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**The Trade in Water Services –
Improving Certainty with Respect to Drinking Water**

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1. Introduction

The General Agreement on Trade in Services (GATS)¹ is a complex and at times poorly understood agreement. These characteristics are a direct result of its negotiation history and the compromises made by the Member States of the World Trade Organisation (WTO) to reach consensus regarding a services based agreement during the Uruguay round of negotiations.² As a result of this negotiation process the GATS was designed to be an ‘opt in’ agreement through which two of the main provisions, Article XVI (national treatment) and Article XVII (market access) only apply in circumstances where a member state nominates the sector for liberalisation. This however requires the ‘classification’ of the service being nominated for liberalisation. The list of services sectors and their classification for liberalisation are broadly contained within two documents, the W/120 Scheduling Guidelines³ and Central Product Classification (CPC).⁴ The voluntary nature of the agreements and the non-exhaustive nature of the classification lists have done little to remove the uncertainty surrounding the document. The uncertainty is perhaps most pronounced but certainly not limited to the area of water services where the very application of the agreement itself continues to be an issue.

The globalisation of water services is a multifaceted concept and process and is one inherently intertwined with the process of service liberalisation and privatisation. It also relates closely to the right to water⁵ and the attainment of universal service, through initiatives such as the Sustainable Development Goals (SDG).⁶ This paper will explore the nature of water services and the content and application of the GATS. In particular it will examine the key provisions of the agreement to the water services sector and assess how water services are classified under the W/120 and CPC. It will also explore the application of the limited GATS related case law, in particular the leading Appellate Body Decision, *US-Gambling*⁷ and ask whether the decision and general uncertainty surrounding service classification raises the prospect of unintended liberalisation and whether changes to the service classification sectors may provide greater certainty. Improving the certainty surrounding this agreement will support its function and the expansion and improvement of water services.

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

² Eric Leroux, ‘Eleven Years of GATS Case Law: What Have we Learned?’ (2007) 10(4) *Journal of International Economic Law* 749, 749-50.

³ Services Sectorial Classification List, MTN.GNS/W/120, World Trade Organisation (W/120).

⁴ Central Product Classification (CPC) Version 1.0, Statistical Papers Series, M, No. 77 Ver 1.0, United Nations 1998.

⁵ See Human Rights and Access to Safe Drinking Water and Sanitation (6 October 2010) A/HRC/RES/15/9; The Human Right to Water and Sanitation, UNGA Res 64/292 (28 July 2010).

⁶ See Target 6 United Nations Development Programme, *Transforming Our World: The 2030 Agenda for Sustainable Development* A/RES/70/1 (2015).

⁷ Appellate Body Report, *United States – Measures Affecting the Cross-Boundary Supply of Gambling and Betting Services* WT/DS285/AB/R, adopted 20 April 2005; Panel Report WT/DS285/R, adopted 20 April 2005 (*US – Gambling*).

2. The Globalisation, Liberlisation (and Privatisation) of Water Services

Globalisation is an amorphous, multifaceted and multidimensional process that eludes simple definition. Broadly, globalisation may be taken to mean the total amount of economic, social, political and legal processes which transcend national boundaries and move freely between states.⁸ The term was coined by Theodore Levitt, who used the expression in 1985 to describe the pervasive and rapid flow of investment, production and consumption of goods, services, technology and capital across the globe which he had observed occurring over the previous two decades. From this perspective, Jeremy Finger and Mathias Allouche note that the term globalisation was mainly employed by economic historians as a means of describing the changing global economy, a connotation that the expression maintained until recently.⁹ Today, globalisation describes the different types of changes occurring within not merely the economic dimension, but all aspects of human life.¹⁰

Globalisation challenges the concept of state boundaries, as national governments no longer possess total sovereignty in managing their economic affairs. The process also demonstrates the dominance of neo-liberal economic theory as it aims to remove global barriers to the free flow of commerce and trade.¹¹ Since the 1970s, it has not been a static process. Jurgen Habermas argues that, since the formation of the WTO, the rate of globalisation has rapidly augmented, as a result of the increased imposition of free trade imperatives on economic activity.¹² Consequently, national boundaries diminish in significance as the instruments of liberalisation take effect.

Globalisation and the tools of trade liberalisation, such as the GATS, have the potential to radically change the operation of water markets, in particular those that have traditionally operated under monopoly government control. The private provision of water services is not however a new phenomenon. The private sector was responsible for the first formal provision of water and sanitation services in Western Europe and North America in the nineteenth century and, from this time has expanded to multi-billion dollar industry.¹³ The responsibility for the provision of water services gradually shifted to the public sector over the nineteenth and early twentieth centuries as private firms failed to meet the needs of their consumers.¹⁴ The government sector maintained its dominance in the water and market from this time until the 1970's when Western political thought embraced neo-liberal economic theory and the concept of the 'free market'.¹⁵ Private firms operate in over one hundred and twenty countries around the world.¹⁶ National governments generally

⁸ Frank Garcia, 'The Global Market and Human Rights: Trading Away the Human Rights Principle' (1999) 25 *Brooklyn Journal of International Law* 51, 56.

⁹ Theodore Levitt, 'The Globalisation of Markets' in A.M. Kantrow, *Sunrise...Sunset: Challenging the Myth of Industrial Obsolescence* (1985), 53-68; Mathias Finger & Jeremy Allouche, *Water Privatisation: Trans-National Corporations and the Re-Regulation of the Water Industry* (Spon Press, 2002) 2-4.

¹⁰ Maude Barlow, *The Free Trade of the America: The Threat to Social Programs, Environmental Sustainability and Social Justice* (Council of Canadians, 2001), 2.

¹¹ Jurgen Habermas 'The European Nation-State and the Pressures of Globalisation' (1999) 235 *New Left Review* 46.

¹² *Ibid* 52.

¹³ Jessica Budds & Gordon McGranahan, 'Are the Debates on Water Privatisation Missing the Point? Experience from Africa, Asia and Latin America' (2003) 7 *Environment & Urbanisation* 87, 90-2.

¹⁴ James Salzman, 'Thirst: A Short History of Drinking Water' (2006) 31 *Duke Law School Working Paper Series* 1.

¹⁵ Budds & McGranahan (n13).

¹⁶ Jason Morrison & Peter Gleick, 'Freshwater Resources: Managing the Risks Facing the Private Sector' (Pacific Institute, 2004) 5; Vandana Shiva, *Water Wars: Privatisation, Pollution and Profit* (South End Press, 2002) 97.

rely upon regulation as the primary means of ensuring a balance between consumer and corporate interests.¹⁷

Despite the high level of private sector participation in the water services sector, the industry operates generally outside of the direct influence of trade liberalisation and the WTO. At present there are no specific commitments with respect to water services under the GATS. There is also a significant degree of uncertainty as to how the agreement classifies a water service if a specific commitment were to be made by a Member State.¹⁸ It is therefore important to understand how GATS applies to the water services sector and whether there is any scope to provide greater clarity to their relationship.

3. The Right to Water and the Sustainable Development Goals

The World Health Organisation (WHO) and the United Nations Children's Fund (UNICEF) estimated that in 2017 nearly 2.1 billion people lacked access to adequately managed drinking water services.¹⁹ Moreover, four in ten people globally as classified as experiencing water stress.²⁰ The 2017 United Nations (UN) Water Report further emphasised these concerns. It highlighted that two thirds of the world's population live in areas which experience water scarcity for at least one month per year and that approximately 500 million people live in areas where consumption exceeds locally renewable water resources by a factor of two.²¹ There is a strong and interconnected relationship between the adequacy of a nation's water and sanitation system and its level of economic development. Investment is the key for developing countries to improve their water and sanitation infrastructure and service, however foreign investors generally avoid nations with 'unpredictable food production, health problems related to poor water quality and unreliable electrical supplies' and therefore do not assist in the 'breaking' of the poverty cycle.²² International law has increasingly recognised the right to water over recent years, most notably in 2010 with the United Nations General Assembly²³ and Human Rights Council Resolutions²⁴ acknowledging the existence of the right within international law. This international recognition has led to the increased application of the right at the regional and domestic level.²⁵

The right to water has developed within international law over a number of years. The right to access adequate drinking water was first directly acknowledged by the international community in 1977 at the United Nations Water Conference.²⁶ Since this time the right has been recognised in a number of international instruments, including

¹⁷ See for example, OFWAT, the economic regulator of water services in the England and Wales, <https://www.ofwat.gov.uk> (accessed 4/8/15). See also as an example of regional water regulation: *Water Framework Directive – 2000/60/EC*.

¹⁸ See Rebecca Bates, 'The Trade in Water Services: How Does GATS Apply to the Water and Sanitation Services Sector?' (2009) 31(1) *Sydney Law Review* 121-42.

¹⁹ World Health Organisation and United Nations Children's Programme, 'Progress on Drinking Water, Sanitation and Hygiene 2017: Update and SDG Baselines' (2017) available at <<https://washdata.org/sites/default/files/documents/reports/2018-01/JMP-2017-report-final.pdf>> (accessed 15/3/18)

²⁰ United Nations, 'Water' available at <<http://www.un.org/en/sections/issues-depth/water/>> (accessed 15/3/18).

²¹ *Ibid*

²² The World Bank, *Water and Poverty Linked* at <<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS0,print:Y>> accessed 5 March 2006 (Document on file with Author)

²³ The Human Right to Water and Sanitation (n5); Human Rights and Access to Safe Drinking Water and Sanitation (n5)

²⁴ *Ibid*

²⁵ Rebecca Bates, 'The Road to the Well: An Evaluation of the Customary Right to Water' (2010) 9(3) *Review of European Community and International Environmental Law* 282, 289-92

²⁶ Report of the United Nations Water Conference, Mar del Plata (March 25, 1977) UN Publication, E77 II A 12 (Mar Del Plata Action Plan)

the Stockholm Declaration,²⁷ the Convention on the Rights of the Child²⁸ and the International Convention on the Elimination of all forms of Discrimination Against Women,²⁹ which have supported the development of different elements of the right.

In July 2010, the UN General Assembly endorsed Resolution 64/292, ‘The Human Right to Water and Sanitation’³⁰ which recognised the right to water in light of previous UN commitments and the significant numbers of individuals still lacking basic water services.³¹ The resolution acknowledged ‘the importance of equitable access to safe and clean drinking water as an integral component of the realization of all human rights’.³² The resolution also called upon States to ‘scale up [their] efforts’ to provide ‘safe, clean, accessible and affordable drinking water and sanitation for all’ through the provision of additional technology transfer, capacity building and financial resources.³³ The Resolution was a highly significant development in the right, both in terms of the acknowledgement of previous developments and moving the right forward in terms of status and acceptance.³⁴

In September 2010, the United Nations Human Rights Council added to the General Assembly Resolution, with its own Resolution entitled ‘Human Rights and Access to Safe Drinking Water and Sanitation’.³⁵ This resolution added to the recognition of the General Assembly affirming that the right to water and sanitation formed part of the existing body of international law and the binding nature of the right.³⁶ Importantly, the Resolution recalls the General Assembly Resolution, and in Principle 3 affirms:

that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.³⁷

The Resolution again recalled the vast body of international instruments which have supported and recognised the right including the Universal Declaration of Human Rights,³⁸ ICESCR, Convention on the Elimination of All Forms of Discrimination Against Women³⁹ and Convention on the Rights of the Child⁴⁰ and the relevant provisions of declarations and programmes of action adopted at major United Nations Conferences such as Mar del Plata. It also makes reference to regional commitments and initiatives recognising the right to water and international commitments.⁴¹ Winkler argues that the Resolution places the rights to water within ‘the context of legally binding human rights instruments and reinforces its understanding as a component of the right to an adequate standard of living’.⁴² Linked to these statements

²⁷ Declaration of the United Nations Conference on the Human Environment (1972) U.N. Doc A/CONF.48/14/Rev.1, reprinted 11 ILM 1416 (Stockholm Declaration)

²⁸ Convention of the Rights of the Child, UNGA Res 44/25 of 20 November 1989 (2 September 1990) (CRC)

²⁹ Convention on the Elimination of all forms of Discrimination Against Women (entered into force 3 September 1981) UNTS No 20378 vol. 1249 (CEDAW)

³⁰ The Human Right to Water and Sanitation (n5)

³¹ Ibid; Bates (n25) 289-92

³² The Human Right to Water and Sanitation (n5), principle 2

³³ ibid

³⁴ Inga Winkler, *The Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart, 2014) 79-80

³⁵ Human Rights and Access to Safe Drinking Water and Sanitation (n5)

³⁶ The Right to Water and Sanitation, ‘International Timeline’ <<http://www.righttowater.info/international-timeline/#sep2010>>, accessed 25/4/18

³⁷ Principle 3, Human Rights and Access to Safe Drinking Water and Sanitation (n5)

³⁸ *Universal Declaration of Human Rights*, G.A. Res 217, U.N. Doc A/64 (1948) (UNDR)

³⁹ CEDAW (n29)

⁴⁰ CRC (n28)

⁴¹ Resolution on Human Rights and Access to Safe Drinking Water and Sanitation (n5)

⁴² Winkler (n34) 81

from the General Assembly and Human Rights Council was the resolution by the World Health Assembly also in 2011. The resolution 'Drinking-Water, Sanitation and Health', affirmed the recognition of the right and proposed a roadmap for its realisation. In particular it called for the World Health Organisation's Director General to

'strengthen WHO's collaboration with all relevant UN-Water members and partners, as well as other relevant organizations promoting access to safe drinking-water, sanitation and hygiene services, so as to set an example of effective intersectoral action in the context of WHO's involvement in the United Nations Delivering as One initiative, and WHO's cooperation with the United Nations Special Rapporteur on the human right to safe drinking water and sanitation with a view to improving the realization of the human right to water and Sanitation".⁴³

Such a statement demonstrates the recognition of the right by the international community and also a change of dialogue surrounding the right. Following the General Assembly and Human Rights Council Resolutions the right may be said to have attained international recognition. It also is being increasingly integrated and appropriated by international agencies, governments and civil society.⁴⁴ The World Health Assembly Resolution also illustrates that emphasis has now shifted from recognition to realisation.

This change was also demonstrated by the 2030 Sustainable Development Goals (SDG).⁴⁵ The goals developed by the United Nations Development Programme in 2015 aim to build on the work stated by the Millennium Development Goals (MDG)⁴⁶ in 2000, placing again an emphasis on the objective of sustainable development. Goal 6 of the SDG provides

6.1 By 2030, achieve universal and equitable access to safe and affordable drinking water for all

6.2 By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations

6.3 By 2030, improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally

6.4 By 2030, substantially increase water use efficiency across all sectors and ensure sustainable withdrawals and supply of freshwater to address water scarcity and substantially reduce the number of people suffering from water scarcity

6.5 By 2030, implement integrated water resources management at all levels, including through transboundary cooperation as appropriate

6.6 By 2020, protect and restore water related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes

⁴³ World Health Assembly, Resolution 64/24 'Drinking-Water, Sanitation and Health' (24 May 2011) available at http://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_R24-en.pdf accessed 15/3/18

⁴⁴ Malcolm Langford and Anna Russell 'Introduction' in Malcolm Langford and Anna Russell (eds) *The Human Right to Water: Theory, Practice and Prospects* (Cambridge, 2017) 51.

⁴⁵ United Nations Development Programme, *Transforming Our World: The 2030 Agenda for Sustainable Development* A/RES/70/1 (2015).

⁴⁶ United Nations Millennium Development Goals GA Res A/CONF 55/2 (2000). 2002 World Development Summit Plan of Implementation UN Doc A/CONF.199/20 (2002).

6.b Support and strengthen the participation of local communities in improving water and sanitation management⁴⁷

Langford and Russell argue that the SDGs demonstrate the growing influence of the right to water and the adoption of a rights based perspective.⁴⁸ Also it is noteworthy that the concerns of drinking water and sanitation are treated as separate goals in 6.1 and 6.2. This mirrors the approach of the General Assembly also in 2015 with the passing of the resolution ‘The Human Rights to Safe Drinking Water and Sanitation’ which aims to support the development of a separate right of sanitation within international law.⁴⁹

4. Overview of the General Agreement on Trade in Services (GATS)

The General Agreement on Trade in Services (GATS) is the sector specific agreement negotiated by WTO member states during the Uruguay Round of negotiations. It formed part of the ‘new’ WTO replacing the previously stand alone General Agreement on Tariffs and Trade (GATT). The GATS is responsible for establishing ‘binding rules’ on the international trade of services.⁵⁰ Eric Leroux argues that this Agreement is ‘somewhat complex’ as a result of the substantial challenges faced by the negotiators in achieving their goal of drafting a ‘comprehensive set of disciplines governing the multilateral trade in services’.⁵¹ As a result, the GATS is a mixture of mandatory and voluntary obligations, which at times create substantial interpretative difficulties.⁵² Interestingly, the Agreement does not define the meaning of ‘services’⁵³ within its text. However, it is clear that GATS applies to all forms of trade in services and ensures that the liberalisation commitments made by Member States apply to all services nominated by a Member for liberalisation.⁵⁴ The Agreement does, however, define the meaning of ‘trade in services’ as being the supply of a service:

- (a) from the territory of one Member into the territory of any other Member;
- (b) in the territory of one Member to the service consumer of any other Member;
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.⁵⁵

Article 1(3)(b) excludes the application of the Agreement from government services.⁵⁶ As previously mentioned the classification of services is generally defined

⁴⁷ United Nations Development Programme, Sustainable Development Goals available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> accessed 15/3/18

⁴⁸ Langford and Russell (n44) 51

⁴⁹ See The Human Rights to Safe Drinking Water and Sanitation (n5)

⁵⁰ World Trade Organisation, ‘The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines’ <https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm> accessed 25/4/18; David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy* (4th ed, Foundation Press, 2011) 1216.

⁵¹ Leroux (n2) 749-50

⁵² Ibid

⁵³ The exclusion of a definition was the intention of the drafters: See Aly K Abu-Akeel, ‘Definition of Trade in Services Under the GATS: Legal Implications’ (1999-2000) 32 *George Washington Journal of International Law and Economics* 189, 190-1.

⁵⁴ Ibid

⁵⁵ GATS art I, (n1)

⁵⁶ GATS art I:3(b), (n1); GATS art I:3(c), (n1) defines a service supplied in the exercise of government authority to be ‘any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers’

by the CPC and W/120. The nature of the classification process and its application to water services will be discussed in depth in the following section.

The GATS document is divided into two key sections - the framework Agreement containing the general rules and the accompanying schedules which list national commitments on specific domestic access for foreign suppliers.⁵⁷ GATS, like the GATT, contains a number of key provisions designed to promote equality between Member States, market access and non-differential treatment of like products. These are:

- Article II:1: Most Favoured Nation (MFN)
 - With respect to any measure covered in this Agreement, each Member shall accord immediately and unconditionally to service and service suppliers of any other Member treatment no less favourable than it accords to like services and service suppliers of any other country.
- Article III: Transparency
 - Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.
- Article XVI – Market Access
 - With respect to market access through the modes of supply identified in Article I, each Member shall accord services, and service suppliers of any other Member, treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.
- Article XVII – National Treatment Obligation
 - In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

Despite the existence of similar principles in the two Agreements,⁵⁸ the GATT and GATS differ as a result of the mixed approach adopted by the GATS. This approach allows for the core provisions of Article XVII (National Treatment) and Article XVI (Market Access) only to apply to individual service sub-sectors nominated by the Member State for liberalisation whereas Articles II (Most Favoured Nation) and III (Transparency) apply ‘horizontally’ across all sectors in a similar manner to the GATT.⁵⁹ Consequently, Articles XVI and XVII will only apply in circumstances where a Member State has specifically nominated it for inclusion thus making GATS an ‘opt in’ Agreement. Therefore, Member States are required to nominate their

⁵⁷ WTO (n50)

⁵⁸ Leroux, (n2) 752

⁵⁹ Hunter, Salzman & Zaelke (n50) 1216; WTO (n50)

service sectors for liberalisation before Articles XVII and XVI have national application.⁶⁰

Specifically, the MFN principle requires Member States to ‘automatically and unconditionally’ provide other Member States with treatment no less favourable than they would afford any other country. The concept of like services has not yet been fully explored by the WTO adjudication bodies. However, it did find in *Canada – Autos*⁶¹ that ‘manufacture beneficiaries’ and ‘non-manufacture beneficiaries’ were like service suppliers ‘regardless of whether they have production facilities in Canada’.⁶² Members are required to afford this access without delay and to all WTO Members.⁶³ The GATS, however, allows a Member to ‘maintain a measure inconsistent with [the MFN principle] provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions’,⁶⁴ thus enabling members to exclude themselves from the operation of the provision for both legal and political reasons.⁶⁵ Similarly, Article II, the Market Access provision, requires members wishing to liberalise a service sector to specifically nominate the sector for liberalisation and then enter into commitments under Articles XVI, XVII and XVIII.⁶⁶ Once nominated, the provision operates to restrict a Member from limiting the number of suppliers in the country, value of services imported, quantity of service output, number of service operations, number of persons employed, participation on foreign capital and certain forms of legal entities.⁶⁷ However, Article XVI.2 creates an exception to the rule allowing Members to meet its requirements ‘according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.’⁶⁸ Mitsuo Matsushita, Thomas Schoenbaum and Petros Mavroidis argue that this allows Members to make exceptions through a number of means, including the use of population density tests to determine the number of service suppliers permitted to operate or limiting the operation of foreign subsidiaries to a percentage of total domestic assets in an industry sector.⁶⁹ Consequently this provision, like the MFN principle does not apply to all Members in all circumstances. Finally, Article XVII, the National Treatment provision requires that members treat the ‘like services’ of Members in a manner no less favourable than their domestically produced ‘like services’. This provision has a potentially large scope of operation, having the capacity to cover all GATS measures. However, in reality, its operation is limited to the areas affecting the trade in services excluding those already covered by Articles XVI and VI.⁷⁰ In *EC-Bananas III*,⁷¹ the dispute resolution panel developed a four pronged test to determine the inconsistency of a measure with the GATT

⁶⁰ WTO (n50)

⁶¹ *Canada — Certain Measures Affecting the Automotive Industry*, WTO Doc WT/DS139/R, WT/DS142/R (2000) (Report of the Panel); WTO Doc WT/DS139/AB/R, WT/DS142/AB/R, AB-2000-2 (2000) (Report of the Appellate Body).

⁶² Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis, *The World Trade Organisation: Law, Practice and Policy*, (2nd ed., 2006) 619-20

⁶³ *Ibid* 620-21

⁶⁴ GATS art II.2 (n1)

⁶⁵ Matsushita, Schoenbaum & Mavroidis (n62) 623-6.

⁶⁶ *Ibid* 648

⁶⁷ *Ibid*

⁶⁸ GATS art XVI.2 (n1)

⁶⁹ Matsushita, Schoenbaum & Mavroidis (n62) 468-9

⁷⁰ *Ibid* 659-60; GATS art VI (n1) (the Domestic Regulation provision) provides that in circumstances where a member has made a GATS commitment, the Member must apply regulations that may affect the trade in services ‘in a reasonable, objective and impartial manner’

⁷¹ *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/R/USA (1997) (Report of the Panel); WTO Doc WT/DS27/AB/R (1997) (Report of the Appellate Body) (*‘EC — Bananas III’*).

National Treatment provision.⁷² First, the test requires that the complainant establish that the Member had taken a ‘specific commitment in the relevant sector and mode of supply’. Second, the Member must have adopted a measure that ‘affected the supply of services in the sector and the mode of supply concerned’. Third, the disputed measure must have been ‘applied to foreign and domestic like services and/or services suppliers’ and finally, the measure must have accorded the foreign suppliers ‘treatment less favourable than that accorded their domestic counterparts’.⁷³ However, it remains to be seen whether this approach will be applied by a dispute resolution panel with respect to the GATS National Treatment provision.

The GATS, however creates a number of general exceptions under Article XIV which provide for circumstances in which Members are allowed to take certain otherwise prohibited actions on a number of limited grounds in the same manner as Article XX of the GATT. These actions must not be applied in a discriminatory manner or act as a distinguished restriction on the trade in services.⁷⁴ Specifically of interest with respect to the water services sector, the Article XIV(b) provides that:

‘nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures...necessary to protect human, animal or plant life or health’.⁷⁵

Similarly, Article XIV also provides an exception for measures designed to protect ‘public morals and public order’⁷⁶ however not as in the case of GATT Article XX(g) ‘exhaustible’ natural resources. Generally the Article XX/Article XIV case law has demonstrated a willingness of the WTO Panel and Appellate Body to accept the merits of trade restrictive measures in genuine circumstances, however a general failing of the Member State to construct the measures in a non-discriminatory manner.⁷⁷ An exception to this trend can be found in the recent Appellate Body decision, *EC-Seals Products*⁷⁸ where measures adopted by the European Union (EU) to prohibit the importation and marketing of seals products were the subject of a complaint by Canada and Norway. In this dispute the EU justified the application of its measures under GATT XX(a), and the ‘protection of public morals and public’, on the basis that animal welfare concerns were of high importance to public morals in Europe.⁷⁹ These arguments were upheld by both the Panel and Appellate Body despite the measure being discriminatory under Articles I(i) and III(iv).⁸⁰ The finding in *EC-Seal Products* has the potential to inform the interpretation of Article XVI(a)

⁷² Matsushita, Schoenbaum & Mavroidis (n62) 662

⁷³ Ibid; *EC – Bananas III* (n71)

⁷⁴ GATS art XIV (n1)

⁷⁵ GATS art XIV(b) (n1)

⁷⁶ GATS art XIV (a) (n1)

⁷⁷ See for example US – Gambling (n7); *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, 38 ILM 118 (1999), *Reformulated Gasoline and Brazil: Measures Affecting Imports of Retread Tyres*, Report of the Appellate Body, WT/DS332/AB/R, 3 December 2007

⁷⁸ Appellate Body Report, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R (May 22, 2014)

⁷⁹ WTO, ‘European Communities — Measures Prohibiting the Importation and Marketing of Seal Products’ <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds401_e.htm> accessed 25/4/18

⁸⁰ European Communities - Measures Prohibiting the Importation and Marketing of Seal Products - AB-2014-1 - AB-2014-2 - Reports of the Appellate Body (2014); Rob Howse, Joanna Langille, and Katie Sykes, ‘Sealing the Deal: The WTO’s Appellate Body Report in EC – Seal Products’ 18(2) Insights (4 June 2014) <http://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto-s-appellate-body-report-ec---seal-products> accessed 25/4/18

as the ‘protection of public morals’ has been a key issue in the very limited case law to date.⁸¹

5. GATS and Service Classification

The classification of water services is an area of relative uncertainty under the GATS. As previously mentioned, service classification within the Agreement is governed by the W/120 and CPC documents which categorise and define service areas and subcategories. The CPC agreement was created by the United Nations Statistical Office in 1991 with the goal of classifying goods and services in a ‘comprehensive and mutually exclusive manner’.⁸² Mireille Cossy notes that originally the document was created for statistical purposes but was later adopted by Member States as the guiding classification document following the Uruguay Round. Since 1991, the document has been revised twice but now however shares the responsibility for service classification with the Services Sectorial Classification List (W/120).⁸³ The W/120 was drafted by the GATT Secretariat in 1991 and creates twelve broad service sectors which are divided in 160 sub sectors and as Cossy notes is generally viewed as a ‘simplification’ of the CPC. Member States are free to use either classification system or to adopt another of their choosing.⁸⁴ This ‘freedom’ has been a significant cause of the general uncertainty surrounding service classification as there are no definitive boundaries or groupings.⁸⁵ This, as will be discussed subsequently in relation to *US-Gambling*, presents challenges in terms of defining both the nature and boundaries of GATS commitments. Specifically, with respect to water services the issue of classification is particularly fraught. Neither the CPC or the W/120 contain a specific reference to water services, however the related areas of sanitation and sewage services are included within the environmental services category.⁸⁶

The area of environmental services has seen a growth in the number of commitments made by Member States over recent years. The W/120 creates four subcategories within this sector namely ‘sewage services’, ‘refuse disposal services’, ‘sanitation and similar’ and ‘other’, which may include cleaning, noise abatement and landscaping.⁸⁷ At present there are over 60 commitments in the area, 54 of which are with respect to sanitation.⁸⁸ This number is however minimal compared to the number of commitments made in other areas such as tourism and financial services.⁸⁹ The low level of commitments in this area can be partly explained by the operation of the public services exception in Article 1(3)(b) as many environmental services are state operated, and particularly in the case of sanitation, have monopolistic tendencies. There are however generally higher levels of community concern regarding the liberalisation of essential services, such as water and sanitation, which has made

⁸¹ See for example *US-Gabbling* (n5); *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products - AB-2009-3 - Report of the Appellate Body* (2009).

⁸² Mireille Cossy, ‘Water Services at the WTO’ in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder (eds) *Fresh Water and International Law* (OUP, 2005) 117-25.

⁸³ *Ibid* 122-5

⁸⁴ *Ibid*.

⁸⁵ *Ibid* 121-2

⁸⁶ *Ibid*

⁸⁷ W/120 (n3)

⁸⁸ WTO/World Bank., Services Database [http://i-tip.wto.org/services/\(S\(5s22pd0bjgendtvmsulcamk\)\)/SearchResultGats.aspx](http://i-tip.wto.org/services/(S(5s22pd0bjgendtvmsulcamk))/SearchResultGats.aspx)

⁸⁹ WTO (n50)

liberalisation in these areas more politically sensitive than other areas such as financial services⁹⁰

The European Community submitted a proposal in 2000 to the WTO for greater clarity regarding the classification of environmental services. The proposal argued for the creation of seven new categories of 'purely environmental services' which it asserted would support the enhanced take up of commitments by Member States.⁹¹ Importantly, it allocated a specific category for water services, 'water for human use and water management'.⁹² This proposal while gathering a great degree of interest was not formally adopted by the WTO.⁹³ As a result, water services are not specifically mentioned within the classification system and there to date have been no Member State commitment in this area.⁹⁴ However, the increasing rate of commitments in the environmental services sector and in particular with respect to sewage and sanitation, raises the question the question of how long water services may remain outside the Agreement. Sewage and sanitation services both rely heavily upon water for their processes and clearly their water needs feed into water use and resource allocation. Water services therefore in their broadest meaning may be subject to GATS commitments while the specific area of drinking water may remain outside. This fragmentation of water supply in terms of the Agreement may raise domestic challenges for water managers given the tendency of the sector towards a natural monopoly and require co-existence of public and private actors.⁹⁵ The complexity and uncertainty surrounding the classification of water services is a significant challenge for the WTO and the GATS agreement. Whilst the sector is currently outside the agreement, the increasing activity in environmental services means that liberalisation may occur within some aspect of service. The likelihood of this occurring is enhanced by the interpretation of the Agreement in particular through the leading decision of *US-Gambling*.

6. US-GAMBLING and Unintended Service Liberalisation?

There has been relatively little case law regarding the GATS within the Panel or Appellate Body level of the Dispute Settlement Unit (DSU). The GATS has only been considered by the Dispute Settlement Body in a handful of cases and only two at the Appellate level.⁹⁶ The first of these decisions, *US -Gambling*⁹⁷ is a GATS specific dispute and one whose details will be considered subsequently. The second, *China — Publications and Audiovisual Products (2009)*⁹⁸ was a dispute between US and China over a number of Chinese measures which the US argued restricts the distribution of audiovisual and home entertainment products in China. This dispute considered both GATT and GATS provisions. The Chinese measures in this dispute were found to be

⁹⁰ See for example World Trade Organisation (WTO), *GATS – Fact and Fiction* at <http://www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf> (accessed 4/8/15); See also Shiva (n16).

⁹¹ WTO, 'Communication from the European Communities and their Member States' GATS 2000: Environmental Services S/CSS/W/38 (22 December 2000).

⁹² *Ibid* II, 8, 6A.

⁹³ Cossy (n82) 123-4.

⁹⁴ World Bank and WTO, I-TIP Services < [http://i-tip.wto.org/services/\(S\(r2sl0omoomrwnqs4bwb02o4i\)\)/default.aspx](http://i-tip.wto.org/services/(S(r2sl0omoomrwnqs4bwb02o4i))/default.aspx)> accessed 25/4/18

⁹⁵ Budds & McGranahan (n13) 93; Peter Gleick, Garry Wolff, Elizabeth Chalecki & Rachel Reyes, 'The New Economy of Water: The Risks and Benefits of Globalization and the Privatization of Fresh Water' (Pacific Institute for Studies in Development, Environment and Security, 2002) 5-6.

⁹⁶ Leroux (2) 750

⁹⁷ *US – Gambling* (n7)

⁹⁸ *China — Publications and Audiovisual Products* (n81).

inconsistent with Article XVII (national treatment) of the GATS.⁹⁹ There are currently six of disputes under consultation before the DSU,¹⁰⁰ including *European Union and its Member States — Certain Measures Relating to the Energy Sector — Dispute between EU and Russian Federation* in relation to the EU's Third Energy Package.¹⁰¹ If this dispute progresses it will be the first GATS decision in relation to natural resources and may provide some important insights in the area.

This discussion will focus on US-Gambling as it contains significant implications for service classification and raises the prospect of what can be called 'unintended liberalisation'. In *US-Gambling*, Antigua and Barbuda (Antigua) claimed that the United States (US) had violated paragraphs 1 and 3 of Article VI, through a number of federal¹⁰² and state measures¹⁰³ legislated in the US relating to the remote supply of gambling services.¹⁰⁴ Given the number of provisions, Antigua alleged the 'collective effect' of the state and federal measures amounted to a total prohibition on the cross-border supply of gaming services.¹⁰⁵ The GATS however only allows a Member to challenge the *effect of a measure* as opposed to the collective effect of a group of measures.¹⁰⁶ As a result, both the Panel and Appellate Body rejected Antigua's claim, focusing the failure of Antigua to structure its complaint in an appropriate form.¹⁰⁷

Despite this technical outcome the Panel and Appellate took the opportunity to consider the nature of the US's GATS commitment to 'other recreational services (except sporting)' and whether the commitment included 'gambling and betting services' within its scope.¹⁰⁸ The Panel and Appellate Body found that the US had made a specific commitment with respect to gambling and betting services by applying the W/120¹⁰⁹ and 1993 Scheduling Guidelines¹¹⁰ as a 'supplementary means of interpretation' under Article 32 of the *Vienna Convention*.¹¹¹ The W/120 had been relied upon by the DSU¹¹² as a means of defining individual service sectors, while the Scheduling Guidelines was endorsed as a means of assisting Members achieve the 'greatest possible degree of clarity' when scheduling a specific commitment.¹¹³ Consequently, both documents were deemed important by the bodies as a means of

¹⁰⁰ WTO, Disputes by Agreement (GATS)

https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A8 25/4/18

¹⁰¹ WTO, European Union and its Member States — Certain Measures Relating to the Energy Sector https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds476_e.htm accessed 25/4/18

¹⁰² *United States Code (the 'Wire Act')* s1084 of Title 18; *United States Code (the "Travel Act")* s 1952 Title 18; *United States Code (the "Illegal Gambling Business Act", or "IGBA")* s 1955 of Title 18.

¹⁰³ *Colorado Revised Statutes* ss 18-10-103; *Louisiana Revised Statutes (Annotated)* s14:90.3; *Annotated Laws of Massachusetts* s17A ch 271; *Minnesota Statutes (Annotated)* s609.755(1) & subdiv 2-3 of s609.75; *New Jersey Constitution* para 2 of sVII of art 4, *New Jersey Code* s2A: 40-1; *New York Constitution* s 9 art; *New York General Obligations Law* s 5-401; *South Dakota Codified Laws* ss 22-25A-1 through ss22-25A-15; *Utah Code (Annotated)* s 76-10-1102: source *US-Gambling*, above n55 at para 4

¹⁰⁴ Leroux (n2) 756; Panagiotis Delimatsis, 'Due Process and 'Good' Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS' (2006) 10(1) *Journal of International Economic Law* 13, 13-14

¹⁰⁵ Leroux (n2) 756

¹⁰⁶ *US- Gambling* (n7) para 124-6

¹⁰⁷ *US – Gambling* (n7) 115-128 in Leroux (n2) 756

¹⁰⁸ Leroux (n2) 762-5, 761; WTO, *US-Gambling* (n7)

¹⁰⁹ *Uruguay Round, Group of Negotiations on Services, Service Sectors Classification List*, MTN.GNS/W/120, 10 July 1991

¹¹⁰ *Scheduling of Initial Commitments in Trade in Services: Explanatory Notes*, MTN.GNS/W/164, 3 September 1993

¹¹¹ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331; 8 ILM 679

¹¹² Article 23(3)(f)(ii) *Marrakesh Agreement*, opened for signature 15 April 1994, 1867 UNTS 3, annex 2

(*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401 (entered into force 1 January 1995) ('DSU').

¹¹³ Leroux (n2) 759-61

assisting them determine the scope and nature of the US's commitment.¹¹⁴ The Appellate Body found that, even though the US commitment schedule did not specifically refer to the Central Product Classification¹¹⁵ (and followed the W/120), both documents could be used as 'context' for the interpretation of specific Member commitments within the meaning of Article 32 of the *Vienna Convention*.¹¹⁶ Consequently, the Appellate Body determined that the US GATS commitment to 'other recreational services (except sporting)' must be interpreted as including 'gambling and betting services' within its scope.¹¹⁷ The Panel and Appellate Body also considered whether the US had acted inconsistently with paragraphs 1 and 2 of Article XVI. The Appellate Body upheld the decision of the Panel finding that the US had violated Article XVI on the basis that the disputed federal acts prohibited the cross border supply of gambling services in circumstances where the US had made a specific GATS commitment in the area.¹¹⁸ The Appellate body found that the federal acts in effect created a 'zero quota' which are prohibited under Article XVI:2(a) and (c) and were therefore invalid.¹¹⁹ However, the Appellate Body reversed the Panel's decision with respect to the state laws as it found that Antigua had failed to establish a prima face case.¹²⁰ Also with respect to Article XVI, the Appellate Body upheld the Panel's findings that the US laws had been designed 'to protect public morals or to maintain public order' within the meaning of Article XIV(a) and reversed that Panel's finding that the laws had been unnecessary.¹²¹ However, the Appellate Body modified the Panel's decision with respect to the Article XIV determining that the US measures had not satisfied its requirements as the prohibition on the remote supply of gambling had not been applied equally to domestic and foreign suppliers.¹²²

The finding of the Appellate Body in *US-Gambling* raises a number of points of interest regarding the application of GATS to the liberalisation of services. The Panel and Appellate Body's readiness to accept the exception claimed by the US under XIV(a) illustrates a willingness on the part of the WTO to recognise claims made by countries under this provision. Thus, if a Member State legislates for a legitimate purpose within the scope of the Article XIV, there is a substantial likelihood that the measure will be held to be valid. This is particularly significant in light of the recent *EC- Seal Products* decision. With respect to any future cases involving water services, it would be hoped that Article XIV(b)¹²³ may be employed in a similar manner to protect non-discriminatory legislation aimed at protecting and promoting basic water access, quality and affordability as a means of promoting and protecting human health.

The Appellate Body's inclusion of gambling and betting services within the US's 'Other Recreational Services (except sporting)' commitment however also demonstrates the potential uncertainty with respect to GATS commitments. The decision demonstrates that the meaning and scope of a Member's commitment will

¹¹⁴ Ibid

¹¹⁵ CPC (n3); Leroux (n2) 760

¹¹⁶ Leroux (n2) 762-765, 761; *US-Gambling* (n7)

¹¹⁷ Ibid

¹¹⁸ Matsushita, Schoebaum & Mavroidis (n62) 652; *US-Gambling* (n7)

¹¹⁹ *US-Gambling* (n7)

¹²⁰ Ibid

¹²¹ Ibid

¹²² The US had claimed an exception under Article XIV(a) which provides exemption for measures 'necessary to protect public morals or to maintain public order' provided they applied in a manner consistent with the chapeau of the Article XIV. GATS (n1); See also Leroux (n2)787; *US-Gambling* (n7)

¹²³ GATS art XIV(b) provides an exception for measures 'necessary to protect human, animal or plant life or health': GATS (n1)

ultimately be determined by the DSU in circumstances where a dispute arises.¹²⁴ Leroux argues that the *US- Gambling* decision illustrates a need for ‘greater clarity, consistency, and precision in the scheduling of commitments under the GATS’ and that this outcome should be pursued through negotiation between Members rather than dispute resolution outcomes.¹²⁵ However, for the present time, it appears that the clarification of commitments will continue through dispute resolution channels as many Members fear that a clarification process may lead to a reduction in commitments.¹²⁶ With respect to Article VI, it is noteworthy, that despite the case’s focus on domestic regulation, both the Panel and the Appellate Body did not consider the domestic regulation provision found in Article VI. Delimatsis argues that the Appellate Body highlighted the irrelevance of the provision when it asserted that ‘[i]t is neither necessary nor appropriate for us to draw, in the abstract, the line between quantitative and qualitative measures’.¹²⁷ Consequently, *US – Gambling* does not provide any insights into how Article VI will apply to domestic regulatory measures. This is unfortunate as Article VI has the potential to be a central GATS provision and therefore it is important to understand how the obligation to ‘ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner’ will be applied.¹²⁸

Clearly, these aspects of the *Gambling* decision risk creating ambiguity for Member states regarding the scope of their commitments and a potential chilling effect as Members may be less willing in future to nominate a service sector for liberalisation. Moreover, given the uncertainty surrounding sector classification there exists a substantial risk that a commitment may be interpreted differently by different Member States and most importantly by the DSU. The issue of interpretative differences raises the prospect of a commitment being found to be wider than originally intended for liberalisation for the Member State. If a commitment includes an additional aspect or aspects of a service not envisioned to be included in the original classification, this may be said to be ‘unintended’. This is not to say that entire service sectors will suddenly become the subject of an unintended GATS commitment, rather that related aspects of an existing service commitment may be interpreted to include related services not originally intended by the Member State for liberalisation. As a result of the *US-Gambling* decision it is clear that a Member’s liberalisation commitment will only be fully defined after it has been considered by the DSU in the context of a dispute. This issue is now particularly important with respect to water services given the growth of commitments in the related areas of sanitation and sewage. As previously mentioned, water, sanitation and sewage services are interlinked and ultimately depend upon connected supply and infrastructure channels. The lack of a specific reference to water services under the classification documents and the likely expansive interpretation of any commitment by the DSU continues to raise practical questions as to how existing sanitation and sewage commitments may be interpreted and how a future water services commitment may function. As Cossy argues, the GATS can play an important role in supporting decisions regarding privatisation and private sector involvement in any of its service sectors however this best achieved by providing a ‘predictable legal framework’ which will send a positive signal to

¹²⁴ Leroux (n2) 766

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ *US- Gambling* (n7) para 250; Delimatsis (n104) 14

¹²⁸ Delimatsis (n104) 14

investors and foster foreign direct investment.¹²⁹ Clearly, in this area greater certainty could still be achieved.

7. How can Greater Certainty be Achieved?

The application of the GATS to water services has always been a controversial issue in light of the associated 'threats' of enhanced privatisation and foreign control over water services. Many commentators, such as Vandana Shiva have raised concerns regarding the scope of the Agreement and its effect once in force.¹³⁰ In particular, Shiva has argued that once commercial activity or competition was introduced to a service area, there was a risk that this service area 'may be dragged into a free trade ambit' despite the lack of a specific commitment by a Member States. Moreover, she asserted has also that the ambiguity surrounding the meaning of 'commercial basis' in Article 1:3(c) created uncertainty regarding the status of public services and that the inclusion of a service area under the GATS would allow companies to sue countries in circumstances where government restrictions prevent free market access.¹³¹ Such concerns and a number of privatisation failures, unrelated to the agreement,¹³² resulted in significant public hostility to the role of the GATS and the wider liberalisation of water services. These concerns resulted in the publication of the 2001 document 'GATS: Fact or Fiction' by the WTO.¹³³ GATS: Fact or Fiction outlines the structure of the GATS Agreement and the benefits of service liberalisation. It clearly reflects a concerted attempt by the WTO to overcome the negative perceptions that were associated with the Agreement at the time. In particular one section of the document was devoted to the issue of water services entitled, 'The WTO is not after your water' which outlined the freedom of Member States to maintain a public or private owned monopoly service.¹³⁴ It is perhaps in this climate of distrust that the reforms to classification or additional commitments with respect to water services have remained off the agenda. To date the European Communities have been the only Member to have requested specific commitments with regards to water distribution. This proposal was, as previously mentioned, not adopted by the WTO.¹³⁵ More recent rounds of negotiations have also failed to touch upon the issue.¹³⁶ Therefore the central question remains, is the absence of a specific reference to water services from the classification schedules beneficial as it removes the pressure from governments to nominate their water sectors and separates the Agreement from this controversial area, or is the absence of a specific classification creating further uncertainty?

The nature of water supply presents significant difficulties with service liberalisation as it remains one of the only true natural monopolies. The private sector as previously mentioned now plays a significant role in the supply of water, however the creation of true competition remains a challenge. Water resources and networks are interconnected meaning that it can be difficult to fully separate water supplied for the

¹²⁹ Cossey (n82) 141.

¹³⁰ Shiva (n16); See also Maude Barlow & Barry Clarke, *Blue Gold: The Battle Against the Corporate Theft of the World's Water* (2002).

¹³¹ Shiva (n16) 94-5.

¹³² See for example Cochabamba and the resulting International Centre for Investment Disputes Case: *Aguas del Tunari v Bolivia* (Netherlands-Bolivia BIT) available at <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/02/3> accessed 25/4/18; See also Eric Woodhouse, 'The "Guerra del Agua" and the Cochabamba Concession: Social Risk and Foreign Direct Investment in Public Infrastructure' (2003) 39 *Stanford Journal of International Law* 295.

¹³³ WTO Secretariat *GATS Fact or Fiction* <http://www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf> accessed 25/4/18

¹³⁴ *Ibid* 11

¹³⁵ Cossey (n82) 140

¹³⁶ *Ibid* 14-1; WTO (n50)

purposes of household and commercial consumption, sanitation and sewage. In light of the existing commitments with respect to sanitation and sewage and the likely expansive interpretation of commitments by the DSU in the case of a dispute, it is clear that a specific services classification for 'water services including drinking' would benefit the overall operation of the agreement. This is not to say that Member States would therefore be required to nominate for liberalisation in this area, rather that the creation of the category would more clearly define the boundaries with respect to service. Enhanced certainty would support investment in water services, which in turn would support the expansion and improvement of services.

7. Conclusions

The application of GATS to water services has been one of the more controversial topics within globalisation discourses since the adoption of the Agreement in 1995. The liberalisation of water services under the GATS is inherently linked to the processes of globalisation and privatisation, areas which have both been a topic of significant public debate. These concerns have stemmed in part from the sector's traditional mode of public sector supply and also water's fundamental role in human health and survival. However, another contribution to these sentiments has been the challenge of reconciling the economisation of what has traditionally been viewed as a public good and now a human right. Service liberalisation is not however a new process having been widely adopted within more traditionally commercial spheres such as banking and telecommunications. It has however struggled to make similar inroads within the environmental services sector and with respect to water services themselves.

Environmental services are a relatively new area of liberalisation activity under the GATS. The recent increase in commitments by Member States under the Agreement indicates a likely expansion of this area in coming years. However, the challenges regarding service classification present a number of difficulties in this area with respect to water services. The absence of a specific reference to the service area within the W/120 or the CPC means that a Member State is not able to specifically nominate their water services for liberalisation or in the alternate, not able to specifically exclude their water services from a liberalisation commitment. The interconnected nature of water supply and the growing number of commitments in the areas of sanitation and sewage raises the risk that part of Member State's water services may be included within a commitment. This uncertainty has been supported by the lack of GATS specific case law and the prospect of 'unintended liberalisation' raised by the Appellate Body decision, *US-Gambling*. The decision of *US-Gambling* demonstrates that the nature and content of a services commitment will ultimately be decided by the DSU in the context of a dispute. This was the case with respect to the US's commitment to 'recreational services (other than sporting)' which was found to include the remote supply of gaming services. Consequently, as a result of this decision it is clear that the exact boundaries of a commitment may be uncertain until adjudicated by the DSU. This raises particular challenges with respect to water services due to the interconnected nature supply and the lack of clarity regarding their classification.

The inclusion of a new sub-category specifically related to water service may support the overall operation of the Agreement in this area. The creation of a such a category would allow the area of water services to be specifically included or excluded from a commitment and may also avoid ‘commitment creep’ in the case of existing sewage and sanitation commitments. Such an approach could facilitate greater certainty and enable a Member State to make a water services commitment if that was their intention. This is one circumstance where the voluntary nature of the GATS Agreement may prove to be highly beneficial to both Member States and to the overall functionality of the Agreement. Improving the certainty regarding the application of GATS to water services would support investment and aid in meeting the needs of underserved communities and targets such as the Sustainable Development Goals.