directly to services, but to all **“measures by Members affecting trade in services.”**

So what is a “measure”? The GATS definition includes laws, regulations, rules, procedures, administrative actions or any other form of administrative action.

The inclusion of “affecting” means that any measures which might place conditions on how a corporation provides a service, such as environmental and public health regulations, comes under the GATS regime. This word has significant implications for helping corporations pry open municipal water/sewer services, for local democratic authority over such systems and even for whether GATS covers the supply of water needed for water services.

### **Government Services Exempted — Not Really**

The WTO will tell you not to worry about public services, because they are not covered by GATS. In fact you have every reason to worry, because of the narrow and ambiguous way government services are defined in GATS.

GATS exempts services “supplied in the exercise of government authority” and then proceeds to define such services so narrowly as to be almost meaningless. Government services are covered only if they are supplied neither “on a commercial basis” nor “in competition with one or more service suppliers.” — GATS Article I.3 (b)&(c)

If a municipal utility charges its customers, it could be argued that this is on a commercial basis. If a city allows a private company to build and operate one of its sewage facilities, as Phoenix, Arizona has just done, then there is competition between the private and public facilities. Only services provided for free by government monopolies would clearly qualify for this exemption. So this language is virtually useless in protecting public water/sewer services and the WTO has refused to refine the language despite many requests to do so.

The GATS definition of service supplier is further evidence that public services are covered by GATS. While “service supplier” is defined as “any person that supplies a service,” the full meaning becomes clear in the definition of “juridical person” which “means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned...” — GATS Article XVIII (g),(l)

Notice how corporations are treated as if they are persons. This raises the specter of corporate personhood which is used by courts in the U.S. to grant corporations the same protections as people under the Bill of Rights, but that is another story

### **Weak Environmental Exceptions**

GATS does have a general exception for measures “necessary to protect human, animal or plant life or health” but, unlike GATT, it must show that the measure is “necessary.” Such necessity tests create a threshold which makes it hard to safeguard environmental protection regulations before a WTO trade tribunal. This impacts public health as well as the environment. Nor does GATS have the GATT exception for “conservation of exhaustible natural resources.”

### **GATS : The First Global Investment Agreement**

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*“GATS is the world’s first multinational agreement on investment, since it covers not just cross-boundary trade but every possible means of supplying a service including the right to set up a commercial presence in the export market.”*

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– WTO Secretariat

## **GATS: Serving the Water Privatizers** continued

This statement reflects the fact that GATS covers services provided in every possible way including

**Commercial presence** which covers foreign investment by a service supplier of a member country, e.g., Vivendi, Suez, RWE or Bechtel investing in water or sewage treatment plants in other member countries around the world. (This is often referred to as Mode 3).

There are three other ways (or modes) by which services are supplied:

**Cross border supply** which is from one country to another, e.g., transporting water by pipeline or giant water bags.

**Consumption abroad** which is when consumers use a service in another country. This can include foreign corporations of one member country using domestic water services to produce food or beverage products or using local transportation/distribution systems of another member country.

**Presence of Natural Persons** which is when workers enter a another member country temporarily in order to provide a service for either a domestic or a foreign corporation,. For instance, Nestle/Perrier might want to use European workers to perform certain technical or managerial functions at its bottled water production plants in the U.S.

### **GATS Rules**

Some GATS rules apply to all services (general obligations), but two important rules (National Treatment and Market Access) only apply to specific services for which a country has voluntarily made a commitment to comply with one or both of these rules. These “commitments” are then listed on each country’s schedule of commitments.

A country can specify existing laws and regulations which they want exempted, but they can only do this at the time they make the commitment to national treatment and/or market access for the particular service. Through “progressive liberalization” these exceptions are supposed to be removed over time.

### **National Treatment**

National Treatment in GATS uses the same principle as in GATT but is much broader because it specifically covers “all measures affecting the supply of services.” It also covers government subsidies. While countries can decide what service sectors they want covered by this powerful rule, the inclusion of any service that could impact water supply, use or protection could

have unintended consequences. As a result, a country might not be able to protect its water resources and services simply by refusing to take a commitment on water/sewage collection and distribution (see section below on requests and offers).

So if a country makes a commitment with no exceptions, the national government, states and municipalities would be prohibited from providing any preferential loans, loan guarantees, or grants to public or private domestic service suppliers or taking other actions that would put foreign corporations at a competitive disadvantage.<sup>8</sup>

### **Market Access**

This rule applies even if there is no discrimination against foreign service providers. Once a country agrees to provide market access for a particular service sector, foreign service providers must be granted virtually unrestricted entry and right to operate in the country. Foreign corporations can set up as many business ventures as they want with no limit on the value of the operations or on the quantity of the output, even if the increase causes environmental or social damage. Nor may the country “restrict or require specific types of legal entity or joint venture” by the foreign service provider as a condition for doing business.

The U.S. has already taken full national treatment and market access commitments on sewage services for industry. This means there can be no limit on the number of such facilities built or operated in the U.S. by foreign corporations to treat industrial sewage. In addition, the U.S. has taken full commitments on sanitation services without specifying private industry.

Beyond these obvious services involving water, the U.S. has taken full commitments on a wide variety of other services related to water including services incidental to agriculture, mining and energy distribution; construction and related engineering services; wholesale and retail distribution; advertising; packaging; freight transport by rail or road; and private recreational services.<sup>9</sup>

With these commitments covering advertising, packaging, transportation, and wholesale and retail distribution services, the bottled water industry, for example, is afforded much protection under GATS even without the U.S. taking commitments on water services.

Water infrastructure such as irrigation systems and dams which have to do with the storage and transport of water, as well as services depending on the supply of water such as energy generation and

distribution, mining and tourism can also come under GATS rules.

## **Water Supplies “Affecting” the Provision of a Service**

Remember that word “*affecting*”? This implies that access to water necessary to provide services such as water treatment and distribution, irrigation, mining and other industries dependent on the supply of water are also protected by certain GATS market access rules. This is complicated, but very important. Here is how it works.

A GATS footnote allows governments to set “limits on the inputs for the supply of services.” Such “inputs” could include water supplies, implying, for example, that governments can protect natural springs from overuse.

Unfortunately, this exception to the ban on quantitative limitations only applies to one of the market access rules. This rule says there can be no limit on “the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units or the requirement of an economic needs test.” GATS XVI.2 (c) A very similar market access provision forbidding any limitation on the number of service *suppliers* found in GATS XVI.2 (a) is NOT covered.

So governments, which have granted full market access for any of the services mentioned above, may not be able to limit access to water supplies required by the corporations in order to supply these services. The authority to decide which provision applies rests with the secret WTO tribunals.

## **Lock-in**

Whenever a country includes a service on its schedule, the commitment is “locked-in” for three years. After three years, if a country wants to modify a commitment, it must compensate other countries by agreeing to make other commitments to offset the loss and thus maintain the same level of mutual advantage.

So if municipalities, states or countries discover that they need stronger regulations relating to water/sewer services or services relating to the protection of water supplies after the U.S. has made a commitment, they could be challenged by other countries whose corporations would lose business or become less profitable. This provision has not yet been tested.

## **Most Favored Nation (MFN)**

This rule requires member countries to treat service providers from all other member countries in the same

manner. This “general obligation” applies to all services and prevents any country or state from using human rights, labor or environmental standards as criteria in deciding whether to allow a foreign company to operate in their country and under what conditions.

## **Ongoing GATS Negotiations – Requests and Offers**

The GATS requirement for “progressive liberalization” specified that a new round of negotiations must begin within five years of GATS’ adoption. The purpose is to get countries to open up more services to foreign competition by including them on their schedule of commitments and by strengthening some of the GATS rules.

This round of negotiations began in February 2000 right after the Seattle ministerial. They now include bilateral negotiations where one country makes a “request” of another country to open up certain services and the other country responds with an “offer.” If 144 countries participated in bilateral negotiations with all other member countries, this would come to 10,296 sets of bilateral negotiations!

At the WTO 4th Ministerial held in Doha, Qatar, in November 2001, ministers agreed to make initial requests by June 30, 2002 and initial offers by March 31, 2003; however, these are not being treated as firm deadlines. By July 2003 only 30 countries had made any offers, half of which were developing countries.

By the end of 2004, countries are supposed to have finished these negotiations. Then, because GATS requires that countries do not discriminate between member countries (Most Favored Nation rule), any agreement one country makes with another country to add certain services to its schedule will automatically apply to all the member countries.

These secret bilateral negotiations put developing countries under tremendous pressure to cut deals with developed countries; however the paucity of offers indicates that many developing countries are resisting the pressure and demanding other concessions, for instance relief from U.S./EU agricultural subsidies.

Initially, countries refused to release their requests and offers; however, as a result of critical public voices, the U.S., Canada and Japan have made their offers public. So far the U.S. has refused to make its requests to other countries public.

The confidential requests by the European Commission (EC) to other countries were made available at <http://www.polarisinstitute.org> in February 2003. This information turned out to be very significant for water.

## **EC Requests on Public Water Services: Helping out Suez, Vivendi, RWE/Thames**

Of the 34 countries in North, Central and South America, the European Communities (EC) have requested that all but five very small countries provide full national treatment and market access commitments on water and wastewater. For the U.S., which had already committed on private waste water systems, the EC request was specifically directed at public systems.

**A Small Victory.** The U.S. has refused the EC request in its first round of offers, but this could change if the EC holds out and does not provide access to its markets for a service like energy which the U.S. really wants. While the U.S. insists on transparency of government rules for corporations, it is not calling for transparency of these negotiations so the public knows what kinds of tradeoffs are being considered in the negotiations.

The EC worked hard to create an opportunity to make these requests. First it made clear in the GATS negotiations that it wanted the services classification to specifically include “Water collection, purification and distribution services through mains” under a heading of “Water for Human Use & Wastewater Management.” There was no formal WTO decision. Rather the EC just went ahead and used this category in their requests.

In its draft requests which were somehow obtained by an NGO, the EC requested full national treatment and market access commitments for use of services in other countries and for investment in other countries for the category they had created of “Water collection, purification and distribution services through mains, except steam and hot water.”

Probably in response to strong criticism from trade and water activists, the EC request was modified in their final requests to clarify that

*“This subsector only concerns distribution of water through mains (i.e., urban sewage systems). This excludes any cross-border transportation either by pipeline or by any other means of transport, nor does it imply access to water resources.”*

In reality such assurance will be worthless once a country has made full commitments to National Treatment as requested by the EC. Vivendi or Suez

can claim that access to water resources is protected under National Treatment which specifically covers all measures “affecting” the supply of the service. Getting access to water certainly is necessary to provide water treatment services. (See discussion above under National Treatment above.)

Ellen Gould succinctly summarizes the potential impacts of a country committing to water services saying the impact would be:

- “1. Losing local decision-making authority over how water services are provided*
- 2. Subjecting all water regulations, e.g., water quality, universal access to service, to potential trade challenges*
- 3. Threatening conservation of water as a natural resource.*
- 4. Creating uncertainty and legal risk. WTO members are being pressured to make legally binding commitments when it is not clear either what these commitments cover or when governments would be violating the agreement.”<sup>10</sup>*

## **NAFTA Still Kicks In**

Finally, even if the U.S., Mexico or Canada makes no GATS commitments relating to water for human use, NAFTA rules on investment and services discussed above will still apply, unless a specific exception for water has been taken.

Fortunately NAFTA’s rules on services are much weaker than GATS. For instance, national treatment does not have the “affecting trade in services” clause found in GATS. Nor does NAFTA have the market access language of GATS. Also the NAFTA provision for “nondiscriminatory measures” is much less specific than GATS Article VI-4. It just states: “Each Party shall set out in its Schedule to Annex VI its commitments to liberalize quantitative restrictions, licensing requirements, performance requirements or other nondiscriminatory measures.”

## **Domestic Regulations: The Race to the Bottom**

Back in 1995 when the GATS was adopted, the

negotiations were not really complete. Some of the rules are under further negotiation now among all the WTO members. These negotiations are supposed to be finished before the request/offer process is completed. Most important are the negotiations on “Domestic Regulation” which relate to GATS Article VI.4

Even if domestic regulations do not discriminate against foreign service providers and apply equally to all WTO member countries, they can still be judged WTO illegal. GATS says domestic regulations must not

***“constitute unnecessary barriers to trade in services.”*** – GATS Article VI.4

Since GATS covers all rules and regulations “affecting” trade in services and this section is expected to apply to all services, this gives trade arbitrators a great deal of discretion to rule in favor of corporate interests.

If, for instance, private developers want to build a new subdivision which would require expansion of the water and sewer treatment facilities and pipelines and Suez or Vivendi want to bid on building the facilities, they could argue that any local zoning to prevent such expansion is an unnecessary barrier to providing the services and therefore GATS illegal.

In the U.S., environmental impact statements or reviews are required by federal law and by a number of states. The agencies often have the industry prepare the documents and cover the associated costs. This could be ruled to be an unnecessary barrier to provision of this service by a foreign corporation.

It gets worse. WTO members are mandated to negotiate specific provisions (“any necessary disciplines”) to ensure that domestic regulations are

***“not more burdensome than necessary to ensure the quality of the service.”*** – GATS Article VI.4 (b)

The European negotiators are pressing for a “necessity test” in order to provide guidance as to what is meant by “necessary.” They also want to clarify what is meant by developing “a non-exhaustive list of legitimate objectives for the application of domestic regulatory measures.”<sup>11</sup>

So far the negotiators have refused to develop an illustrative list of legitimate objectives which would provide the dispute panels with some guidance. This leaves the panels with total discretion and power to

intervene in governments’ right to regulate. They could find that regulations pertaining to universal access to essential services such as water or the conservation of natural resources are not legitimate government objectives.

While other WTO agreements have a necessity test that limits government regulations to what is strictly “necessary,” the full impact of this powerful deregulatory mechanism is at least reduced somewhat by the recognition of legitimate government objectives.

Since such GATS rules on domestic regulation threaten to be the most powerful force driving for deregulation and privatization in the WTO, the best outcome would be that the negotiations conclude by finding that “no new disciplines are necessary.”

This position has been taken by the U.S. negotiators in the past, but the U.S. has negotiated a necessity discipline in bilateral agreements such as the U.S.-Singapore bilateral agreement which may signal that it is prepared to accept such language in the GATS. The U.S.-based Coalition of Service Industries and the European Services Forum have put getting a “necessity test” on the top of their GATS lobbying agenda.

Even with no definition to bolster their case, trade panels could rule that “virtually any regulation — including universal service provisions” are unnecessary barrier to trade, according to Gould. For instance,

***“a panel may accept that a government could legitimately seek universal access to drinking water for its citizens. But requiring that a water company subsidize access for the poor from its more profitable operations could be judged unnecessarily trade restrictive. Instead governments could be expected to provide assistance to the poor so they could pay the rates the company charged.”***<sup>12</sup>

– Ellen Gould

This is precisely the position advocated by conservative think tanks like the U.S. based CATO Institute.

## **Subsidies**

GATS poses a threat to all public sector funding which is viewed as a subsidy and therefore a barrier to free trade. For instance, many governments,

## **GATS: Serving the Water Privatizers** continued

including the U.S., provide federal funding for building water/sewer treatment facilities which constitutes a subsidy. Under GATS National Treatment any such government support could be viewed as modifying “ the conditions of competition” and so would be GATS illegal unless made equally available to foreign service providers. For municipal systems this could force equal consideration of using private contractors.

### **GATS in Cancun**

Even though GATS negotiations are moving forward and not formally scheduled for the WTO Ministerial in Cancun September 10-14, the U.S.-based Business Roundtable has made GATS a priority for Cancun. The Business Roundtable represents CEOs of leading corporations with \$3.7 trillion in annual revenues. In a May 2003 press release they call for the following:

*“a global commitment to comprehensive liberalization without exception in all sectors for all modes of supply and the adoption of new General Agreement on Trade and Services (GATS) rules to ensure transparency in regulatory regimes.”<sup>13</sup>*

– Business Roundtable

Transparency, when used in trade agreements, means that governments must publish all their laws and regulations relating to the trade agreement. But corporations, supported by the USTR, want to go further and require governments to solicit comments on proposed regulations and to consider these comments before finalizing any rules or regulations.

## **FTAA and CAFTA: Danger Ahead for the Americas**

**T**he **Free Trade Area of the Americas** (FTAA) would expand NAFTA to include all 34 nations in the Western Hemisphere, except Cuba. These countries are all members of the WTO so the purpose of the FTAA negotiations is to create even more benefits for corporations and investors within this larger region.

The U.S. is hedging its bets on the FTAA by also proceeding to negotiate a smaller regional agreement, the **Central America Free Trade Agreement** (CAFTA), in case countries like Brazil and Argentina derail the FTAA altogether or make it

This gives corporations, which have the economic interest and capacity to track local regulations around the world, tremendous power to influence the regulatory process.

### **CONCLUSION: Stop the GATS Attack on Democracy and Public Systems**

Not only does GATS allow other countries to challenge local and regional rules and regulations, sub-federal governments do not have the right to participate in the secret WTO trade tribunals. If a local or state law is found to be in violation of GATS by the trade tribunal, then the national government can be fined or have trade sanctions levied against it until the local or state jurisdiction changes its rules or laws.

#### **Unfortunately most local officials have not been informed about this threat to their sovereignty.**

Nor are local officials, including municipal water officials, able to participate directly in the negotiations. The best they can hope for is that trade negotiators voluntarily consult with them through their national associations. For instance, the Office of the U.S. Trade Representative (USTR) has consulted with the Association of Municipal Water Authorities. It is important that concerned citizens make sure their water officials are aware of the GATS negotiations.

### **Demand Water Out of GATS**

The very comprehensive nature of GATS combined with the very weak environmental protection language are compelling reasons for demanding that water must not be included in this agreement at all. Barring this, the right to water and the protection of water resources should be specifically included in GATS as legitimate national policy objectives which cannot be compromised by GATS rules.

much weaker than the U.S. would like. CAFTA, involving Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica, and Panama which are also part of the FTAA negotiations, can be expected to include rules at least as strong as is being proposed for the FTAA and possibly even stronger. Since no draft text has been released, one can only surmise.

The second draft of the FTAA was declassified in November 2002 in response to demands from activists throughout the Americas that the drafts be made public. While almost all of the second draft is

in brackets indicating no agreement on the text, many proposed provisions would give water corporations far more power and protection to pursue profitable operations throughout the Americas.

For an excellent overall analysis of the second draft, see The FTAA Unveiled published by the Hemispheric Social Alliance and available as a PDF file at <http://www.art-us.org>.

## **Does FTAA Cover Water?**

The answer for now is YES, but this could change.

There is still an opportunity to influence the FTAA process to keep water out of the agreement. To be effective advocates, it is important for activists to know details about key points in the proposed text. So put on your hip boots so you can wade into the muddy waters of the FTAA draft text.

**Water Services.** If the FTAA chapter on services is based on a schedule of commitments for national treatment and market access like in GATS, countries could exclude water services. But it is much more likely that the FTAA services chapter will be “top down” like NAFTA where all services are included and countries must list for exclusion any existing regulations that violate the agreement. Such exclusions may be considered only temporary if “progressive liberalization” language is included in the agreement.

**Foreign Investments in Water Services.** Services provided by investing in another country may be moved to the investment chapter. This option is being promoted by the U.S. to make sure investments related to services are subject to the investor-to-state and “tantamount to expropriation” power tools discussed in the NAFTA section above.

### **How Will the Investment Chapter Cover Water?**

The draft investment chapter includes proposals for a definition of investment that is broader than in NAFTA and so would benefit water privatizers even more. Specifically it would encompass intellectual property rights and commercial contracts and in some definitions even “futures, options and other derivatives,” thus creating unprecedented protection for speculators in water resources. The draft uses very broad language such as “every kind of asset and rights of any nature.” Like NAFTA, the investment chapter is almost certain to be top down and include local government.

At the same time, there is an effort by some countries to narrow the scope of investments that would be covered. For instance one bracketed option in Article 1.4 on Scope would allow countries to exclude certain sectors or to have the right for their government to

*“perform exclusively the economic activities set out in Annex \_\_\_ and to refuse to authorize the establishment of investment in such activities.”*

This provides an opportunity to argue that water and water services should be excluded.

Later in the investment chapter under General Exceptions and Reservations (Article 12) there is a bracketed option that

*“Any Party may present general exceptions, reservations and specific exceptions.”*

This gives activists a handle to promote an exception for water.

The bad news is that one option requires that the sector and subsector be identified along with the specific obligations to be excepted and a concise description of the specified measure.

**How many local municipal water/sewer authorities will be aware that they have to get the U.S. negotiators to include an exception for their specific regulations on water/sewer services? Activists need to alert them.**

Among the many options for defining investment, some point to the inclusion of water. There is a specific reference to “the exploration and exploitation of natural resources” in Article 16 on Basic Definitions in the bracketed option which refers to contracts:

*“Licenses, permits and other rights obtained under public law, including concessions granted by law, administrative act or contract to carry out an economic activity, such as the exploration and exploitation of natural resources, or the construction, conservation and maintenance of public works;”*

Note also the specific reference to public works. While the drafters may have had energy and mineral



resources in mind, this language could equally well apply to water resources and water services.

Another option specifically mentions “other property rights such as *usufruct*.” *Usufruct* means the right to use, which is the basis for state laws regarding the use of surface water in the U.S. So this option would have major implications for the regulation of water use in the U.S. and could potentially be used to attack public trust doctrine which protects public use of water in most states.

Under the definition of “company” the bracketed text includes any “entity” which is “governmentally owned or controlled” which could include municipal water/sewer authorities.

Are you sufficiently confused? Welcome to the world of the FTAA. You can be sure the water privatizers are going over this text and all its brackets this with a fine-tooth comb.

**Progressive Liberalization: More Deregulation and Privatization.** Finally, even if a country exempts water under the investment and/or services chapter, the Trade Negotiations Committee has declared that “There shall be progressive liberalization in agricultural and non-agricultural goods, services, investment and government procurement.” This means that there will be pressure for any exemption for water to be removed down the line.<sup>14</sup>

### Turning Off the FTAA Tap

**Quantitative Restrictions.** FTAA specifically cites Article XI of GATT on quantitative restrictions. In addition there is bracketed language stating that a restriction can be “...applied temporarily to alleviate acute shortages.” “Temporarily” in this case means only up to one year, or a longer period if the Parties agree to it. This is more restrictive than GATT and NAFTA.

**Proportionality.** So far the FTAA does not include the complicated proportionality provision of NAFTA.

**How about general exceptions for environment?** The investment chapter includes the general exception to “Protect human, animal and plant life;” in one of the two options under general exceptions. There is nothing on the conservation of resources.

One heavily bracketed option under the services chapter says” b) [to protect][the protection of] human[, plant] and animal life and health [and preserve][or the conservation of] the environment;” so there is a chance that health and conservation will be included. But another option is narrower

saying “b) necessary to protect human, animal or plant life or health;” and omitting conservation. As with GATS, the term “necessary” is left undefined, leaving it up to trade tribunals to define how onerous this provision will be.

### Taking Action to Exclude Water

Activists must demand that water and water services are removed from the FTAA entirely. If this fails, they must demand that countries adopt specific options such as:

- The services chapter should include a schedule of commitments for National Treatment and Market Access rather than treating them as “general commitments.”
- The investment chapter should allow countries to exclude water and water services in the sections on scope and general exceptions.
- Water should be clearly excluded from any quantitative restrictions.

### Does FTAA Include NAFTA’s Investment Power Tools?

The answer is YES.

**Tantamount to expropriation.** The NAFTA provision on “tantamount to expropriation,” sometimes referred to as “equivalent effect,” is included in all bracketed options. A glimmer of hope is that one option includes “unless such measures are adopted in the public or social interest, on a non-discriminatory basis and in accordance with due process of law.” This would allow countries to determine that the human right to water is in the public or social interest and should not be privatized.

**Investor-To-State.** This NAFTA power tool is also included in the FTAA. In fact most of the draft investment chapter pertains to this provision. Investment is defined far more broadly than in NAFTA. FTAA investments would include enterprises and their related shares, debts, loans; and intangible property.

**Fair and Equitable Treatment.** This language from NAFTA says investors must be provided “fair and equitable treatment” which sounds innocuous enough. However, the history of how NAFTA’s investor-to-state provision has been used is ominous. Foreign investors have used this vague language in all of the successful claims to date, according to the authors of the investment chapter

in The FTAA Unveiled. The authors continue,

*“This obligation is particularly problematic because investors have attempted to use it to expand the ambit of investor-state claims to include NAFTA obligations outside the agreement’s investment rules.”*

### **Taking Action to Exclude Investment Power Tools**

Activists should mobilize to prevent corporations from being given the right to sue under investor-to-state rules and to oppose inclusion of “tantamount to expropriation” or “equivalent effect” language. If unsuccessful, they should support the exclusion for “public or social interest.”

### **Domestic Regulation: The Noose Tightens**

The second FTAA draft includes an unnumbered article on Domestic Regulation which is modeled on GATS Article VI-4. But the FTAA goes even further in setting out the rules, referred to as disciplines, needed to avoid “unnecessary barriers to trade in services.”

For instance, the FTAA draft specifies that government must “avoid unnecessary regulations.” This could allow corporations to challenge a wide range of domestic regulations. FTAA Section 6.14(b)

Far worse, section14(f) says such disciplines should be “aimed at stimulating the use of market mechanisms to achieve regulatory objectives.” THIS REALLY LAYS OUT THE MARKET BIAS!!!

### **Other Ways to Protect Public Water Services**

- **Demand Clear Exclusion of Government Services.** The second FTAA draft uses the weak and ill-defined language of GATS which the WTO has refused to clarify. Activists should demand that the FTAA exclude “services provided in the exercise of government authority” period.
- **Demand Exclusion of Local Government.** Local government should be specifically excluded from both the investment and services chapters because it is at the local level that many important rules and regulations on provision of water services are made.
- **Demand that the FTAA in no way compromise the national right-to-regulate and local democratic authority.**
- **Demand that any language aimed at stimulating market mechanisms be removed.**

### **CONCLUSION: Most Important, Say No to the FTAA and CAFTA**

Despite the scattered efforts by some unnamed countries to constrain the reach of the FTAA, it remains a supercharged version of NAFTA which bodes ill for the protection of water resources and public services. CAFTA, which the U.S. wants on a fast track to completion, will be just as harmful for Central American countries.

The only way to be sure that corporate water privatizers will not gain more power to profit from water and water services is to defeat the FTAA and CAFTA. This means mobilizing to oppose these engines for corporate water profiteering. Water activists should join with activists throughout the hemisphere to defeat the FTAA and CAFTA, while at the same time mobilizing to strike water and water services from these dangerous agreements.

## **WTO New Issues: Danger Ahead for the World**

At the Fourth WTO Ministerial in Doha, Qatar, the European Union pressed hard to begin negotiations on WTO agreements on the “new issues” of investment and competition. The developing countries did not want to negotiate these new issues because they were already finding that they were not benefiting as promised from existing WTO agreements.

Great pressure was placed on trade ministers from developing countries during an all-night meeting. As the last planes of the day were about to leave Doha, the trade ministers agreed that there would have to be “explicit consensus” at the next Ministerial in 2003 before the WTO members could proceed with negotiations on investment and competition.

## **INVESTMENT: Bill of Rights for Transnational Corporations**

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*“They [investment agreements] are not aimed at regulating investment but to regulate governments so that they can’t regulate investments.”*

Martin Khor, Third World Network

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Like a ping pong ball, the idea of an investment agreement has bounced from the WTO to the Organization for Economic Cooperation and Development (OECD) representing the industrialized countries, where it emerged as the infamous Multilateral Agreement on Investment (MAI), and now back to the WTO after global trade activists defeated the MAI in 1998.

Consider the investment provisions in NAFTA, GATS and the FTAA for a taste of what could be down the road for all WTO countries and all investments if the world’s trade ministers agree to proceed with investment negotiations when they meet in Cancun in September 2003.

While there is some doubt whether the NAFTA/FTAA/MAI investor-to-state provision will fly in the WTO, it will certainly be on the table. It is more likely that the infamous NAFTA “tantamount to expropriation” provision will be included.

### **Requiring Binding Environmental and Social Rules for Corporations**

In a July 2003 letter to U.S. Trade Representative Robert Zoellick opposing investment negotiations, the AFL-CIO joined with environmental and other public interest organizations to say:

*“We believe that investment flows can facilitate sustainable development only when they are properly governed to deliver social and environmental benefits. WTO investment rules would likely strengthen the rights of corporations with respect to foreign investment, without any corresponding obligations governing their behavior. We believe, therefore, that negotiations on international investment agreements should not take place at a time when*

*investors face no binding rules on their conduct developed by international environmental and social bodies.”*

The need for binding rules to hold investors accountable for their environmental and social practices and the critical importance of not undermining democratic governments to act in the public interest are both directly relevant to concerns regarding water and water services.

### **Business Roundtable Says Now Is Not the Time**

Much more surprising than the opposition of labor and public interest organizations, the Business Roundtable, which represents CEOs of leading U.S. corporations, is also opposing WTO investment negotiations. They are saying “now is not the time.” When these two often opposing sides agree, something is up!

It is important to understand the basis for the Business Roundtable’s position and the implications for the FTAA/CAFTA negotiations. They make their position very clear in a May 2003 position paper.

*“...If negotiations were launched now, it is unlikely that a new binding investment agreement would offer members any more protection than what they currently enjoy under existing agreements. The resulting WTO international investment agreement would be more like the ‘stepchild’ of bilateral and regional agreements to which members are already a party.*

*“The contentious negotiation of a WTO investment agreement is more likely to distract from, rather than contribute to, the success of other ongoing WTO negotiations (e.g. agriculture, services and tariff liberalization).*

*“...A multilateral agreement that offers less protection to investors would not be useful to members who enjoy*

*greater protections through their respective bilateral and regional agreements. Second, there is great potential that contentious negotiations of a WTO investment agreement will disrupt ongoing bilateral and regional trade negotiations, which are proving to be especially successful in the comprehensive liberalization of investment regimes.”<sup>15</sup>*

In other words, U.S. corporations believe they can get much more through investment chapters which are part of the FTAA, CAFTA and bilateral negotiations (called BITS) such as U.S.-Chile.

### **The ICC Road Map for Privatization**

By contrast, the International Chamber of Commerce (ICC), the primary drafter of the defeated MAI, is still gung-ho and wants to bring back the very broad scope of the MAI. They call for a WTO investment agreement to include:

- Tantamount to expropriation
- Binding investor-to-state dispute settlement mechanism,
- Top down covering all investments, with strong constraints on any exceptions
- Broadest possible definition of Investment

The definition of investment would, according to the ICC, include strategic alliances, goodwill, any claims to money or performance under contracts, as well as shares, stocks, bonds and debentures or any other forms of participation in a company, business enterprise or joint venture.<sup>16</sup>

### **COMPETITION: Protecting TNCs not the Small Guys**

The European proposal for a new WTO agreement on competition is about protecting the competitive "rights" of foreign corporations operating in a member country, not about helping domestic enterprises compete with powerful transnational corporations. Rights for foreign corporations would take precedence over local economic development and other social policy objectives a country might wish to pursue such as ensuring affordable supplies of drinking water for all.

So there you have it. The return of the MAI, A DETAILED CORPORATE ROAD MAP for water and water services privatization.

### **The Big Fish Eat the Little Fish**

“What is investment?” asked Yilmaz Akyuz, Chief Economist, UN Conference on Trade and Development (UNCTAD) at a public forum in Geneva in March 2003. He answered himself, saying that three quarters of investment is actually mergers and acquisition, rather than creation of productive capacity.<sup>17</sup>

This has clear implications for the ability of public systems to survive. Already in the U.S. Suez has bought United Water, Vivendi has bought U.S. Filter and RWE/Thames has bought American Waterworks, while Perrier/Nestle has been busy buying up local bottled water companies. In addition, these transnational corporations (TNCs), working hand-in-glove with the World Bank and IMF, are competing to take over public water/sewer systems in developing countries.

### **Taking Action**

It would be foolish to sit back and assume the investment negotiations will not go forward. The corporations will be keeping all their options open. If the FTAA or CAFTA negotiations falter, they will be pushing hard for a WTO investment agreement. Moreover, if they are successful with the FTAA and/or CAFTA, they will try to get these provisions applied to all countries through the WTO. For corporations it is just a matter of timing.

Water activists should oppose the initiative of investment negotiations at the Cancun ministerial and remain vigilant whether or not negotiations are initiated in Cancun.

If the WTO ministers agree, again purportedly by “explicit consensus,” to begin negotiations on this competition agreement when they meet in Cancun, transnational corporations like Suez, Vivendi, Thames/RWE and Bechtel can be expected to benefit at the expense of public and community-based systems for supplying and treating water and sewage.

Once again, the Business Roundtable is not enthusiastic about an agreement in Cancun to proceed with negotiation of this competition agreement, saying: “...a binding multilateral competition policy agreement

could create more friction between WTO members than it would resolve.”<sup>18</sup>

But this agreement is far from dead. The November 2001 Doha Ministerial Declaration called for an examination of the application of the three “core principles” of transparency, procedural fairness and legal nondiscrimination in commerce in the context of the interaction between trade and competition policy.<sup>19</sup>

## **Nondiscrimination**

Given that national treatment and most-favored nation provisions address nondiscrimination, why is another agreement needed?

The answer is that this agreement would proactively require WTO member countries to move toward conforming all their laws to the standards set by the agreement, rather than addressing inconsistencies on a case by case basis.

The EC says:

*“for those WTO Members who have yet to adopt domestic competition laws, a WTO agreement would provide important guidance for the drafting of such laws. Finally, a WTO Agreement would help lock Members into these principles, making their legal regimes transparent and predictable and at the same time limiting the possibility of recourse to formal discriminatory treatment at a later point in time.”*<sup>20</sup>

## **Transparency**

Likewise, the EC admits that there already are transparency requirements in GATT, GATS, and at least one other WTO agreement. So why more? The EC explains:

*“The obligation would be for WTO members to ensure public availability in a comprehensive and timely manner — be it in print or on a publicly accessible web site — of all laws, regulations and guidelines of general application.”*<sup>21</sup>

Given that the U.S. wants transparency extended to provide corporations with the opportunity to comment on proposed regulations and to require that the government agency take into consideration such comments, this could give corporations significant leverage for influencing government regulations.

## **Procedural Fairness**

This, the EC says, includes the right of foreign corporations “to appeal such administrative decisions by competition authorities and to have them reviewed by a judicial body.” Of course, it would also provide “protection of confidential information, including business secrets.”<sup>22</sup>

Again this would apply to all laws. What would this mean for citizens’ right to know the terms of contracts with Suez or Vivendi?

Domestic courts would be expected to enforce “procedural fairness” by levying penalties against domestic enterprises, public and private, and administrative bodies whose practices and policies restrict the ability of transnationals to compete with domestic businesses in local markets. If these corporate rights are not enforced, there would be recourse to a secret WTO trade tribunal with the power to levy economic penalties.

## **Conclusion**

Now it is clearer why the USTR has been lukewarm on both the competition and investment agreements. With the lack of consensus in the business community about how best to proceed with the investment and competition agreements and with the USTR less enthusiastic than the EC, there is important political space for water activists to mobilize public opinion against these agreements.

At the same time, the Business Roundtable gives activists every reason to be concerned about the push by the business community for a very strong investment agreement as part of the FTAA and CAFTA.

## **Taking Action in Miami**

Mobilization for the FTAA ministerial in Miami November 20-21, 2003, is essential to keep corporations pursuing privatization of water and water service from getting more power to pursue their profit-making agenda.

# Defeating the Two-Headed Monster and Stopping the GATS Attack

Now it should be clear why activists around the world say that the FTAA and WTO is a two-headed monster which must be slain. Like Dracula, it will not be able to survive the light of day. Activists are also mobilizing to Stop the GATS Attack.

With the information in this guide, you have the basic facts you need to...

- Alert your municipal water/sewer authority and your municipal government to the dangers ahead to their autonomy.
- Prepare short fact sheets that focus on local issues and use them for public education. Leave them in your libraries. Taken them to meetings. Use them to write Op Eds for your local papers.

- Join with other concerned citizens and hold a public forum to alert your community about the dangers ahead with the WTO and FTAA negotiations.
- Keep pressure on the USTR and Congress not to cave in on the EC's GATS requests on water.
- Support from your local unions and municipal water/sewer authority is key.

Activists and workers are mobilizing for the FTAA ministerial in Miami November 20-21. There is time to raise funds locally so you can join the mobilization and make sure the water issue is heard loud and clear. For up-to-date information, go to <http://www.FLFairTrade.org>.

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## Footnotes

- 1 [UN World Water Development Report](#), pp. 193-4
- 2 [Ibid.](#) p. 102
- 3 See Peter Gleick et al, [The New Economy of Water](#), p. 16
- 4 [Ibid.](#)
- 5 Quoted in Gleick, p. 18
- 6 [Ibid.](#)
- 7 Article 1110: Expropriation and Compensation
  1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
    - (a) for a public purpose;
    - (b) on a nondiscriminatory basis;
- 8 See Ellen Gould, [Briefing Paper](#), Jan. 2003
- 9 See U.S. schedule of Commitments in GATS S/C90 p. 38-40, 43, 49-50, 52-53, 73-74
- 10 Gould, Jan. 2003
- 11 EC Communication to Working Party on Domestic Regulation
- 12 Gould, Jan. 2003
- 13 Press release at <http://www.brt.org/press.cfm/929>
- 14 See "Methods and Modalities for Negotiations" derestricted in October 2002
- 15 "A Business Roundtable WTO Policy Paper: How The WTO Can Promote The Benefits Of International Investment," May 2003, emphasis added.
- 16 "ICC's Expectations Regarding a WTO Investment Agreement," Commission on Trade and Investment Policy, 7 March 2003
- 17 <http://www.investmentwatch.org/files/GenevaNotes.doc>
- 18 "A Business Roundtable WTO Policy Paper: The WTO's Role In Maintaining Competitive Markets" 5/03
- 19 WTO Ministerial Conference, Ministerial Declaration, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001)
- 20 Communication from the European Community and its Member States, 19 November 2002, WT/WGTCP/W/222
- 21 [Ibid.](#), emphasis added
- 22 [Ibid.](#)

# Keeping the Privatizers from Invading Your Community

Whether it is bulk water exports or pumping springs for bottled water or taking over municipal water and sewer facilities, water privatizers may come knocking in your community. Now you can warn your local officials and educate your community members about how these trade agreements will take away their ability to regulate these corporations and explain how the corporations have gained vast new rights backed up by economic penalties.

## Resources

### Key websites on trade agreements:

GATT .....[http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf) (Acrobat)  
GATS.....[http://www.wto.org/english/docs\\_e/legal\\_e/26-gats\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm) (html)  
NAFTA .....<http://www.sice.oas.org/trade/nafta/naftatce.asp>  
FTAA/2nd draft .....[http://www.ftaa-alca.org/ftaadraft02/eng/draft\\_e.asp](http://www.ftaa-alca.org/ftaadraft02/eng/draft_e.asp)  
EC GATS requests .....<http://www.polarisinstitute.org/gats/main.html>  
U.S. Schedule of Commitments for GATS ...<ftp://ftp.usitc.gov/pub/reports/studies/GATS97.pdf>  
U.S. Schedule-Initial GATS Offers .....[http://www.ustr.gov/sectors/services/2003-03-31-consolidated\\_offer.pdf](http://www.ustr.gov/sectors/services/2003-03-31-consolidated_offer.pdf)

### Websites for background on water privatization and trade agreements:

[www.thealliancefordemocracy.org/water](http://www.thealliancefordemocracy.org/water) .....Alliance for Democracy website includes power point on “Water for People and Nature: The Story of Corporate Water Privatization” which can be used for public presentations  
[www.citizen.org/cmep/water](http://www.citizen.org/cmep/water) .....Excellent resources including backgrounds on corporate water grabs in U.S.  
[www.polarisinstitute.org](http://www.polarisinstitute.org) .....Polaris Institute Canada has GATS requests and excellent background material  
[www.canadians.org](http://www.canadians.org) .....Click on Water Campaign for Council of Canadians materials including “Canada on Tap: The Environmental Implications of Water Exports” March 2002  
[www.PSIRU.org](http://www.PSIRU.org) .....Public Services International Research Unit has invaluable research  
[www.GATSWatch.org](http://www.GATSWatch.org) .....Keep up-to-date on GATS  
[www.tradewatch.org](http://www.tradewatch.org) .....Public Citizen site with up-to-date information on trade agreements  
[www.waterobservatory.org](http://www.waterobservatory.org) .....Covers wide range of water issues for activists

### Key references for background on water:

Blue Gold, Maude Barlow & Tony Clarke, The New Press, New York 2002 (also translated into Spanish, Portuguese, Japanese and many other languages)  
Financing Water for All, Michel Camdessus (former head of IMF sets out the privatizers formula for success at Third World Water Forum in Kyoto 2003)  
Global Water Grab, Polaris Institute, January 2003 (excellent booklet for activists)  
The New Economy of Water, Peter H. Gleick et al, Pacific Institute, February 2002  
Promoting Quality, Equity, and Latino Leadership in California Water Policy, Latino Issues Forum <http://www.lif.org/publications/reports.html>  
Water Follies, Groundwater Pumping and the Fate of America’s Fresh Waters, Robert Glennon, Island Press, 2002

Water for People, Water for Life, UN World Water Development Report, UNESCO Publishing, 2003  
Water In Public Hands, David Hall, Public Services International Research Unit, 2001  
“Water in the Current Round of WTO Negotiations on Services,” Briefing Paper Series V. 4 N. 1 Ellen Gould, January 2003, Canadian Centre for Policy Alternatives  
The Water Barons, International Consortium of Investigative Journalists, Public Integrity Books, DC 2003  
Thirst for Water, Stephen Shrymban, January 2002, Council of Canadians  
<http://www.canadians.org/documents/campaigns-tfc.pdf>

### Key references for background on trade:

Making the Links: A Citizens’ Guide to the WTO and FTAA, Maude Barlow & Tony Clarke (very good on the politics leading up to Cancun and Miami)  
[http://canadians.inline.net/documents/making\\_links\\_web.pdf](http://canadians.inline.net/documents/making_links_web.pdf)

The FTAA Unveiled, by members of the Hemispheric Social Alliance, [www.art-us.org](http://www.art-us.org)

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