

From

Global

to Local:

**GATS Impacts on  
Canadian Municipalities**

By Michelle Swenarchuk

Canadian Centre for Policy Alternatives  
Canadian Environmental Law Association

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## **About the author:**

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## Executive summary

Municipalities supply basic and essential public services which may be affected by the WTO General Agreement on Trade in Services (GATS). This paper examines GATS potential impacts on municipal water and sewage services, waste management, land use planning, transportation, libraries, and office administrative services in Canada. It also considers the impact of GATS for the proposals of the Federation of Canadian Municipalities for urban sustainability and infrastructure planning for the future.

## GATS application

GATS applies to “measures (laws, regulations, practices) affecting services,” including municipal ones, and to all methods of trade in services: cross-border supply (data processing abroad), consumption abroad (tourism), foreign investment (a local office), or presence of foreign staff (management consultants). It requires that countries make their measures available (transparent) to others, and extend the same trade advantages to all foreign companies that they extend to companies from any one foreign country (the most favoured nation principle)

## Country-specific schedules

In addition, for those sectors listed by each country in schedules to the GATS in 1994, countries must treat foreign

companies like domestic ones (national treatment) and prohibit practices which may limit foreign business from establishing locally (market access provisions). These prohibitions are extensive. They preclude limits on numbers of service suppliers, service operations or employees, and limits on total value of sales or amount of foreign ownership.

Canada made substantial commitments in many sectors affecting municipal services. To change these commitments would require paying compensation to countries who claim to have lost benefits from the change. This provision effectively “locks in” liberalization commitments, and makes change very difficult.

## Services provided by government

A key question is whether GATS disciplines apply to services provided by government. GATS has an exception for government services “neither supplied on a commercial basis nor in competition with private suppliers” but this is unlikely to exempt many municipal services, given the mix of public and private suppliers and the widespread payment of fees for services (water services, waste management, transportation). Services purchased by municipalities for their own purposes and not for sale (e.g. office administrative services) are likely exempted from certain GATS rules, being within its definition of government procurement.

## **GATS and domestic regulation**

By regulating “measures,” GATS governs domestic regulation. A Working Party on Domestic Regulations is currently negotiating rules to ensure that domestic regulations are “not more burdensome than necessary.” These rules will govern qualification licensing requirements for professionals and technicians involved in services (i.e. water service engineers, samplers, inspectors) and “technical standards” pertaining to those services (i.e. water system quality, waste dump safety requirements) Annexes B and C to the paper contain examples of the types of current regulations to ensure safety in the water sector. By establishing these rules, the GATS will allow countries to challenge domestic standards for services, and enable trade dispute panels to rule on whether they are more burdensome than necessary. However, in twelve past trade law cases involving “necessity tests,” only one case decision has upheld the challenged law.

The GATS also contains a “General Exception” permitting countries to have laws “necessary to protect human, animal or plant life or health.” However, it does not protect measures enacted for resource conservation so that planning for water, energy or land conservation in services is not protected from possible challenge. (i.e. no waste dumps on sensitive lands or over water sources, urban high density to reduce auto use for air quality)

## **Canadian specific commitments and resulting impacts**

Canada made extensive liberalization commitments which affect major municipal services including water and sewage services; waste management; transportation services; public transit; road-building; land use planning; and library services.

Due to the commitment of “other environmental services,” environmental assessment laws, frequently applied to water, sewage, land use, waste management and transport services may be challenged as “more burdensome than necessary.”

### **Water and sewage services**

Although a specific commitment for water services was not made, nearly full commitments were made for engineering for water supply and sanitation services, sanitation and similar services, business services including technical testing and quality control, general construction and sewage services. The result is that engineering, construction and technical and quality testing for water services are substantially covered by GATS obligations.

Foreign companies (engineering, construction, including scientific water testing and monitoring firms) have rights to the same degree of involvement in water services and wastewater quality and quantity monitoring as Canadian companies may have, increasing the number and scale of pri-

vate sector players with an interest in more privatization of water services.

Foreign companies may claim rights to subsidies now paid to public providers, and any assistance (technical or funding) given to small water systems to implement full cost pricing.

Much-needed improved national water quality standards and standards for operator training might be found, in a trade dispute, to be “more burdensome than necessary.”

Changed land use planning for watershed management, storm-water runoff absorption, and reduced water demand may limit urbanization and deny water to proposed new businesses in some areas, meaning reduced opportunities for market entry by new suppliers, contrary to GATS XVI.

Flexibility for municipalities in designing services to meet multiple purposes including lower greenhouse gas emissions, is reduced when, due to high capital costs, they obtain long-term corporate contracts and procedures for municipal service delivery. The flexibility is further reduced by GATS, which gives foreign firms more strategies to demand access to such long-term service commitments.

The mix of regulatory tools (sewer use bylaws, permits, policies, user fees and education) needed to control discharges to sewers may reduce the rights of businesses to set up (contrary to GATS market access rules) and may be challenged as “more burdensome than necessary.”

### **Waste management**

A full commitment of refuse (waste) disposal services was made,

together with the construction, engineering and technical and quality control services. “Other environmental services” (also committed) presumably covers the options for waste management other than disposal: waste diversion, recycling, reduction, reuse.

GATS may provide foreign companies with opportunities to challenge municipal and provincial waste reduction policies.

Provincial regulations and municipal zoning controls which limit opportunities for companies to establish waste management facilities, even if designed for the overall goal of waste reduction and environmental protection, may contravene the market access provisions of GATS XVI through limits on service suppliers, total value of service transactions, numbers of service operations and “total quantity of service output.”

The measures may also be challenged as “more burdensome than necessary.”

Zoning restrictions on locations of waste dumps to protect the environment and local amenities may be challenged.

### **Transportation services (public transit, road-building)**

Full commitments were made on engineering for transportation infrastructure; for general construction for civil engineering, for business services of technical and quality control; for rail and road transport services and for services auxiliary to transport (other than for marine transport).

A preference for public transit may discriminate against “competing” roads-based transport methods, (car sellers and service dealers) permitting challenges against the FCM policies proposed to implement the change to public transit, including tax-exempt transit passes and a fuel tax.

Given that transportation is currently provided by a mix of public and private suppliers, and subsidies are large in this sector, one may expect demands from private foreign operators for equal access to public subsidies for transport, particularly if a shift in subsidy to rail from roads-based transport occurred.

Land use changes promoted to create greater density and long term transportation plans favouring rail and public transit as part of the strategy for reduced car use raise the potential of challenges from construction (development) and engineering interests whose business opportunities may be affected.

### **Land use planning**

Commitments were made regarding urban planning and landscape architecture; architectural services; nature and landscape protection services; “other environmental services” and retailing services (which may be subject to planning controls in many municipalities).

Zoning decisions affect all other services studied here. Because they may affect where businesses may locate, and whether they can do so, they may be challenged under the “Market access” provisions of GATS.

Potential challenges to zoning could involve: limits on big “box stores;” location of auto repair and other regulated services; limits on numbers of waste dumps in specific areas; changed land use for watershed, stormwater and water demand management (reducing development opportunities); and land use changes to favour greater urban density and a shift to more public transit.

### **Library services**

Although library services are not listed in the Canadian schedule, broad categories of computer and related services, data processing and data base services, and research and development services are listed.

Foreign libraries might use a GATS challenge to demand equal access to public funding support, low postal rates, preferential tax treatment as charities, and low-cost use of public infrastructure.

Private service suppliers (Internet cafes) may argue that the use of public infrastructure by libraries to support on-line services constitutes abuse of an (effective public ) monopoly, contrary to GATS VIII.

Decisions regarding qualifications of librarians may face challenges from foreign librarians or companies on the basis that the standards are “more burdensome than necessary.”

### **Office support and administrative services**

Canada made commitments for broad categories of business services including accounting, book-keeping,

computer services, information technology, data processing, and other business services such as telephone answering, electronic mail, voice mail, on-line information and database retrieval, duplicating services, and mailing list compilation and mailing services.

However, any office and administrative support functions essential to the functioning of a municipal government (accounting, auditing, data processing, telephone answering, mail services etc.) are likely not subject to GATS as they are not purchased for commercial resale.

Engineering and scientific consulting reports regarding water, sewage, or transport, though purchased for use by government administrators, are related to the provision of services with a commercial component. Whether they are subject to the government procurement exemption is unclear.

## Conclusions

The GATS and the ongoing negotiations to expand it pose significant problems for Canadian municipalities. This study demonstrates that the GATS adversely affects municipal governments' ability to supply and to regulate basic services such as water and sewage services; waste management; transportation services; public transit; road-building; land use planning; and library services. It also shows that the GATS exclusions and exceptions said by federal trade officials to protect public services and regulatory capacity are clearly inadequate.

When the GATS was concluded in 1994, the federal government made sweeping commitments affecting municipalities without adequately consulting municipal representatives. As awareness of the GATS and its impacts on municipalities has increased, there has been growing concern expressed by municipal representatives and citizens.

### No new commitments

Negotiations to broaden and deepen the GATS are currently underway in Geneva. All sectors are on the table in this "request-offer" process. There are several service sectors important to municipalities that Canada has not fully committed in its GATS schedule. It is imperative that Canada continue to exclude these sectors. Further, Canada should not make requests of other countries that relate to municipal services, to avoid creating problems for foreign local governments.

### GATS Working Party on Domestic Regulations (WPDR)

Negotiations are also occurring regarding the development of further GATS disciplines on domestic regulations under GATS Article VI. Municipalities have an important role to play in influencing the Canadian government's position. The GATS domestic regulation negotiations are already deservedly controversial. A strong voice from municipalities opposing expanded GATS restrictions on governments' regulatory powers would contribute significantly to defeating the

proposed Article VI restrictions and maintaining our governments' authority to regulate in the public interest.

### **Government Procurement**

Another key concern for municipalities is procurement. GATS negotiations on government procurement in services are also now underway in Geneva.

Local governments should insist that their procurement decisions and procedures not be subject to GATS procurement restrictions. Local governments should also urge Ottawa to ensure that Canada's commitments under the WTO Agreement on Government Procurement are not extended to cover municipal-level procurement.

GATS Article XIII excludes government procurement from the MFN, national treatment and market access restrictions. However, the GATS does not clearly and comprehensively define government procurement. Local governments should also press Canada to pursue a broad definition that would better protect the full range of municipal procurement and contracting decisions.

### **Impacts of Existing Canadian GATS commitments**

Even steps to curtail the further intrusion of GATS restrictions on municipalities are successful, local governments still face the cold reality that Canada's existing 1994 commitments present formidable problems.

The GATS gives governments the option to modify or withdraw any commitment in its schedule. To do so,

however, a government must compensate other WTO members with reciprocal trade concessions or face trade sanctions. Because Canada's commitments affecting municipalities are so extensive, the amount of compensation required makes this a poor option for reducing GATS impacts on municipalities.

What is needed are fundamental changes to ensure that the GATS is made more deferential to governments' essential role in supplying and regulating services.

A revision or clarification of the problematic GATS I(3)(c) regarding services "supplied in the exercise of governmental authority" could provide greater protection for local measures. Given the widespread view that it is unclear and problematic, it may be possible to expand its scope to protect important municipal services and regulatory measures.

The regulatory authority of all levels of government could also be better protected if the GATS General Exception (Article XIV) were changed to allow a government to take regulatory measures "**which it considers necessary**" to meet its legitimate objectives.

There are other potential changes to the GATS and Canada's commitments that could reduce its adverse impacts on municipalities. However, building the momentum to change the GATS to reduce its impacts on municipalities is primarily a political issue.

### **Building the momentum for change**

To this end, municipal officials must continue to raise their concerns forcefully with the federal government.

which alone represents Canada at the negotiating table – even when its trade policy decisions affect the jurisdiction of other levels of government.

Municipalities must actively monitor the negotiations and insist that the federal government demonstrate that it is acting on municipal concerns at the table.

Municipalities should also raise their concerns with provincial governments and encourage them to intervene on local governments' behalf with the federal government.

Municipalities should also work in tandem with other concerned interests, for example environmental and financial service regulators, who have expressed concerns about GATS impacts on legitimate public interest regulation.

Local governments and councillors should work with concerned citizens, NGOs unions, environmental groups, first nations, cultural industries and

other Canadians who are also concerned about the adverse impacts of the GATS.

Finally, Canadian local governments should communicate their concerns to local governments in other WTO countries and cooperate with them in raising concerns with their national governments.

These and other steps to multiply and amplify the voices supporting change, nationally and internationally, are the best strategies for achieving meaningful changes to the GATS. Democratically elected local government representatives have an especially influential and legitimate voice. By strongly defending their essential role in providing basic services to their citizens and in regulating all services in the public interest from GATS intrusion, municipal governments defend the interests of all Canadians.

## Introduction

In modern economies, services have evolved from merely providing for basic human needs to complex webs of infrastructure for supplying goods, technologies, and the organizational needs for developed societies.

In 2000, services accounted for over 11.2 million jobs in Canada, or three-quarters of total employment, and 90% of the new jobs created in 2000 were in services sectors, including knowledge-based sectors. In 1998, international services transactions were valued at nearly C\$2 trillion, or 19% of world trade, including Canada's trade in services constituting 12% of total Canadian exports.<sup>1</sup>

Municipalities provide many of the most essential local services to Canadians.

With the signing in 1994 of the first multilateral free trade agreement on services, the General Agreement on Trade in Services (GATS), international trade rules now apply to municipal services. This paper will examine the impacts of these rules on local water and sewage services, waste management, land use planning, transport, libraries, and office and administrative services.

## Purpose of the GATS

The purpose of the GATS is explicitly to establish rules on trade in services to achieve

“the early achievement of progressively higher levels of liberalization of trade in services

through successive rounds of multilateral negotiations.” (GATS Preamble)

This goal is echoed in the body of the GATS, which prescribes “successive rounds of negotiations” with a view to achieving a progressively higher level of liberalization (GATS XIX (1)). The purpose is to increase “effective market access” for service corporations by opening to business more sectors and types of transactions and countries.

Corporations consider that government monopolies are barriers to trade, and they want both the right to provide services (for profit) that are now provided by governments and have access to the government money now spent on them. These are the fundamental goals of current GATS negotiations.

This paper will examine the impacts of the GATS and Canadian commitments made under it for municipal services, specifically:

- water and sewage services;
- waste management;
- transportation services; public transit, road-building
- land use planning;
- library services; and
- office support administrative services: call centres, payroll, information technology.

## GATS Coverage

GATS applies to “measures affecting trade in services” (GATS I (1)), a very broad definition. Measures include

“law, regulation, rule, procedure, decision, administrative action, or any other form”) and measures affecting services include subsidies, or “purchase, payment or use of a service,” for private service industries, access to and use of services provided to the public generally. (GATS XXVIII) Future negotiations are planned on new rules “to avoid “trade-distortive effects” of subsidies. (GATS XV)

Among the laws affecting services are quality standards (regulations, licensing requirements). Policies for local benefit—any government action, practice, decision or law—that affects services, whether or not it differentiates between Canadian and foreign service companies, is subject to the GATS. The services considered here are subject to numerous and varied measures, including governing provincial laws, complex shared funding sources (federal, provincial, local), established administrative practices and procedures, and policies responsive to local political sensitivities and citizens’ needs.

## GATS Application to Municipal Measures

The GATS explicitly covers municipal measures, as well as governing provincial legislation (and federal legislation where it applies), since “measures by Members” means measures taken by:

- i) central, regional or **local** governments and authorities; and
- ii) non-governmental bodies in the exercise of powers delegated by central, regional or **local** governments or authorities. (GATS 3a)

A national government is obliged to take “such reasonable measures as may be available to it to ensure their observance by regional and **local** governments” within its territory.<sup>2</sup>

GATS covers all methods (“modes”) of providing trade in services:

GATS covers all the various **methods** for supplying services, including:

- Cross-border supply (supplying a service across a border, such as advertising on the Internet, data processing abroad).
- Consumption abroad (when people go to another country for a service, like students or tourists).
- Commercial presence (corporate foreign investment in a local business or setting up an office in a foreign country).
- Presence of natural persons (staff of foreign companies who travel to another country to provide a service, such as management personnel or technical specialists).

Regarding the municipal services considered here, which must largely be provided locally, the most significant modes for trade purposes are:

- commercial presence (international water and waste management firms),
- presence of natural persons (foreign-based technical experts), and
- cross-border supply of some business services (professional services, data processing).

### **General commitments applicable to all signatory countries and services**

**(Articles II-XV):** GATS Includes some obligations which apply to all WTO member countries. The most important of these obligations include: most-favoured nation treatment, transparency, disciplines on domestic regulation, and provisions regarding monopolies.

**Most-Favoured Nation (MFN):** Countries must give to services and service suppliers from each country with which they trade treatment “no less favourable” than they give to ones from any other foreign country. (GATS II) In other words, any right to provide a service, business procedure or advantage (for example, subsidies) which is available to one foreign service supplier must be similarly available to any other foreign service supplier. (GATS II)

**Transparency:** All countries must publish all measures which affect services (except some forms of confidential information), inform the WTO Council on Trade in Services of changes, and respond to requests for information from other countries about measures. (GATS III)

**Monopolies and exclusive service suppliers:** Governments frequently provide services through public utilities (transit commissions, water and sewage boards, library boards). These are considered “monopolies and exclusive service suppliers” and, under GATS, must provide most favoured nation treatment to relevant foreign

suppliers, as well as the further liberalization provided for in the country’s “Specific commitments” (discussed below) in supplying their services. (GATS VIII)

**Government procurement:** The most significant disciplines of the GATS (most favoured nation, market access, and national treatment) do not apply to procurement by governmental agencies “of services purchased for governmental purposes and not for resale,” but negotiations occurred after 1994 resulted in a separate agreement signed by a small number of nations, including Canada. The agreement did not make commitments affecting provincial or municipal procurement.

**Domestic Regulations:** One of the most far-reaching sections of the GATS concerns domestic regulations that affect services. The section applies broadly to all such regulations, whether or not they discriminate between domestic (Canadian) and foreign services and service suppliers. Countries commit to “reasonable, objective and impartial” administration of regulations that affect service sectors for which specific commitments were made, as well as a decision-making process with information about the status of applications by service providers and decision-making. (GATS VI.3)

More broadly, countries commit to further “disciplines” (limits) on domestic regulations:

With a view to ensuring that measures relating to qualification requirements and procedures,

technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

- a. based on objective and transparent criteria, such as competence and the ability to supply the service;
- b. not more burdensome than necessary to ensure the quality of the service;
- c. in the case of licensing procedures, not in themselves a restriction on the supply of the service. (GATS VI(4))

Again, the impact is broad. For example, “qualification requirements and procedures affect the full range of professional qualifications; “technical standards” apply to public safety standards for services as varied as water quality testing and road engineering specifications; and licensing applies to many services. A WTO Working Party on Domestic Regulations is currently developing these rules.

However, for those sectors in which countries made specific commitments in 1994, including substantial elements of municipal services, these rules effectively already apply. Countries are precluded from acting so as to “nullify or impair such specific commitments” by not complying with the criteria above where other countries (and foreign companies) could have reasonably expected them to apply. (GATS VI(5)) Failing to comply with the rule brings the

risk of a trade-based challenge at the WTO from a country whose industry complains that it has been affected.

Scheme of country-specific commitments (Articles XVI-XXI):

In addition to the general obligations, GATS contains country-specific commitments which apply to sectors listed by individual countries in “Schedules” to the agreement. These are sectors which countries have deliberately made subject to the full impact of GATS liberalization requirements, i.e., sectors which federal trade policy is designed to open to foreign corporations. In Canada’s case, they include many services relevant to municipal government. The GATS country-specific commitments are broad and have wide potential impact on municipal policies.

**Market Access:** This is the term used in the GATS to describe the local, provincial, and national policies and practices which must be eliminated in order to liberalize the sectors named in country-specific schedules. The prohibitions are absolute, and apply to measures that govern domestic as well as foreign business, i.e., governments may not utilize such measures, even for the supply of services from domestic (Canadian) suppliers).

The prohibited measures are:

- limits on the **numbers of service suppliers** (through quotas, monopolies, exclusive suppliers, economic needs tests);

- limits on the **total value of service sales or assets** (through quotas or economic needs tests);
- limits on **numbers of service operations or service output** (through quotas or economic needs tests);
- limits on **numbers of employees in a sector or employed by a specific business** to provide the service (through quotas or economic needs tests);
- restrictions on the **type of legal entity** (structure of a business) or joint ventures used by a service supplier; and
- limits on **foreign ownership** (whether on percentage of foreign ownership of shares or individual foreign investment) (GATS XVI)(2).

These prohibitions are currently in effect for all the sectors in which Canada made commitments, and may affect measures currently used in municipalities.

**National Treatment:** National treatment is a requirement that countries treat foreign businesses at least as favourably as they treat domestic ones. Canada cannot discriminate against foreign corporations or provide preferences to Canadian companies. The GATS wording on national treatment is particularly strong. A country must give service and service providers from other countries “treatment no less favourable than that it accords to its own like services and service suppliers (GATS XVII),” and this applies to both “formally identical treatment” and “formally different treatment” provided to Canadian companies, mean-

ing that any preference given to domestic businesses must be extended to foreign ones. The test for national treatment is whether the treatment provided “modifies the conditions of competition” in favour of Canadian suppliers.

The WTO Appellate Body has confirmed that, in the interpretation of WTO trade rules, *de facto* discrimination (unintended discrimination that occurs through the effect of a decision) as well as *de jure* discrimination (deliberate, different legal treatment of foreign and domestic businesses) are both precluded. This means that government measures that were not designed to affect domestic and foreign companies differently, (i.e., non-discriminatory measures) may still be challenged if they have the incidental effect of putting foreign competitors at a disadvantage.<sup>3</sup>

The trade rules require that measures provide “effective equality of opportunities” for imported products. For example, a Canadian government measure will contravene this requirement if it “modifies the conditions of competition in favour of services or service suppliers” of (Canada) compared to like services or service suppliers of any other WTO Member—even if there was no intention to do so. (GATS XVII:3)

**Modification of schedules:** Members are allowed to change specific commitments but must compensate all countries which claim a loss of benefits from the change in commitment. (GATS XXI) This requirement is a powerful mechanism to lock in the liberalization effects of specific commitments.

## Exceptions from GATS requirements

### Application of the GATS to services provided by government

While GATS applies to municipal measures, it purports to exclude services **provided** by government, but this exclusion is unclear. Although the GATS contains an exemption for government services, it applies only to those services that are “neither supplied on a commercial basis nor in competition with private suppliers.” (GATS I 3(c) The WTO concedes that the meaning of “commercial basis” is unclear,<sup>4</sup> noting that services provided on a commercial basis are covered by the GATS, whether the owner of the business is a public or private entity.

If the government has privatized services as local monopolies (i.e., private firms are paid by government to provide the service), the service might still be covered by the “governmental authority” exemption. However, in the view of the WTO Secretariat, it might rather be considered as an example of governmental procurement, and therefore subject to GATS XIII which includes no real multilateral disciplines on the governmental actions. Since many municipal services are provided by a mix of public and private operators (e.g., waste disposal, day care), it seems unlikely that they could be classified as both non-commercial and non-competitive.

In a comprehensive examination of the uncertainties surrounding this exemption, officials of the Government

of British Columbia identified numerous uncertainties regarding its application<sup>5</sup>:

- The exclusion is very narrow, given that both excluding criteria must apply; the service must be supplied on a non-commercial basis **and** not in competition with another supplier.
- Ordinary dictionary definitions of the terms of both criteria are broad.
- A similar exclusion in the European communities treaty has been interpreted very narrowly.
- WTO statements about the GATS coverage are not reassuring; some merely reiterate the text, others use a narrow definition of public services; others suggest that the exclusions are very limited; others (such as the Secretariat paper noted above) confirm the uncertainties.

Statements from WTO officials regarding health and education confirm an intention to extend GATS requirements to government services:

- The Council asserts that, regarding the health and social service sectors, the exception “needed to be interpreted narrowly;”
- it may only apply to the health sector in exceptional circumstances: for example, where services are provided “directly through the government, free of charge;”
- the exception may not apply to the hospital sector in many countries, given that it is often made up of government and private entities, charging patients or insurers for coverage;
- for sectors listed by individual countries, GATS requirements of national

treatment may apply to government subsidies for hospitals;

- public monopolies which “operate commercially” are covered by GATS.<sup>6</sup>

Given that many municipal services are provided by a mix of public and private suppliers, and fees for service are common (for waste disposal, water, public transit), **it seems unlikely that many municipal governmental services will actually be exempted from the GATS.** There is no distinction in the GATS between public and private, for-profit and non-profit services; all are covered and treated the same.

### **The general exception to the GATS: the necessity test**

The GATS contains a “general exception” which purports to permit countries to continue to enact measures for public interest protections, but its wording and impact are limited.

Specifically, it provides that countries may enact measures:

- a. necessary to protect public morals or to maintain public order;
- b. necessary to protect human, animal or plant life or health;
- c. necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to:
  - (i) prevention of deceptive or fraudulent practices;
  - (ii) the protection of...privacy;
  - (iii) safety. (GATS XIV)

These rights are subject to the qualifying language of the introduction to

the Article, which requires that such measures

are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions apply, or a disguised restriction on trade in services.

This article is similar to the General Exception to the GATT (GATT XX), though more limited. For example, Article XIV does not include protection for measures for resource conservation as does GATT XX (g), which permit measures:

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

However, resource conservation is an essential consideration in planning for water services, waste management, land use, and transportation, as discussed below.

Further, the GATS Article XIV wording imports the jurisprudence on the “necessity” test, which has developed over several decades. It demonstrates that it is virtually impossible to protect a domestic measure by invoking the necessity test.

Regarding the necessity test, six GATT cases and five WTO post-1994 cases are relevant.<sup>7</sup> They concern such measures as:

- U.S. cases concerning restrictions on imports of tuna from Canada following a jurisdictional dispute; and

from Mexico, the EEC and the Netherlands due to U.S. provisions requiring fishing technologies lowering the rates of dolphin deaths from tuna fishing. (3 cases)

- 1988: *Canadian Fisheries Act* regulations prohibiting export of some unprocessed salmon and herring could not be justified as a conservation tool under GATT XX (g), although Canada argued that they were part of a system of resource management designed to preserve fish stocks.
- 1990: Thailand's prohibitions on import of cigarettes were found not "necessary" within GATT XX (b), although chemicals and other additives in U.S. cigarettes may have been more harmful than those in Thai cigarettes.
- 1994: the U.S. CAFÉ regulation (Corporate Average Fuel Economy regulation) could not be justified under GATT XX(d). The regulation specified the permissible level of average fuel economy for passenger cars, both imported and domestic, but the trade panel ruled that elements of the accounting and averaging discriminated against foreign producers.
- 1996: U.S. regulations under the *Clean Air Act* regarding composition of gasoline auto emissions designed to reduce air pollution. The Appellate Body held that the regulations fell under XX (g), but did not satisfy the introductory wording of the Article prohibiting "disguised restriction(s)" on trade.
- 1998: EC measures to ban certain hormones in beef were challenged by both the U.S. and Canada. The Appellate Body upheld the Panel's ruling that the EC measure was unjustifiable as it was not "based on" a risk assessment.
- 1998: U.S. prohibitions under the *Endangered Species Act* on shrimp imports caught without turtle excluder devices could not be justified under GATT XX.
- 1998: Australian quarantine restrictions on certain salmon imports were found inconsistent with the Sanitary and Phytosanitary chapter on the basis of available scientific evidence.
- 2001: In the only case to uphold a defence based on the necessity test, a French directive banning chrysotile asbestos, challenged by Canada, was found justifiable.

In summary, of the 11 cases, 10 held that the challenged measure could not be maintained. In every case except the recently-decided *Asbestos* case, the defence of necessity (however defined) was rejected. This jurisprudence demonstrates that it is virtually impossible for a country to justify a challenged measure as "necessary," even one that concerns human health or the environment. The existence of one decision in favour of a challenged measure does not detract from the conclusion that "necessity" tests cannot be a reliable basis of defence for important measures aimed at public protection.

In contrast to the necessity test in Article XIV, the GATS provides a much wider exemption for government measures related to security, as a government is entitled to take "any action

which it considers necessary for the protection of its essential security interests,” (GATS XIV bis), a standard which, in effect, cannot be challenged by foreign interests. However, no other government measures, including municipal ones, have received equivalent protection in Article XIV.

## Implications of the GATS provisions on domestic regulation

In Article VI (4) and (5), the GATS also incorporates a necessity test regarding regulations that affect domestic services. It provides:

(VI)(4) With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

- a. based on objective and transparent criteria, such as competence and the ability to supply the service;
  - b. not more burdensome than necessary to ensure the quality of the service;
  - c. in the case of licensing procedures, not in themselves a restriction on the supply of the service.
5. (a) In sectors in which a Member has undertaken specific commitments,

pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

- i) does not comply with the criteria outlined in subparagraphs 4 (a,b,c); and
- ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

GATS VI 5(b) provides that international standards may be taken into account in assessing whether a country’s measures comply with the Article.

The new rules to be developed under GATS VI will potentially apply to all services, not only those listed specifically by each country. Further, the effect of subsection (5) of the Article is to apply the restrictive criteria now to regulations in sectors countries have listed.

The GATS VI term “not more burdensome than necessary” is vague and inappropriate, as a criterion of measurement for public protections, and invites biased decision-making in favour of strictly economic interests. There is no articulated standard for measuring “burdensome” and for whether it includes measures that add mere inconvenience to potential exporters, or must entail significant costs or even serious disadvantage. The Canadian government has not indicated what meaning it considers applicable to these discussions, or whether there is an agreed definition among negotiators (not that

such an agreement would bind future panels).

The concept of regulations being burdensome conflicts with the increasing relevance of precaution in regulation-making for environmental protection and human health. Application of a precautionary principle or approach involves taking steps to prevent or minimize harm when a risk has become apparent, even though scientific uncertainty may exist regarding some elements of the risk and the cause-effect relationships that produce it. Technical standards implemented on a precautionary basis are likely to be particularly vulnerable to a finding that they are unnecessarily burdensome.

Illustrative examples of the type of regulation potentially affected by the GATS Working Party on Domestic Regulations (i.e., examples of “qualification requirements and procedures, technical standards and licensing requirements” pertaining to services), are provided in Annexes B and C regarding water quality and water and sewage works construction and maintenance.

The various services required for the construction and maintenance of water and sewage works are subject to detailed regulatory standards. These crucial public protections are the type of domestic regulations regarding services that GATS VI(4) will make vulnerable to challenge by foreign service providers. Given subsection (5) of the Article, these limits on regulatory powers are already in effect regarding the many services Canada listed, including those pertaining to water and waste services.

## The economic value of environmental regulation

The weakening of environmental and health standards due to trade rules is not only harmful for the environment and human health. It is also unwise economically, since strong environmental standards provide a major impetus for both public and private sector innovation and improved environmental technology. As the WTO Secretariat has noted:

National environmental problems and regulation have enabled firms to build up competitive advantages in different areas. For instance, the strict Japanese regulations on air pollution has made them market leaders in this domain, while the U.S. industry’s competitiveness in hazardous wastes is attributed to U.S. Toxic regulations.<sup>8</sup>

This comment accords with the observation of Gary Gallon, President of the Canadian Institute for Business and the Environment, that:

Tough water pollution and toxic waste regulations in Canada in the 1970s and 1980s drove the development of new technologies which today Canada is using and exporting. One area that Canada and the provinces failed to develop and enforce regulations was in air pollution. As a result, Canada has an immature air pollution control industry with very few regulation-driven innovations in technology. This

has left Canada uncompetitive in the international environmental market in air pollution control equipment. It has also resulted in Canada having to import air pollution control equipment, since it can't produce much of its own.<sup>9</sup>

The GATS standard of "not more burdensome than necessary" is likely to be a barrier to improving regulatory standards for services, with resulting harmful effects on both the environment and the economy.

## Canadian Sectoral Specific Commitments

As noted above, some of the most far-reaching impacts of the GATS flow from individual countries' decisions on which sectors of services they list in country-specific schedules. As detailed in Annex A, Canada made very extensive commitments, including regarding all the municipal services considered here. Not many of the WTO members did so. Thirty-eight members listed some level of environmental services, including 29 which listed sewage, refuse disposal, and "other environmental services," and 30 which listed sanitation and similar services.<sup>10</sup>

The GATS relies on classifications of thousands of services in the 800-page United Nations *Central Product Classification (CPC)*<sup>11</sup>. International institutions, including the OECD and WTO, concede that the classification of all possible services is very difficult and introduces complex problems of definition and inclusion. Also, the cross-

effect of various classifications makes it difficult to argue that a given service is excluded, since various component elements of it are included in other classifications.

For example, regarding water services, the CPC lists over 100 classifications pertaining to water services, i.e., "water meters, maintenance of," "water piping systems, primary, installation of" to "waterways, mechanical engineering design services for the construction of," and "waterworks, general construction of," and "waterworks, other engineering services for the construction of," and many more.

Although Canada did not list water services in its schedule of commitments, it did list many other services that are essential in the delivery of water services, including engineering, construction, testing, and analysis services.

The subject of classification of environmental services under the GATS continues to be debated by WTO members, and is unresolved<sup>12</sup>. However, since Ottawa made broad commitments in these sectors in 1994, these services are largely subject to GATS disciplines in Canada.

Canada listed "other environmental services," which, in the opinion of the WTO Secretariat, includes "nature and landscape protection services, water and air quality monitoring, assessment and modelling, biological and ecosystem studies, environmental impact assessment and audits, and site remediation activities,"<sup>13</sup> which are listed in an OECD classification. However, it may be broader, and cover all environmental services not specifically

listed (e.g., waste diversion, reduction and recycling, water conservation programs, etc).

In the Canadian schedule of commitments, there is a “Limitation on national treatment” which applies to all listed sectors (a “horizontal” exception) which provides:

The supply of a service, or its subsidization, within the public sector is not in breach of this commitment.<sup>14</sup>

The meaning of this purported limitation is unclear. It appears to indicate that the supply or subsidization of a service in the public sector does not, in itself, breach the requirement for national treatment of foreign companies. In other words, it suggests that private foreign suppliers do not have a right to provide a particular service just because it is provided in the public sector.

National treatment in Canada does not include a right to provide in the private sector every service provided in the public sector. However, if the limitation was intended to limit subsidies paid to the private sector to Canadian companies (for example, for engineering services related to water), it is unclear that the wording would achieve that goal.

There are also a number of provincial exceptions to full liberalization of sectors, but no municipal ones.

In summary, Canada made the following commitments to liberalize municipal services:<sup>15</sup>

- **Water and sewage services:** Although commitments for water classifications listed in the CPC for wa-

ter services were not made, substantial coverage of the sectors has been made through broad commitments for: engineering for water supply and sanitation services; for sanitation and similar services, for business services including technical testing and quality control; and for general construction services. The result is that engineering, construction, and technical and quality testing for sewage and water services are substantially covered by GATS obligations.

- **Waste management:** A full commitment of refuse (waste) disposal services was made, together with the construction, engineering and technical and quality control services. “Other environmental services” presumably covers the options for waste management other than disposal: waste diversion, recycling, reduction, re-use.
- **Transportation services** (public transit, road-building): Full commitments on engineering for transportation infrastructure; for general construction for civil engineering; for business services of technical and quality control; for rail and road transport services; and for services auxiliary to transport (other than for marine transport).
- **Land use planning:** Commitments were made regarding urban planning and landscape architecture; architectural services; nature and landscape protection services; “other environmental services,” and retailing services (which may be subject to planning controls in many municipalities).

- **Library services:** Although library services are not listed in the Canadian schedule, broad categories of computer and related services, data processing and data base services, and research and development services are listed.
- **Office support and administrative services:** Broad categories of business services, including accounting, bookkeeping, computer services, information technology, data processing, and other business services such as telephone answering, electronic mail, voice mail, on-line information and database retrieval, duplicating services, and mailing list compilation and mailing services.

## Implications of Canadian sectoral commitments

### Land use planning

Land use planning determines the structure of our cities' rural areas and therefore affects the delivery of all other services provided by both the public and private sectors.<sup>16</sup>

A municipality's broad land use objectives, goals and policies are generally set out in the Official Plan (as amended from time to time). These provisions usually deal with a variety of "big picture" planning issues for a 10-to- 20-year planning horizon, including where future growth should be directed, and the location of commercial and industrial zones, transportation corridors, protected natural heritage areas, conservation lands, etc.

These Official Plan provisions are then refined and set out in more prescriptive detail in the municipality's zoning by-laws, which must conform with the Official Plan. A representative example is the City of Hamilton Official Plan. With the intent that "commercial development occur in an orderly manner, consistent with the needs of the community,"<sup>17</sup> the Plan specifies in detail what constitutes a commercial establishment. Similar detailed categories are prescribed for Industrial Uses.<sup>18</sup>

The general categories of land use outlined in the Official Plan are implemented through zoning bylaws. Land can only be used for the purposes specified in the bylaws, and they are frequently very precise, detailing which particular residential, institutional, commercial, or industrial uses are permitted on a given piece of land. They may also specify requirements for heights, area, intensity, and distance of buildings.<sup>19</sup>

The land use responsibilities of municipalities are so broad that they influence rights of location and establishment of almost all businesses, as well as water, sewage, waste management, and transportation services. Since Canada made a commitment on land use planning, the obligations of the GATS, both for liberalization and regarding domestic regulation, apply fully. There is a potential for GATS-based challenges to zoning bylaws which limit where businesses can establish, and by implication, regarding any particular service, may limit the numbers of service suppliers, total value of services transactions, and total numbers of services operations, con-

trary to the market access provisions of GATS XVI.

Given Canadian commitments on retailing and wholesaling services, foreign service suppliers may challenge restrictions on where they can locate (and by implication, whether they can locate). For example, particular problems could arise from such businesses as auto service centres and repair shops, whose location and design requirements (in the illustrative Hamilton Official Plan) include restricting the locations of these businesses so that traffic movement will not endanger the public.<sup>20</sup>

“Big box stores” trying to locate in communities despite disputes over lack of need, adverse socioeconomic impacts, traffic/parking problems, or loss of agricultural lands, may now argue that the GATS gives them rights of establishment. GATS XVI prohibits limits on numbers of service suppliers based on an economic needs test.

Conflicts with the private sector, particularly the construction/development industry, are part of the daily reality of land use planning across Canada. However, it appears that the GATS will give new opportunities for challenge to an increased number of foreign businesses. The EC communication on “Construction and Related Engineering Services” for current GATS negotiations includes this comment:

The construction sector is subject to many different aspects of domestic regulation. They include controls on **land use**, building regulations and technical requirements, building permits and in-

spection, registration of proprietors, contractors and professionals, regulation of fees and remuneration’s (sic), environmental regulations, etc. Such measures are applied not only at the national level, but also very frequently at the sub-federal or local government level. Standards may be fixed by the governments or by standard-setting bodies or private-sector associations. Some technical standards and specifications may be applied only to foreign suppliers. Even if the same measures are applied to all suppliers, domestic or foreign, they may be found to be more onerous to foreign suppliers.<sup>21</sup>

Given that GATS prohibits *de facto* discrimination (discriminatory effect) as well as *de jure* discrimination (intentional discrimination), a finding that a land use measure that is equally applicable to domestic and foreign suppliers is “more onerous” to the foreign one raises the possibility of a challenge.

Such concerns are reflected in a letter from the U.S. National League of Cities, which claims to represent 138,000 elected officials, to the U.S. Trade Representative:<sup>22</sup>

Municipal governments often rely on their power to regulate land-use related activities in their communities. Zoning ordinances alone provide a powerful tool for promoting such priorities as a mix of residential, office, and commercial uses, the preservation of green space, and the reuse of previously developed or

vacant parcels of urban land. The ability of local governments to experiment with new regulatory approaches to land use to encourage such activities as the development of affordable housing must not be compromised.

Local elected officials often provide tax incentives for economic revitalization efforts that are relevant to the needs of new businesses or infrastructure investment and foster expansion and retention of existing businesses...

NLC is concerned that trade liberalization provisions could prove detrimental to local prerogatives. For example, market access and “least trade restrictive” language could serve as an assault against popular local community development programs such as the Community Reinvestment Act (CRA). Another example would be cities having to privatize their drinking and waste water services when the existing governmental service meets their needs more than adequately and is in compliance with federal laws and regulations.

Municipal land use planning is also the key tool for local environmental protection, as it lays the groundwork for the range of human activities that affect soil, water and atmosphere, affecting water quantity and quality, greenhouse gas emissions, contamination of soils, natural areas protection, etc. However, GATS XIV, the general

exception, does not safeguard measures for natural resource conservation, and even the unreliable “necessity” test defence would not be available to a municipality if such a measure were challenged.

### **Water and wastewater (sewage) services**

The engineering, construction, and technical and quality testing for sewage and water services in Canada are substantially covered by GATS obligations. Sewage and sanitation services are specifically covered. The degree of private sector involvement in water and sewage construction and operation in various Canadian centres means it is likely that GATS rules apply to the provision of these services in most Canadian cities.

Water and sewage services are currently provided through at least four different structures in Canada:

- the municipal corporation itself can set up and run sewage works and water works;
- the municipal corporation can establish a public utilities commission where the municipality retains ownership of the facilities, but the PUC independently operates them, sets water/sewage rates, etc.;
- in Ontario, the municipal corporation can contract with the Ontario Clean Water Agency (OCWA) to run its facilities, particularly in small rural communities; or
- the municipal corporation can contract out the works to private companies.

There are few privately operated water systems in Canada at this time.<sup>23</sup> Moncton (with U.S. Filter, a subsidiary of Vivendi) and Hamilton (with American Water Works) have long-term contracts for water and wastewater services. Fort Saskatchewan (with CH2M Hill's subsidiary), Haldimand-Norfolk and Goderich (with U.S. Filter) have relatively short-term operation and management contracts. There are few other systems where the private sector is providing core water services, except for a few metering contracts.

However, several large European multinational corporations, including Lyonnaise des Eaux and Vivendi, are targeting North America for expansion, operating in Canada through United Water Resources and U.S. Filter of Canada, respectively.

There have also been proposals for public-private partnerships for a wastewater facility in Halifax, and a water filtration plant in the Greater Vancouver Regional District. Facilities built as public-private partnerships are unlikely to benefit from the exemption for services "provided in the exercise of governmental authority" (GATS I(3)), since the private sector partner's interest is commercial and the services delivered may well be in competition with private operators. As well, long-term contracts for private operation of the facilities (which may extend to the entire term of its use) weaken the claim of public ownership. It is likely, then, that GATS disciplines extend to public-private partnerships for municipal water and wastewater services.

Water system operators are subject to federal and provincial law regard-

ing water quality, and provincial legislation which may include certificates of approval, water-taking permits, and environmental assessment approvals. These processes are likely to have the effect of limiting the number of operators and scale of operations in any particular area.

The Federation of Canadian Municipalities is currently addressing Canadians' concerns regarding water safety in a comprehensive policy review of sustainability for communities.<sup>24</sup> Possible impacts from the GATS on these proposals are analyzed in this section.

The FCM notes that, in contrast to the U.S., whose *Safe Drinking Water Act - 1996* applies nationally to every public water system, Canada only has Guidelines for Canadian Drinking Water Quality, which do not have legal force except to the degree they are adopted as legal requirements by provincial and territorial governments. This has resulted in varying levels of water quality and enforcement nationally.

Although municipal governments have the responsibility to deliver safe water to citizens, they often do not have adequate powers and resources to do so. The FCM therefore proposes a nine-point plan to provide safe drinking water to Canadians. The plan includes:

- national standards for water quality;
- monitoring and testing of both water sources and treated water;
- infrastructure financing;
- full cost pricing of water;

- assessments of quantity and quality of water sources before treatment;
- better land use planning and watershed-based management;
- demand management;
- infrastructure and treatment options, including best available technology and special support for small communities; and
- ongoing operator training.

The FCM also prescribes water efficiency measures:

Canadians have the second highest average residential water consumption per capita in the world, at more than 300 litres per person per day... Volumetric water meters are a key feature of demand management... In 1994, a Canadian household paying for water by volume used 263 litres per person per day—39% less water than a household paying a flat rate, which used 430 litres per person per day. Water meters are a necessary tool to implement full-cost pricing...

Water conservation offers the primary opportunity for reducing energy use, with an estimated 11% reduction in energy used throughout water distribution systems and an impact of roughly 3% reduced energy use in sewage collection and treatment plants.<sup>25</sup>

Wastewater (sewage) management is another important municipal function, and there are approximately 3,000 wastewater treatment facilities in Canada. Nearly 22 million Canadians

were served by municipal sewer systems in 1996.<sup>26</sup> Municipal wastewater treatment needs much improvement in Canada, as it constitutes a serious continuing source of water pollution, and the implementation of the *Canadian Environmental Protection Act* may require costly upgrades to municipal plants. Untreated urban stormwater runoff is a significant problem, being largely untreated prior to its discharge into the environment.

FCM strategies for wastewater and stormwater management include:

- together with other levels of government, requiring the use of pollution prevention techniques including non-toxic raw materials, changed technologies to eliminate toxic by-products, and material reuse and recycling in manufacturing processes;
- Use of a mix of regulatory tools (sewer use bylaws), permits, policies, user fees and education to control discharges to sewers;
- bylaws and alternative development standards that encourage more natural drainage in new developments;
- focusing growth to reduce development pressures in rural areas; and
- stormwater quality and quantity monitoring.

The Canadian schedule to the GATS lists full commitments on sewage services (wastewater).

The FCM and the Canadian Water and Wastewater Association (CWWA) consider that many of Canada's approximately 4,000 drinking water plants and 3,000 wastewater plants

need upgrades. The FCM notes that, although the national infrastructure funding program (\$2.05 billion from 2000-2006) is a good step, the level of funding is inadequate, and a permanent funding source is critical.<sup>27</sup>

The Canadian Water and Wastewater Association has estimated that between \$80 billion and \$90 billion would be needed over a fifteen-year period to maintain and improve existing water and wastewater infrastructure and build additional needed infrastructure.<sup>28</sup> The new program anticipates substantial private sector financing of infrastructure and private sector representation with the FCM in administering the program.

The current structure of water delivery in Canada and growing likely private sector involvement raise numerous concerns related to GATS and the strategies the FCM promotes. The GATS provides a number of strategies for foreign service providers to gain access to water services in Canada and to create barriers to stronger regulation. These include:

- The broad coverage of services related to water service delivery in the Canadian schedule gives rights to foreign companies (engineering, construction, including scientific water testing and monitoring firms) to the same degree of involvement in water services and wastewater quality and quantity monitoring as Canadian companies may have. It increases the number and scale of private sector players who may create pressure for more privatization of water services or parts of these services.
- Where municipalities have contracted exclusively with a private company or, in Ontario, with OCWA, other foreign companies may claim that the contracts constitute monopolies, even if a single-source supplier is preferable for public protection, cost, and efficiency. They may then pressure for treatment equal to that given the chosen supplier.
- Measures to promote water efficiency and use reduction, as well as energy reduction related to water services, if they impact private sector projects (entry of new operators or access to the resource) or designs, may be vulnerable to challenge. They are not protected by the limited GATS XIV general exception which does not protect measures taken for resource conservation.
- Since GATS covers subsidies, private water companies may seek access to the subsidies now paid to public water providers.
- The FCM call for improved national water quality standards raises the possibility of stronger regulatory controls, which will affect the provision of water services. Foreign companies (through their governments) may argue under GATS VI that such regulations are “more burdensome than necessary.”
- The FCM has called for more monitoring and testing of both water sources and treated water. Since Canada made commitments on these services, it would be difficult to require that these services be provided by Canadian-based public or private companies and not cross-

border ones, as is now sometimes done, to ensure application of Canadian standards and maximum communication in instances of problems.

- Enforcement of standards for water testing by a cross-border company is, in practice, difficult if not impossible. The Ontario regulation passed after the Walkerton tragedy only requires that a cross-border water testing company be accredited, have a copy of the regulation and drinking water standards, and agree to comply with them. (Annex B) However, no inspection or enforcement action is possible to ensure compliance. As Canada has made commitments on water testing and GATS applies to cross-border provision of services, there may be an increase in such services without any effective regulatory oversight.
- Changed land use planning for watershed management, stormwater runoff absorption, and demand management may ultimately imply limits to urbanization in certain rural areas and denial of water to proposed new businesses, meaning reduced opportunities for market entry by new suppliers, contrary to GATS XVI.
- Environmental assessment requirements regarding water facility siting and treatment may be challenged as too burdensome.
- In implementing full cost pricing, the FCM calls for special technical assistance and funding for small water systems. However, the GATS does not distinguish between small and large, profit or non-profit sup-

pliers, and such preferences for small communities could lead to demands for equal treatment from foreign service suppliers.

- The FCM and CUPE both call for operator training and provincial standards for training. These are the types of qualification requirements and licensing standards that are subject to GATS VI and could be challenged as “too burdensome.”
- The FCM discussions of energy conservation options underlines the need for flexibility for municipalities in designing service systems to meet multiple purposes. This flexibility is reduced when, due to high capital costs, corporations gain long-term contracts and procedures for service delivery. The flexibility is further reduced by the GATS, which gives foreign firms more strategies to demand access to such long-term service commitments.
- The use of a mix of regulatory tools (sewer use bylaws, permits, policies, user fees and education) to control discharges to sewers implies controls (through sewer use bylaws) on rights of establishment of industries, as well as questions of domestic regulation of water effluents, both vulnerable to GATS oversight.

### **Waste/refuse disposal**

Municipalities in Canada have significant responsibilities for waste management, and, together with public waste management bodies, spent \$1.1 billion on waste management services in 1996, with 75% of solid waste disposed of in landfills.<sup>29</sup> There is significant private sector involvement in

waste management in Canada. In the view of the FCM:

Waste...is the result of over-consumption, poor product design, inefficiencies in manufacturing processes, use and recovery of materials, and ineffective market signals to correct these deficiencies.<sup>30</sup>

Waste represents a loss of resources and danger to human health from toxic leachates flowing from landfills and volatile organic compounds emitted into the air. Its impact on climate change is significant, since about 20 mega-tonnes of methane emissions (about 3% of Canada's total greenhouse gas emissions) are emitted annually from landfills. This could be flared or used to generate electricity to decrease the climate impacts.

OECD countries show a steady increase in waste in conjunction with increases in GDP. In Canada, waste management costs, including capital expenditures, grew 72% in just two years, 1996-1998.

Municipal governments and public waste management bodies spent \$1.1 billion on waste management services in 1996, with 75% of solid waste disposed of in landfills. "On a per capita basis, Canadians are the second largest generators of solid waste in the world." Municipal governments should incorporate waste minimization and diversion goals when planning for landfill requirements.<sup>31</sup>

Municipalities have two main delivery options for solid waste management: either owning and operating their own waste management system and/or disposal site, or contracting with private proponents who own/operate collection services, 3R facilities (reduction, reuse, recycling) and disposal sites.

Typically, at the municipal level, landfilling operations (or other forms of waste disposal) are not listed as permitted uses within most zoning categories (e.g., agricultural, rural, commercial, etc.), so that, if a company wants to build or expand a landfill, the company must seek rezoning (and/or an amendment to the Official Plan) from the municipality. This gives the municipality some measure of control over the number, size, and location of landfills within their geographic borders. Presumably, if there are already a number of existing landfills which fully address current waste disposal needs, additional applications will not be approved. As well, the concept of "willing host" community has evolved in some regions, a variable policy of the provinces that new or expanded landfills will not be forced upon unwilling host communities.

Waste management is also subject to provincial regulatory oversight, including environmental assessment laws, which may ultimately limit the number, size, and capacity of waste facilities. Although municipalities have zoning and planning authority regarding landfills, once a proposed landfill operator has obtained provincial approvals, the subsequent issuance of any required municipal approvals is sel-

dom refused. Thus, the existing provincial framework may have the greatest influence on the number, size, and capacity of waste facilities.

In addition, provincial legislation may prohibit landfills in certain natural areas such as the Niagara Escarpment, conservation areas, or parks.

The FCM promotes a multi-faceted 14-point strategy to achieve waste minimization, including regulatory and market-based elements. Specifically:

- The FCM calls for the development of programs that account for a broad range of environmental issues, including resource conservation and improved resource management, and ambitious progressive/iterative targets and timelines, consistent with climate change requirements and within realistic funding programs, but the GATS General Exception does not protect resource conservation measures from challenges from foreign companies based on the GATS disciplines.
- Provincial regulations and municipal zoning controls which have the effect of limiting opportunities for companies to establish waste management facilities, even if designed for the overall goal of waste reduction and environmental protection, may contravene the market access provisions of GATS XVI through limits on service suppliers, total value of service transactions, numbers of service operations, and “total quantity of service output.”
- These measures and environmental assessment laws may also be chal-

lenged as “more burdensome than necessary” under GATS VI.

## **Transport services**

### **WTO review of the history of transport services**

The WTO Secretariat has provided background papers on global transport modes which summarize its development as government-led services in most of the world. The papers serve as useful context for the liberalization aims of GATS negotiations.<sup>32</sup>

Historically, though railways began in the 19<sup>th</sup> century as private companies, they were nationalized in many countries. The majority of subway systems were also set up, financed and managed by government authorities, particularly local authorities, given the large cost and the fact that they are seldom profitable. A “classic” public monopoly therefore emerged (although not in the U.S.) and lasted until the 1980s, when pressure began for deregulation, privatization, and granting of concessions, (from governments in some developed countries and the World Bank in developing countries and Eastern Europe). This historic structure meant few countries made significant commitments under the GATS on rail transport. Canada is one of only 22 countries that made commitments.

Rail companies have been characterized by high infrastructure costs, and governments have controlled entry, withdrawal, technology, operating practices, capital formation, pricing, frequency, financial structure, and accounting practices.

In the 1990s, governments began to separate infrastructure from operations, and extend “access rights” to freight and international passenger services across borders. Privatization has also increased in Europe and in developing countries and Eastern Europe due to the World Bank.

In the United Kingdom, the separation of the two activities was “taken to extremes,” with infrastructure given to one privatized company, Railtrack, and “rolling stock” divided up among three privatized countries which leased it to operators. Passenger services, track maintenance and renewal were also privatized. As the WTO Secretariat noted:

The immediate effect of privatization was a sharp rise in subsidies given to operators because they had to meet costs not faced by integrated operators: the charges for using the infrastructure and rolling stock (grants to the British Railway Board: 1993/4: £1,121 million; 1994/1995: £1,984 million. Subsidies to concession holders, 1996/1997: £2090 million; estimated subsidy for 2003: £1169 million).<sup>33</sup>

After recurrent problems of governance, fatal rail accidents, and lack of infrastructure renewal, Railtrack became bankrupt in October 2001.<sup>34</sup> Its demise was described as “an embarrassment to politicians who argued for less state involvement in public services.”<sup>35</sup>

Few countries made GATS commitments on rail transport (13% of WTO members for maintenance, 7% for pas-

senger and freight transportation, with many limitations). Canada is one of the few countries which made commitments on passenger and freight transportation and maintenance and repair of rail transport equipment.

Cars provided 53% of total passenger/km of motorized travel for urban passengers in the world in 1995. The GATS does not apply to most of this travel as it involves individuals using their own vehicles; only taxis are covered by the GATS. Interurban passenger transport by bus appears to be in long-term decline due to the increase in car ownership. This sector was regulated similarly to rail transport in the past (controls on prices, entry into service, withdrawal and sometimes on numbers and services, safety, schedules, needs of people in remote areas), but deregulation has occurred to varying extents in the North and South.

Only 37 WTO members made GATS commitments on road transport in 1994; again, Canada is one of only six which made commitments on transportation of both passengers and freight and on rental of taxis, maintenance and repair of road transport services.<sup>36</sup>

### **FCM transport policy proposals**

The FCM focuses on the essential public service function of transportation:<sup>37</sup>

FCM believes that provincial, territorial and federal government must work with all stakeholders to develop a rational, coherent, regionally sensitive, multi-modal transportation system that meets the needs of both urban and rural communities.

The Federation's policies on national transportation clearly promote a reversal of the declining role of rail transport in Canada, and a priority on replacing automobiles with public transit to the greatest extent possible.

The FCM notes that the federal government has reduced its past role in planning, financing and operating transport infrastructure and services, and government now relies largely on the market. Significant issues resulting include:

(questions of) the long-term viability of divested facilities and services; safety concerns arising when existing regulations are inadequate for the new competitive environment; adequate provision of services where demand is low; and reasonable and equitable transportation pricing for all regions of the country.<sup>38</sup>

Regarding passenger rail, FCM notes that VIA Rail receives much less public subsidy than do inter-city buses and air transportation, but high-speed rail would contribute to Canada economically, with spinoffs for construction, manufacturing and consulting sectors. Regarding rail freight, the Federation is concerned with problems of rail abandonment, and advocates federal measures to maintain rail competitiveness and prevent abandonment.

The change to truck transport creates problems for municipalities, as trucks generate more wear on roads, emit more pollutants, are noisier, and take up more space. The FCM therefore proposes various strategies for dealing with the problems of trucks,

including new funding sources for roads and tighter standards for truck design.

Regarding the use of personal automobiles, the FCM sees a need to: review municipal transportation policies in order to promote more compact development and land use, with the aim of reducing reliance on personal vehicles. The transportation sector accounts for 26% of emissions of greenhouse gases, over half of which come from cars and light trucks.<sup>39</sup>

Most fundamentally, in transport planning for urban areas:

encourage urban municipalities to give preferences to public transportation in their short-and long-range transportation plans. Official, secondary and site plans should be reviewed and upgraded to ensure that transit services can be efficiently operated and that residents can access the services on foot.<sup>40</sup>

Strategies proposed to encourage this shift include tax-exempt transit passes and federal funding equivalent to three cents per litre of gas sold in Canada.

Given the commitments Canada made under the GATS, a number of potential problems arise.

Given the commitments for wholesale and retail sales of cars and other vehicles, and sales of parts and accessories, a preference for public transit may discriminate against "competing" roads-based transport methods (car sellers and service dealers), permitting

challenges against the policies proposed to implement the change to public transit, including tax-exempt transit passes and a fuel tax.

To the extent that transportation is currently provided by a mix of public and private suppliers, and given that subsidies are large in this sector, one may expect demands from private foreign operators for equal access to public subsidies for transport, particularly if a shift in subsidy to rail from roads-based transport occurs.

The land use changes promoted here (greater density) and long-term transportation plans favouring rail and public transit as part of the strategy for reduced car use again raise the potential of challenges from construction (development) and engineering interests whose business opportunities may be affected. These challenges could extend to the environmental assessment laws used in transport planning.

### **Library Services<sup>41</sup>**

Municipal libraries are typically established by provincial legislation, which determines service objectives and terms of service. For example, the British Columbia Libraries Act provides that services shall be provided at no cost to the user. Funding comes from a combination of local property taxes, unconditional provincial grants, fines, fees, and donations, including short-term project funds from the federal government. Some are registered charities and solicit donations. They may also receive the indirect government subsidy of the library rate (lower mailing costs) which originated in 1939 to

assist in extending library services to rural areas.

Funding pressures have led to some public-private partnerships, including;

- placing a company logo on library cards for a fee,
- a direct link to Chapters web page from a book-title on a library webpage, for a percentage of sales,
- promotion of commercial computer courses on a library web page for a percentage of registration fees, and
- research services for a fee.

Libraries are leaders in providing Internet access services to their communities, and increasingly provide their services on-line. Recently, commercial on-line libraries (dotcom libraries) have developed in the U.S., and there are concerns that competition between private commercial services and public non-profit ones will increase.

Canada did not make explicit GATS commitments for library services, but it has made commitments in computer technology, on-line data exchange, telecommunications, and research and development.

As with other municipal services, libraries may or may not be exempt from the GATS under Article I(3) as services supplied in the exercise of governmental authority, if their services are not provided on a commercial basis and not in competition with "one or more service suppliers." As discussed above, this exemption is unclear and likely to be interpreted narrowly.

It would appear that most libraries do not supply services on a commer-

cial basis, although this protection is weaker if fees are substantial, if some services are on a cost-recovery basis, and/or if there is private/public partnership involved. The requirement that library services not be “in competition” with commercial interests is more difficult to assert regarding on-line services, since there is now a plethora of on-line information, including “dotcom libraries.” It cannot be assumed, therefore, that all services provided by municipal libraries are exempt from GATS disciplines due to their governmental sponsorship.

If not protected by the governmental authority exemption, libraries may be subject to GATS disciplines arising from Canadian commitments in computer technology, on-line data exchange, telecommunications, and research and development. The Canadian commitments contain reservations (“horizontal limitations”) reducing the extent of the commitment made. A limitation related to libraries is “Subsidies related to research and development are to be unbound,” meaning that Canada has retained the right to maintain or introduce measures for subsidies and not to provide foreign suppliers with market access or national treatment. However, this only limits the requirement to provide national treatment where foreign investment in research and development has occurred, and is unlikely to have an impact on municipal libraries.

Potential concerns for municipal libraries under GATS include:

- the national treatment requirement that government measures provide to all foreign service providers the

same advantages extended to libraries. There are no protections in the General Exception to the GATS for the public policies of promoting literacy and public education to which libraries contribute. Foreign libraries might use a GATS challenge to demand equal access to public funding support, low postal rates, preferential tax treatment as charities, and low-cost use of public infrastructure.

- Although libraries were not established to be intentional monopolies, it is possible to foresee an argument from private service suppliers (Internet cafés) that the use of public infrastructure by libraries to support on-line services constitutes abuse of an (effective public) monopoly, contrary to GATS VIII.
- Librarians have professional qualifications and, although they are not regulated by professional bodies (like doctors, lawyers etc.), library boards make decisions about library qualifications. GATS VI regarding Domestic Regulations applies to non-governmental bodies which make decisions about professional qualifications. The qualifications set by such bodies may face challenges if foreign librarians dispute the Canadian qualifications, on the basis that the standards are “more burdensome than necessary.”

### **Office and administrative support**

As detailed in Annex A, Canada made commitments for virtually every imaginable office and administrative support function, including: business services, accounting, auditing, book-

keeping, computer services, information technology and data services, computer consulting, data processing; and the office services of telephone answering, voice-mail, duplicating, mail services, etc. Many of these functions are contracted to the private sector at this time.

However, more than the other municipal services studied here, these services are largely provided to the municipalities themselves, and are likely covered by GATS XIII, which provides:

Articles II, XVI and XVII (most favoured nation, and national treatment, market access) shall **not** apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

The WTO Agreement on Government Procurement, signed by only 12 countries, including Canada, does not apply to procurement by Canadian municipalities because Canada did not list provincial or municipal governments in the required annexes to the agreement.<sup>42</sup>

However, the demarcation between services provided to the public which have a commercial component (for example, fee payment), so as to invoke GATS coverage, and those services which can be classified as government procurement within GATS XIII is uncertain and unclear. Services relevant to office tasks essential to the function-

ing of a municipal government (accounting, auditing, data processing, telephone answering, mail services, etc.) are clearly not purchased for commercial resale. However, engineering and scientific consulting reports regarding water, sewage, or transport, though purchased for use by government administrators, are related to the provision of services with a commercial component, and are less likely to be subject to the government procurement exemption.

## Summary of findings

- Resource conservation measures enacted relating to any municipal service (water, wastewater, land, air or energy conservation) are not protected under the GATS XIV General Exceptions.
- Environmental assessment laws governing these services may also be challenged as more burdensome than necessary.

## Land Use Planning

- There is a potential for GATS-based challenges to **zoning bylaws** restricting **where** businesses may set up (e.g., auto service centres and repair shops) and **whether** they may set up ("**big box stores**") due to GATS prohibitions on measures that limit total numbers of service suppliers, value of services transactions, numbers of and service operations, and use of economic needs tests.
- There is a potential for challenges to any land use decision which affects foreign service suppliers differently

than local ones, due to the GATS prohibition on discriminatory effect (unintended differential impacts on foreign businesses.) This includes regulatory and technical standards and licensing and certification standards.

### **Water and Sewage Services**

- The broad coverage of services related to water service delivery in the Canadian schedule gives rights to foreign companies (engineering, construction, including scientific water testing and monitoring firms) to the same degree of involvement in water services and wastewater quality and quantity monitoring as Canadian companies may have. It increases the number and scale of private sector players who may create pressure for more privatization of water services or parts of these services.
- Where municipalities have contracted exclusively with a private company or, in Ontario, with OCWA, other foreign companies may claim that the contracts constitute monopolies, contrary to GATS XVI, even if a single-source supplier is preferable for public protection, cost, and efficiency. They may then (through their national governments) challenge such measures.
- Measures to promote water efficiency and use reduction, as well as energy reduction related to water services, if they impact private sector projects (entry of new operators or access to the resource) or designs, may be vulnerable to challenge (as measures for conservation of a resource). They are not protected by the limited GATS XIV general exception.
- Since the GATS covers subsidies, private water companies may seek access to the subsidies now paid to public water providers.
- It may be more difficult to achieve national high standards for water quality affecting the provision of water services. Foreign companies (through their governments) may argue under GATS VI that such regulations are “more burdensome than necessary.”
- The GATS may make it more difficult to improve monitoring and testing of both water sources and treated water. In particular, it may be difficult to require that these services be provided by Canadian-based suppliers and not cross-border ones, as is now sometimes done, to ensure application of Canadian standards and maximum communication in instances of problems.
- Changed land use planning for watershed management, stormwater runoff absorption, and demand management may ultimately imply reduced opportunities for market entry by new suppliers, contrary to GATS XVI.
- Environmental assessment requirements regarding water facility siting and treatment may be challenged as too burdensome.
- If special technical assistance and funding for small water systems is provided in order to implement full-cost pricing, such preferences for small communities could lead to

demands for equal treatment from foreign service suppliers.

- The FCM and CUPE (the Canadian Union of Public Employees) both call for operator training and provincial standards for training. These are the types of qualification requirements and licensing standards that are subject to GATS VI and could be challenged as “too burdensome.”
- The FCM discussions of energy conservation options underlines the need for flexibility for municipalities in designing service systems to meet multiple purposes. This flexibility is reduced when, due to high capital costs, corporations gain long-term contracts and procedures for service delivery. The flexibility is further reduced by the GATS, which gives foreign firms more strategies to demand access to such long-term service commitments.
- The use of a mix of regulatory tools (sewer use bylaws, permits, policies, user fees and education) to control discharges to sewers implies controls (through sewer use bylaws) on the rights of establishment of industries, as well as questions of domestic regulation of water effluents, both vulnerable to GATS challenge.

### **Waste Management**

- GATS may provide foreign companies with opportunities to challenge municipal and provincial waste minimization policies.
- Development of programs that account for a broad range of environmental issues, including resource conservation and improved resource management, and ambitious progressive/iterative targets and timelines, consistent with climate change requirements, are not protected from challenges from foreign companies based on the GATS disciplines.

source management, and ambitious progressive/iterative targets and timelines, consistent with climate change requirements, are not protected from challenges from foreign companies based on the GATS disciplines.

- Provincial regulations and municipal zoning controls which have the effect of limiting opportunities for companies to establish waste management facilities, even if designed for the overall goal of waste reduction and environmental protection, may contravene the market access provisions of GATS XVI through limits on service suppliers, total value of service transactions, numbers of service operations, and “total quantity of service output.”
- These measures and environmental assessment laws may also be challenged as “more burdensome than necessary” under GATS VI.
- The GATS may provide foreign companies with opportunities to challenge municipal and provincial waste minimization policies.
- The FCM calls for the development of programs that account for a broad range of environmental issues, including resource conservation and improved resource management, and ambitious progressive/iterative targets and timelines, consistent with climate change requirements and within realistic funding programs, but the GATS General Exception does not protect resource conservation measures from challenges from foreign companies based on the GATS disciplines.

## Transport

- A preference for public transit may discriminate against “competing” roads-based transport methods (car sellers and service dealers), permitting challenges against the policies proposed to implement the change to public transit, including tax-exempt transit passes and a fuel tax.
- Given that transportation is currently provided by a mix of public and private suppliers, and that subsidies are large in this sector, one may expect demands from private foreign operators for equal access to public subsidies for transport, particularly if a shift in subsidy to rail from roads-based transport occurred.
- Land use changes promoted to create greater density, and long-term transportation plans favouring rail and public transit as part of the strategy for reduced car use, raise the potential of challenges from construction (development) and engineering interests whose business opportunities may be affected.

## Libraries

Potential concerns for municipal libraries under GATS include:

- Foreign libraries might use a GATS challenge to demand equal access to public funding support, low postal rates, preferential tax treatment as charities, and low-cost use of public infrastructure.
- Although libraries were not established to be intentional monopolies,

it is possible to foresee an argument from private service suppliers (*Internet cafés*) that the use of public infrastructure by libraries to support on-line services constitutes abuse of an (effective public) monopoly, contrary to GATS VIII.

- Librarians have professional qualifications, and library boards make decisions about library qualifications. GATS VI regarding Domestic Regulations applies to non-governmental bodies which make decisions about professional qualifications. The qualifications set by such bodies may face challenges if foreign librarians dispute the Canadian qualifications, on the basis that the standards are “more burdensome than necessary.”

## Office and Administrative Functions

- Many office and administrative support functions essential to the functioning of a municipal government (accounting, auditing, data processing, telephone answering, mail services, etc.) are likely not subject to GATS as they are not purchased for commercial resale.
- Engineering and scientific consulting reports regarding water, sewage, or transport, though purchased for use by government administrators, are related to the provision of services with a commercial component. Whether they are subject to the government procurement exemption is unclear.

## Conclusions

The GATS and the ongoing negotiations to expand it pose significant problems for Canadian municipalities. As this study has demonstrated, the GATS adversely affects the ability of municipal governments to supply and to regulate basic services such as water and sewage services; waste management; transportation services; public transit; road-building; land use planning; and library services. As this study has also shown, the GATS exclusions and exceptions said by federal trade officials to protect public services and regulatory capacity are clearly inadequate.

When the GATS was concluded in 1994, the federal government made extensive commitments affecting sectors of vital importance to municipalities and their citizens. Ottawa had other options. It could have not listed key municipal services in the Canadian schedule or used a "horizontal limitation" to exclude municipal measures from coverage under the Canadian commitments.

Federal negotiators made these sweeping commitments with little public debate and without adequately consulting elected municipal representatives. This failure to consult fully with the governments directly affected and to act on their concerns calls into serious question the legitimacy of the broadly worded GATS rules and commitments that now restrict municipalities.

As awareness of the GATS and its impacts on municipalities has increased, there has been growing con-

cern expressed by representatives of municipalities and their citizens. Since GATS negotiations resumed in Geneva in February 2000, over 70 Canadian municipalities have passed resolutions that are highly critical of the GATS and its impacts on municipal services and local governments' regulatory capacity. As a result of this pressure, the federal government has now been forced to respond, albeit belatedly, to municipal concerns.

### No new commitments

Negotiations to broaden and deepen the GATS are currently underway in Geneva. The Doha Declaration, from the November 2001 ministerial meeting held in Qatar, set out specific deadlines for the so-called "request-offer" phase of these negotiations. *Initial* requests to open service sectors are due by June 30, 2002. Requests can be made in any service sectors. March 31, 2003 is the deadline for WTO members to make their *initial* offers to expand the reach of the GATS by indicating the additional specific commitments they are prepared to make. These initial requests and offers are just the starting point of negotiations that will continue until January 1, 2005, the deadline to conclude the current round of WTO negotiations, including those to expand the GATS.

If this federal-municipal government engagement on the GATS is to be meaningful, then a crucial first step is for the federal government to pledge not to make any further GATS commitments affecting municipal services or regulation. This would be consistent with the call by many developing coun-

try WTO member governments for a through assessment of the impacts of the existing GATS before negotiations to expand it proceed further (reference).

There are several major service sectors of great importance to municipalities – including water, cultural, health, education and social services – that Canada has not yet listed in its GATS schedule. It is imperative that Canada continue to exclude these sectors from coverage by the GATS national treatment and market access rules and that the federal government strongly rebuff any pressure on Canada from other WTO countries to list them.

### **GATS Working Party on Domestic Regulations (WPDR)**

Negotiations are also occurring regarding the development of further GATS disciplines on domestic regulations under GATS Article VI. Municipalities have an important role to play in influencing the Canadian government's position and ongoing intervention on this matter. To date, Canada has been one of the strongest supporters of the Article VI negotiations to increase restrictions on non-discriminatory regulation affecting the supply of services.

The government of Canada has, to our knowledge, not studied the potential impact on the full range of public interest regulation of its trade law positions on regulation. Municipalities should insist that such studies be done immediately, with substantial input from local governments, so that potential regulatory impacts are fully under-

stood before the Article VI negotiations proceed further.

The GATS domestic regulation negotiations are already deservedly controversial. A strong voice from municipalities opposing expanded GATS restrictions on governments' regulatory powers would contribute significantly to defeating the proposed Article VI restrictions and maintaining our governments' authority to regulate in the public interest.

### **Government Procurement**

Another key concern for municipalities is procurement. The GATS mandates further negotiations on government procurement in services. These negotiations are also now underway in Geneva.

Local governments should insist that their procurement decisions and procedures not be subject to GATS procurement restrictions. Local governments should also urge Ottawa to ensure that Canada's commitments under the WTO Agreement on Government Procurement, which now covers only Canadian federal government procurement, are not extended to cover municipal-level procurement.

GATS Article XV excludes government procurement from the MFN, national treatment and market access restrictions. However, the GATS does not clearly define government procurement. The broader the definition of procurement, the broader the exclusion and vice versa. Local governments should therefore also press Canadian trade officials to pursue a broad definition of procurement that would provide better protection for the full range

of municipal procurement and contracting decisions.

### **Impacts of Existing Canadian GATS commitments**

Even if steps to curtail the further intrusion of GATS restrictions on municipalities are successful, local governments are still confronted with the cold reality that Canada's existing 1994 commitments already present formidable problems.

The GATS Article XXI gives governments the option to modify or withdraw any commitment in its schedule. To do so, however, a government must be prepared to negotiate "compensatory adjustments," in the form of reciprocal trade concessions, with the governments of foreign service providers who are affected by this withdrawal. If the government withdrawing commitments does not make the agreed compensatory adjustments it may face trade sanctions, which can occur in any sector.

Because Canada's commitments affecting municipalities are so extensive, the degree of the compensatory adjustments needed to successfully invoke Article XXI make this an unpalatable and, quite possibly an unworkable, option for reducing GATS impacts on municipalities.

Rather, what is needed are fundamental changes to the GATS itself to ensure that the treaty is made far more deferential to governments' essential role in supplying and regulating services.

A revision or clarification of the problematic GATS I(3)(c) regarding

services "supplied in the exercise of governmental authority" could provide greater protection for local measures, and should be pursued. Given the widespread acknowledgement that it is unclear and problematic, it may be possible to achieve an expansion of its scope to protect important municipal services and regulatory measures.

The regulatory authority of all levels of government could also be better protected if the GATS General Exception (Article XIV) were changed to allow a government to take regulatory measures "**which it considers necessary**" to meet its legitimate objectives (this permissive wording now applies only to national security measures.)

There are, no doubt, other potential changes to the GATS and Canada's commitments that could reduce its adverse impacts on municipalities. These should be canvassed and assessed. But building the momentum to change the GATS to reduce its impacts on municipalities is, of course, not primarily a legal issue, but a political one.

### **Building the momentum for change**

To this end, municipal officials must continue to raise their concerns forcefully with the federal government which alone represents Canada at the negotiating table – even when its trade policy decisions affect the jurisdiction of other levels of government.

Municipalities must actively monitor the negotiations and insist that the federal government demonstrate that it is acting on municipal concerns at the table.

Municipalities should also raise their concerns with provincial govern-

ments and encourage them to intervene on local governments' behalf with the federal government.

Municipalities should also work in tandem with other concerned interests, for example environmental and financial service regulators, who have expressed concerns about GATS impacts on legitimate public interest regulation.

Local governments and councilors should work with concerned citizens, NGOs unions, environmental groups, first nations, cultural industries and other Canadians who are also concerned about the adverse impacts of the GATS.

Finally, Canadian local governments should communicate their concerns to local governments in other WTO countries, especially those whose national governments have not made substantial GATS commitments affecting local governments, and cooperate with them in raising concerns with their national governments.

These and other steps to multiply and amplify the voices supporting change, nationally and internationally, are the best strategy for achieving meaningful changes to the GATS. Democratically elected local government representatives have an especially influential and legitimate voice. By strongly defending their essential role in providing basic services to their citizens and in regulating all services in the public interest from GATS intrusion, municipal governments defend the interests of all Canadians.

## Endnotes

- <sup>1</sup> Industry Canada, *Trade in Services: Canada in a Global Context*, <http://strategis.ic.gc.ca/SSC/sc00195e.html> and Department of Foreign Affairs and International Trade, *Services Snapshot – 2000*, March 2001
- <sup>2</sup> The question of whether the federal government has the constitutional authority to enter into trade agreements which affect the powers of provincial and local governments has not been litigated and remains controversial and unresolved in Canada.
- <sup>3</sup> Sinclair, Scott, *GATS How the World Trade Organizations's new "services" negotiations threaten democracy*, Canadian Centre for Policy Alternatives, Ottawa, 2000, pp.41-44.
- <sup>4</sup> WTO Council for Trade in Services, Environmental Services, Background Note by the Secretariat, S/C/W/46/ 6July 1998 (98-2690), Paragraph 53
- <sup>5</sup> Ministry of Employment and Investment, Government of British Columbia, "GATS and Public Service Systems," April 2001, and sources cited in it, originally posted at [www.ei.gov.bc.ca/Trade&Export/FTAA-WTO/WTO/governmentalauth.htm](http://www.ei.gov.bc.ca/Trade&Export/FTAA-WTO/WTO/governmentalauth.htm), now available at [http://members.iinet.net.au/~jenks/GATS\\_BC2001.html](http://members.iinet.net.au/~jenks/GATS_BC2001.html)
- <sup>6</sup> Ibid, p. 15
- <sup>7</sup> The cases to March 1999 are summarized in *Background Document to the WTO High Level Symposium on Trade and Environment*, [www.wto.org/english/tratop\\_e/envir\\_e/tr\\_envbadoc2.doc](http://www.wto.org/english/tratop_e/envir_e/tr_envbadoc2.doc)
- <sup>8</sup> WTO Environmental Services, para.15, citing OECD, *Future Liberalisation of Trade in Environmental Goods and Services: Ensuring Environmental Protection As Well As Economic Benefits*, COM/TD/ENV((98)37/FINAL, 1998
- <sup>9</sup> The Gallon Environment Letter, Vol.5, No. 32, August 29, 2001
- <sup>10</sup> WTO Environmental Services, Table 8
- <sup>11</sup> United Nations Department of Economic and Social Affairs, *Central Product Clas-*



# Annex A

## Canadian sector-specific commitments

### Water and sewage services

- Integrated engineering and project management services for water supply and sanitation works turnkey projects (86732) <sup>1</sup>
- Sewage services (CPC 401) full commitment except on natural persons
- Sanitation and similar services (CPC 9403)
- Business services: technical testing and analysis services including quality control and inspection (CPC8676)
- Construction services: general construction work for civil engineering: (CPC 513) including highways... harbours, dams...rail, communications facilities, pipelines...(includes water power site development permit): few limits to liberalization, except for natural persons (unbound)

### Waste management

- Refuse, disposal services, CPC 9402 (p.51) : full commitment except on natural persons

- Business services: technical testing and analysis services including quality control and inspection (CPC 8676, in the context of engineering and landscape services)

### Transportation services; public transit, road-building

- Transportation: integrated engineering services for transportation infrastructure turnkey projects (CPC 86731)
- General construction work for civil engineering: (CPC 513) including highways..harbours, dams...rail, communications facilities, pipelines... (includes water power site development permit): few limits to liberalization, except for natural persons (unbound)
- Business services: technical testing and analysis services including quality control and inspection (CPC8676)
- Transport services: some limits on foreign acquisitions of some federally regulated transport authority

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<sup>1</sup> Commitments were made on 13 categories of engineering services, variously applicable to water and sewage, waste management, transport and land use planning: engineering services (CPC8671); advisory and consultative engineering services (CPC 86721); engineering design services for foundations and building structures (CPC 86722); engineering design services for civil engineering construction (86724); integrated engineering services (CPC 8673).

They include few limitations on market access and national treatment except for requirements for accreditation of engineers themselves, including a need for Canadian residents (or citizens in Quebec for various engineering services). No commitments were made on presence of natural persons (mode 4).

- Rail transport services: railway passenger and freight transport (CPC 7111 & 7112) and maintenance and repair of rail transport equipment (CPC 8868): fully committed except for presence of natural persons. This includes interurban passenger transportation by railway, urban and suburban passenger transportation (mass transit, underground or elevated railways.)
- Road Transport services: Passenger transportation (including urban and suburban buses, trams, trolleys, school buses, airport limousines and buses,) interurban scheduled bus passenger transportation (CPC 71213) All provinces but PEI and New Brunswick have public convenience and needs test to limit market access but not national treatment.
- Taxis (CPC 1221) and rental services of cars with drivers: Requirements for operating licences and permission under local/provincial authorities are retained including the criteria of: examination of the adequacy of current levels of service; market conditions establishing the requirement for expanded services; the effect of new entrants on public convenience, including the continuity and quality of service, and the fitness, willingness and ability of the applicant to provide proper service.
- Highway freight transportation (CPC 71231,71232,71233,71234) with limitations on market access for foreign investment (mode 3) in all provinces except New Brunswick: public convenience and needs test; criteria of adequacy of current levels of service; market conditions for expanded service; effect of new entrants on public convenience (continuity and quality of service, and the fitness, willingness and ability of the applicant to provide the service)
- Also commitments (with little limitation) on maintenance and repair services of road transport equipment, motor vehicles (6112), of all varieties (motorcycles, snowmobiles, trailers, etc.)
- Also, services auxiliary to transport (other than auxiliary to Marine) including storage and warehouse services (CPC742) and freight transport services (CPC 748) requiring Licensed Customs Brokers (federal) and Canadian boards

## Land use planning

- Urban planning and landscape architectural services (CPC 8674) with some residence and citizenship requirements for use of the title
- Architectural services (CPC 8671), advisory and pre-design architectural services (CPC86711), architectural design services (86712) and other architectural services (CPC 86719): some residence requirements for accreditation for national treatment; market access of architects requires sole proprietorship or partnership.
- Nature and landscape protection services (CPC 9406)
- Other environmental services n.e.c. (CPC9409)

- Real estate services: regarding own or leased properties (CPC 821), or fee or contract basis (CPC 822); some requirements for commercial presence for real estate services and agents (for cross-border supply) and presence of natural persons.
- Retailing services: food retailing (CPC 631) and non-food retailing (CPC 632) fully committed except: some requirements for commercial presence of itinerant sellers (Ontario and Quebec.) and direct sellers (Nova Scotia, BC); and no commitments regarding wine and beer sales (CPC 63107) music scores, audio and video records and tapes, books magazines and newspapers and periodicals, and pharmaceuticals, medical and orthopaedic goods (CPC 632)
- including Communications Services 2CN and Financial Services 7B1
- Data base services, excluding those listed under Financial Services 7B1(CPC 844)
- Research and development: Research and experimental development services on social sciences and humanities, including law, economics, except linguistics and language (CPC 852) limits on natural persons only
- Communication services: on-line information and database retrieval (CPC 7523)
- On-line information and/or data processing (including transaction processing CPC 843)
- Communications Services: electronic data interchange

## Library services

- Computer and related services: No limits on liberalization except re presence of natural persons
- Broad categories of information technology and data services:
- Consultancy services related to installation of computer hardware (CPC841)
- Software implementation services, including systems and software consulting services, systems analysis, design, programming and maintenance services, excluding those under Financial services 7B1(CPC842)
- Data processing services, including processing, tabulation and facilities management services, (CPC 843) ex-

## Office support administrative services: call centres, payroll, information technology.

- Business services:
- Accounting, auditing, and book-keeping: (CPC 862) some limits on auditing
- Accounting: re market access: residency or citizenship required for accreditation; sole proprietorship or partnership required (mode3); no commitment to permit entry of foreigners (mode 4)
- Accounting: national treatment: some residency requirements for cross-border supply (mode 1); some requirements for office management by a resident for commercial pres-

- ence (mode3); no commitments for mode 4 (natural persons)
- Computer and related services: No limits on liberalization except for presence of natural persons
  - Broad categories of information technology and data services (as noted under library services, above):
  - Consultancy services related to installation of computer hardware (CPC 841)
  - Software implementation services, including systems and software consulting services, systems analysis, design, programming and maintenance services, excluding those under Financial services 7B1(842)
  - Data processing services, including processing, tabulation and facilities management services, excluding Communications Services 2CN and Financial Services 7B1(843)
  - Other business services,(CPC 879) including:
    - Telephone answering services (CPC 87903)
    - Electronic mail (CPC 7523)
    - Voice mail (CPC7523)
    - On-line information and database retrieval (CPC 7523)
    - Duplicating services (CPC 87904)
    - Mailing list compilation and mailing services (CPC 87906)
- (Few limits except on presence of natural persons)

## Annex B

### Regulation of services related to water quality

A representative example of necessary health and environmental regulations pertaining to water exists in Ontario Regulation 459/00, Regulation Made Under the Ontario Water Resources Act entitled Drinking Water Protection. The regulation is considered necessary in the wake of the Walkerton tragedy, where seven people died and two thousand became ill due to contaminated water.

The regulation prescribes the minimum acceptable level of treatment of water, whether from surface or ground water source, and provides standards (parameters) for sampling and analysis, (Sec.7 and Schedule 2)) and for experience, education and /or training of those who do the sampling (7c ii A and B) ie. provide these services.

Schedule 2, Sampling and Analysis Requirements includes extensive details regarding how samples are to be taken for testing for various factors (microbiological, turbidity, chlorine residual, flouride, volatile organics, inorganics, nitrates/nitrites, pesticides and PCBs).

Schedule 6 includes "Indicators of Adverse Water Quality" together with required corrective actions and notifications to relevant authorities.

Section 7 (8) prohibits the owner of water treatment or distribution system from using a laboratory outside Ontario unless it is accredited for the par-

ticular parameter tests, has a copy of the regulation and drinking water standards and agrees to comply with notification requirements in the Regulation. (7 (8).

The Regulation requires immediate reporting of test results that exceed specific parameters to the Ministry of Health and Ministry of Environment verbally and in writing and prescribes corrective actions for exceedences, including re-sampling and warning notices. There are also requirements for public information, and quarterly reports to the Ministry of Environment. (Sections 11 and 12)

Section 13 refers to the professional accreditation of the writers of the reports; the writer: must be a professional engineer "as defined in the Professional Engineers Act who has experience in sanitary engineering related to drinking water supplies and who is not an employee of the owner."

(Section 13 (2) There are differing and specific reporting requirements depending on the category of water treatment or distribution system.

In summary, Canada has domestic technical regulations regarding services related to water that cover both the method of sampling and inspection, reporting to the government and the public, and who may perform certain functions (engineers with accreditation and experience.)

## **Regulations pertaining to water and sewage works construction and maintenance**

The Ontario Water Resources Act (RSO 1990, Chapter O.40, Section 75 authorizes Cabinet to make regulations regarding all aspects of construction and maintenance of water and sewage works. Twenty-three different subject matters are regulated for each type of system.

Regulations exist concerning “the location, construction, repair, removal, or alteration of mains, service pipes, valves, hydrants, and all other works in or upon public property that form part of or are connected with water works” and “the location, construction, repair, removal, or alternation of sewers, drain pipes, manholes, gully traps, and all other works in or upon public

property that form part of or are connected with sewage works.” (Section 75, (a and d)

Requirements for licensing or operators of water and sewage works are also regulated, together with the classification and qualifications of persons who may obtain licences (Section 75 h), As well as operating standards for the works.

Similar complex detailed requirements pertain to construction, maintenance, notices, records, and abandonment of water wells, and the requirements and standards of qualifications for well contractor and well technician licences. (Section 75 2).

In summary, the various services required for the construction and maintenance of water and sewage works are subject to detailed regulatory standards.

## Annex C

# Regulations pertaining to water and sewage works construction and maintenance

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# From Global to Local



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