

“Trade Agreements and Local Governments - Implications for Local Governments”

Text of Overhead Presentation: Tuesday, September 25, 2001

Presentation by Ellen Gould, (contact ellengould@telus.net)

[Ellen Gould is an independent researcher specializing in trade and investment agreements. She is a Research Associate with the Canadian Centre for Policy Alternatives. Her most recent publications (since January 2001) are: “The WTO and the Deregulation of Trade in Alcohol” Johns Hopkins International Studies Journal (forthcoming); “The Free Trade Area of the Americas: the Draft Services Chapter” Public Services International; “The GATS: Separating WTO Fact from Fiction”, Council of Canadians; “Impacts of the GATS Negotiations for Consumers”, Transatlantic Consumer Dialogue; “International Trade and Investment Agreements: A Primer for Local Governments” Union of BC Municipalities.]

Key developments impacting on local governments

1. **NAFTA** – In May, 2001 a BC Supreme Court Justice reviewing a NAFTA dispute panel decision warned that “legitimate rezoning” decisions were vulnerable to NAFTA challenges because a NAFTA Tribunal:

“gave an extremely broad definition of expropriation...The definition is sufficiently broad to include a legitimate rezoning of property by municipality or other zoning authority.”

See Justice Tysoe’s judgement at:

<http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp#Metalclad>

The UBCM Executive resolution A-11 speaks to the need to getting NAFTA clarified so that local authority cannot be attacked, a resolution that could reinforce the federal government’s commitment to getting this section reviewed.

2. **The AIT** – BC local governments are being asked to have their procurement covered by the Agreement on Internal Trade. WTO members see expansion of this agreement as key in getting Canadian local government procurement covered by WTO rules.
3. In meetings happening throughout 2001 and 2002, the federal government is seeking broad new constraints on domestic regulation through renegotiation of the WTO services agreement. These new constraints could impact municipal regulations in areas like:
 - water supply
 - urban planning restrictions such as setbacks, green space allocations, and store size
 - pesticide spraying
 - liquor outlet licensing

The federal government is also seeking to expand the services covered by other aspects of this agreement.

What is NAFTA?

NAFTA is a regional trade agreement signed by Canada, the US, and Mexico. NAFTA is different from World Trade Organization agreements because it allows investors to directly sue governments whereas WTO complaints can only be taken by governments.

NAFTA allows investors to sue governments if they:

“take a measure tantamount to nationalization or expropriation”. Chapter 11 of NAFTA says even when governments have acted “for a public purpose”, they still have to compensate investors.

Cases so far against Canada: gasoline additives, water exports, lumber, toxic waste exports.

What is the AIT?

WTO members in their periodic meetings to review Canadian policy challenge Canada to expand the Agreement on Internal Trade as a way to open up markets for WTO members:

WTO comments: “The simultaneous entry into force in 1995 of the NAFTA, the WTO and the Agreement on Internal Trade was certainly more than a mere coincidence. To what extent would the AIT facilitate the implementation of international agreements at all levels of government? The Agreement was still incomplete in areas such as government procurement, subsidies and energy, and left a considerable leeway to the provinces ...” (See WTO document: WT/TPR/M22)

“Public procurement practices at the Canadian sub-federal level had been a source of considerable concern for Canada's WTO partners. He asked whether the Agreement on Internal Trade (AIT) had actually increased access by foreign and out-of-province companies to public contracts at the sub-federal level ... Please explain in what instances opportunities for improved market access which result from the extension of procurement disciplines to ‘MASH’ entities under the Agreement on Internal Trade (AIT) may benefit foreign suppliers.” (See WTO document: WT/TPR/M 57)

Canada’s response: “Negotiations were ongoing to extend the coverage of the procurement chapter of the AIT to municipalities, publicly funded academic institutions, social services agencies and hospitals. In addition, attempts were being made to reduce the number of currently excluded services and entities (Crown corporations) and conclude an energy chapter ... He cited instances where provincial practices had been brought into line with Canada's international obligations.”(See WTO document: WT/TPR/M 57)

BC local governments are being asked to have their procurement covered by AIT rules, which would mean that purchasing could only be done on the basis of a least cost bid.

The impacts of AIT procurement rule on local governments have not been evaluated.

What is the GATS?

“The GATS is the first multilateral agreement to provide legally enforceable rights to trade in all services ... It is the world's first multilateral agreement on investment, since it covers not just cross-border trade but every possible means of supplying a service.” Source: WTO Secretariat

Understanding the GATS

When trying to sort out conflicting opinion, **go to original documents** at the WTO site – **www.wto.org**

What to make of ambiguous or undefined terms?

A WTO panel will decide what these terms mean when there is a dispute. Other opinions can only be best guesses on what a panel might decide.

Legal implications for local governments

- WTO members are obligated to ensure observance of the GATS by "regional and local governments". In a WTO meeting, Canada said:
"the provinces had always implemented the results of GATT and WTO panels when these had found provincial practices to be in violation of international obligations." (See WTO document: WT/TPR/M/22)
- Where Canada has committed a service to the GATS, local governments are obligated to:
 - eliminate specified limits on the supply of the service
 - ensure they do not even unintentionally discriminate against foreign firms (see Articles XVI and XVII)
- Local governments cannot defend their own measures if they are challenged at the WTO
- WTO decisions can only be appealed to the WTO – eg., the Supreme Court of Canada cannot overturn a WTO decision

Note that local governments can violate the GATS even if they apply exactly the same rules to foreign and domestic companies.

"The GATS article on market access extends beyond traditional concerns of access for foreign service suppliers to encompass all policies which restrict access to a market. This is a major extension of multilateral trade disciplines into the realm of domestic policy."

Source: Warren and Findlay in GATS 2000

What kinds of local government regulations are being discussed as barriers to trade in the current negotiations?

- "Controls on land use, building regulations and technical requirements, building permits and inspection, registration of proprietors, contractors and professionals, regulation of fees and remunerations, environmental regulations ... Even if the same measures are applied to all suppliers, domestic or foreign, they may be found to be more onerous to foreign suppliers." (See the European negotiating position at WTO document: S/CSS/W/36)
- "limitations on the number of outlets in chain store operations" (see the US negotiating position: S/CSS/W/27)
- urban planning regulations (see the Swiss negotiating position: S/CSS/W/77)
- "restrictions on the geographical areas for and size and number of stores" (see the Korean negotiating position: S/CSS/W/85)

Uncertainty in the GATS

- **NO DEFINITION for government procurement** of services (temporarily exempted under

Article XIII)

“Article XIII:1 refers to ‘... *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 Agreement contains no further definition of these terms, nor has any interpretation been provided by competent WTO bodies.” (See WTO document: S/WPGR/W/29)

GATS negotiators have a mandate to get procurement covered by the agreement.

- **NO DEFINITION for services exempted as public services** – “services supplied in the exercise of governmental authority” are exempt, unless they are supplied “in competition” or “on a commercial basis”, terms which are not defined.

The WTO services negotiators have agreed the exemption for “services supplied in the exercise of governmental authority” needs to be “interpreted narrowly.” (See WTO document: S/C/M/30)

- **The WTO Secretariat says it is not clear what the GATS applies to and what is exempt.** This means no one can say for sure what is covered by Canada’s commitments.

“(I)t does not seem to be completely clear how much falls within the scope of Article I:3 (services supplied in the exercise of governmental authority) and Article XIII (government procurement), and how much is subject to the main GATS disciplines.” WTO Secretariat (see WTO document: S/C/W/46)

Reasons the GATS might be ignored by local government

- Canada has only lost one GATS-related case so far, and this didn’t involve local governments (Canada had to eliminate the Auto Pact as a result of a WTO ruling based partly on the GATS. See the WTO ruling: WT/DS142/AB/R)
- There’s a “gentlemen’s agreement” among WTO members not to attack each others’ public services.

Reasons the GATS is worth local government involvement

The agreement is being renegotiated to:

1. Apply to more services, including ones in local government jurisdiction, eg., water distribution

“Another area which could deserve further attention in further negotiations is water distribution ... Further liberalisation of this sector would offer new business opportunities to European companies, as the expansion and acquisitions abroad by a number of European water companies show.”

Source: European Commission (see <http://gats-info.eu.int/gats-info/guide.pl?MENU=ccc-8>)

2. Create more grounds for WTO challenges to domestic regulation

Regulations would have to be **"no more burdensome than necessary"**, or **"the least trade restrictive"** thing a government could have done.

How would a WTO panel judge whether a regulation was "no more burdensome than necessary"?

Canada proposes regulators could be required to prove:

- that a problem or risk exists,
- that government intervention can be justified,
- that regulation is the best alternative,
- that the benefits of regulation outweigh the costs,
- that no unnecessary regulatory burden is imposed,
- that impacts on the economy are minimized,
- that information and administrative requirements are limited to what is absolutely necessary and that they impose the least possible cost.

(See March 2001 Canadian negotiating position: S/CSS/W/47)

While local governments may already be working to reduce the cost of regulation, having regulatory guidelines is different from having rules that are interpreted and enforceable through the WTO.

What about the "right to regulate" in the GATS?

The WTO Secretariat says the GATS "right to regulate" is to be balanced against commitments to expand trade.

"(T)he requirement that regulatory measures be no more trade restrictive than necessary is the means by which an effort is made to balance between two potentially conflicting priorities: promoting trade expansion versus protecting the regulatory rights of governments."

Source: WTO Secretariat "Application of the Necessity Test"

The "right to regulate" is only in the agreement's "preamble". The new constraints on regulation would be in the legally binding text.

Weighing the potential benefits versus the risks

Are the promised economic benefits worth the risks to local government authority? Trade is increasing and services *are* the fastest growing sector. Would Canada benefit from an expanded GATS?

- Trade agreements have proven to play a minor role in expanding trade. For example, an Industry Canada study indicates only 9% of increased trade in recent years is due to NAFTA,

the rest is mostly due to the low Canadian dollar and US economic expansion. (See “Canada’s Trade and Foreign Direct Investment Patterns with the United States”, Industry Canada, June 2001)

- The WTO Secretariat says GATS commitments are unlikely to have impacted “noticeably on trade flows”.
- No Canadian government research will be done into the economic downsides, only into the potential benefits of an expanded agreement.

Yet American representatives say the US can solve its trade deficit through gaining more access for US corporations to foreign services markets through an expanded GATS, because US corporations dominate every aspect of the services sector.

Unintended consequences

The Canadian position is that we should not be concerned in Canada about new GATS provisions because our regulations would be safe from challenges, it is other countries that are vulnerable.

But the same things were said about the expropriation provisions in NAFTA.

“The US and Canada thought they were putting in a protection against Mexico. They never thought it would be used against themselves.” Peter Clark, international trade consultant

Canada has already lost more than its share of cases at the WTO and had to change policies that were supposed to be safe from WTO challenges:

- drug patents
- the Auto Pact
- magazines
- dairy marketing

Local governments can make a difference

The GATS negotiations are taking shape in key areas like domestic regulation right now – nothing is yet fixed.

Local government concerns are already raised by some WTO delegations – particularly about procurement - and are part of the deliberations.

The federal government has shown a willingness to try to get the meaning of the investment chapter of NAFTA narrowed, and local governments can reinforce this effort.