GENERAL AGREEMENT ON TRADE IN SERVICES: NEGOTIATIONS CONCERNING DOMESTIC REGULATIONS UNDER GATS ARTICLE VI(4)

*Submitted to the Department of Foreign Affairs and International Trade a*nd to Industry Canada

CELA Report No. 397
ISBN 1-894158-72-5

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November 2000

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November 24, 2000

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General Agreement on Trade in Services: negotiations concerning Domestic Regulations under GATS Article VI(4)

In the current preparatory negotiations on services (part of the "built-in" agenda at the WTO) governments are developing positions regarding GATS Article VI(4) which requires the development of "disciplines" on countries' domestic regulations over services. Specifically, the article seeks to prevent "unnecessary barriers to trade" in regulations regarding "qualification requirements and procedures, technical standards and licensing requirements" and to ensure that regulations are "not more burdensome than necessary to ensure the quality of the service."

In our view, this entire exercise is unjustified. There should be no role for the WTO in over-seeing non-discriminatory domestic regulations (those which do not discriminate in standards and qualifications based on nationality.) This exercise represents a wholly unwarranted intrusion of trade law into important domestic public safety laws.

We are disturbed to learn from our trade officials, that Canada intends to develop its position for these negotiations without conducting a full review of the regulatory framework in Canada (federal, provincial, and municipal) which may be affected by the results. Such a review would demonstrate that the regulatory framework provides essential protections which should not be subject to WTO interference.

In addition, Canada apparently intends to rely on the "necessity" test, as articulated in trade law, to defend any domestic regulations which may be challenged in the future. However, as outlined below, the "necessity" test is a wholly deficient and discredited defence, having been rejected by GATT and WTO decision panels in all but one case (the *Asbestos* case, now under appeal by Canada). In our view, the "necessity" test will provide no defence for regulations.

In response to a request from officials from Foreign Affairs and International Trade, we have prepared an overview of the treatment of the "necessity" test in trade case law to date. We have also provided a number of examples of the types of important public regulations which contain qualifications, standards and licensing requirements for public services to illustrate the range of vital sectors which will be at risk if Canada proceeds as planned in these negotiations. These examples are merely indicative of the regulatory framework. It is important to recognize that countless other service sectors also have protective regulatory provisions.

1. Necessity tests in GATT/WTO trade law

Three chapters of the WTO Agreements besides the GATS contain necessity tests regarding domestic measures.

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) provides in Article 2.1 that members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of the SPS. They may be applied only to the extent necessary (Article 2.2) and SPS measures that conform to the agreement are presumed to comply with GATT 1994 Article XX(b) (SPS Article2.4)

The Agreement on Technical Barriers to Trade provides that in Article 2.2 that technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, including national security requirements; the prevention of deceptive practices; protection of human health of safety, animal or plant life or health, or the environment.

GATT Article XX provides that countries may take measures necessary to protect public morals (XX a), human, animal or plant life or health (XX b) , relating to conservation of exhaustible natural resources (if domestic restrictions are applied)(XX g) but they must be non-discriminatory, and not a disguised restriction on international trade.

These tests have been applied in numerous cases, both under the GATT and the WTO, when "necessity" was raised as a defence or justification by a country whose measure had been challenged. In every case except the recently-decided *Asbestos* case, the defence of necessity, (however defined) was rejected.[1]

GATT cases

US-*Prohibition of Imports of Tuna and Tuna Products From Canada*, adopted 22 February 1982, BISD 29S/91: an import restriction on albacore tuna under the *Fishery Conservation and Management Act* was not justified under GATT XI:2 or XX(g).

US-Restrictions on Imports of Tuna, 3 September 1991, BISD 39S/155: Prohibitions on imports from Mexico of tuna harvested with purse-seine nets causing dolphin deaths (primary nation and intermediary nation embargoes) specified in the *Marine Mammals Protection Act* were not justified by GATT XX(b) (d) and (g).

US Restrictions on Imports of Tuna, 16 June 1994, DS29/R: The same embargoes against imports from the EEC and the Netherlands were not justified by GATT XX (b) (g) or (d).

Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, March 22 1988, BISD 35S/98*: Canadian Fisheries Act* regulations prohibiting on export of certain unprocessed salmon and herring could not be justified as a conservation tool under GATT XX (g).

Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, 7 November 1990, 7 November 1990, BISD 37S/200: Thai prohibitions on import of cigarettes were found not "necessary" within GATT XX (b) although chemicals and other additives in US cigarettes may have been more harmful than those in Thai cigarettes.

US-Taxes on Automobiles, 11 October 1994,DS31/R; Challenged by the EEC, the CAFÉ regulation (Corporate Average Fuel Economy regulation) could not be justified under GATT XX(d).

WTO Cases

US – Standards for Reformulated and Conventional Gasoline, 20 May 1996, WT/DS2/9 (Appellate Body and Panel Reports): Regulations under the US *Clean Air Act* regarding composition of gasoline was found contrary to GATT III by both the Panel and Appellate Body. The Panel found the regulations could not be justified under GATT XX (b), (d) or (g). The Appellate Body held that the regulations fell under XX (g) but did not satisfy the chapeau of the article.

European Communities-Measures Affecting Meat and Meat Products; 13 February 1998, WT/DS26/AB/R and ST/DS45/AB/r IAB) and WT/DS26/R/USA and WT/DS48/R/CAN (Panel): This Beef Hormones case was decided under the SPS chapter, and both the Panel and Appellate Body found the EC's ban on certain hormone-treated beef was inconsistent with the EC's obligations under the SPS.

US-Import Prohibition of Certain Shrimp and Shrimp Products, 6 November 1998, WT/DS58/AB/R (AB) and WT/DS58/R (Panel): US prohibitions under the *Endangered Species Act* on shrimp imports caught without turtle excluder devices could not be justified under GATT XX , either because it did not satisfy XX (g) (in the Panel's opinion) or because it did not satisfy the chapeau of GATT XX (the AB's decision).

Australia – Measures Affecting Importation of Salmon, 6 November 1998, WT/DS18/AB/R (AB) and WT/DS18/R (Panel) Australia's quarantine restrictions on certain salmon imports were found inconsistent with the SPS on the basis of available scientific evidence.

EC – Measure Affecting Asbestos and Products Containing Asbestos: (WT/DS135/R): The panel found that a French directive banning chrysotile asbestos can be justified under GATT XX (b) and the chapeau of the Article. However, the Panel also found that asbestos products are "like" products to those substitutes which are less carcinogenic. The decision has been appealed to the Appellate Body.

Commentary

Of these eleven cases, ten held that the challenged measure could not be maintained. The last case, the Asbestos case, is not yet concluded, having been appealed by Canada to the Appellate Body. It appears to turn on the existence of international standards for asbestos, rather than affirming the right of France and the EC to legislate for public health. Further, in holding that products containing asbestos are "like products" to alternatives selected because they are less carcinogenic, the Panel has set back moves to

clean technologies and set the stage for further challenges against measures to phase out environmentally-damaging products.

This jurisprudence demonstrates that it is virtually impossible for a country to justify a challenged measure as "necessary", even one that concerns health or the environment, which are "legitimate objectives" in the TBT,SPS and in the "General Exception," Article XX. The existence of one panel decision in favour of a challenged measure , a decision disputed by the Canadian government, does not detract from the necessary conclusion that "necessity" tests cannot be a reliable basis of defence for important standards for public protection, whether they are "qualification requirements and procedures, technical standards (or) licensing requirements" as specified by GATS VI.4.

Furthermore, the GATS term "not more burdensome than necessary " is so vague and inappropriate, as a criterion of measurement of public protections, that it invites biased decision-making in favour of strictly economic interests. What is the standard for measuring "burdensome?" Does it include measures that add mere inconvenience to potential exporters, or must it entail significant costs or even serious disadvantage?

It would be helpful to know what definition of "burdensome" the Canadian government considers applicable to these discussions, whether there is an agreed definition amongst negotiators (not that such an agreement would bind future panels) and if so, what the agreed definition is.

The concept of regulations being burdensome conflicts with he increasing relevance of precaution in regulation-making for environment 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 exists 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.

A trade panel in Geneva can hardly be deemed competent to judge what "burdensome" means in any country in the world, and what is" necessary" in the myriad details of culture and ecosystem specific technical regulations which governments implement for public protection.

2 Examples of "qualification requirements and procedures, technical standards and licensing requirements" pertaining to services.

2.1 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 whose 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 particular 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 excedences 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 w*ho 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.)

2.2 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.

2.3 Forestry-related services.

The production of forest products entails many services which are regulated by the provincial government owners of our public forests. Requirements of the *Crown Forest Sustainability Act of* Ontario (S.O.1994, Chapter 25) are representative of provincial regimes in the major forest-producing provinces of Canada.

The Act prescribes a series of activities for forest management, including; developing a management plan for a given area of forest land, to govern road building for access, areas to be logged, logging techniques, biodiversity (wildlife) protections, silviculture (re-forestation) and pesticide applications. To conduct the planning exercise (a service) requires numerous other services, including: collection and analysis of forest stand data; collection of relevant data for road placement; collection and analysis of data concerning geology, soils, and forest species; biodiversity identification and protection planning; public consultation processes, etc. (Sections 7 to 18)

The process is regulated through comprehensive detailed manuals mandated by the Act, including the Forest Management Planning Manual, (Section 8 and 68), the Forest Operations and Silviculture Manual (Section 43 and 68), the Forest Information Manual, (Section 68) and the Scaling Manual (Section 68. These manuals sometimes are supplemented by numerous additional ones, such as species-specific manuals for wildlife protection.
The manuals set standards (requirements) for how the services are to be carried out, for the accuracy of information to be collected, and in some cases, for the required results. For example, silviculture (planting) must result in specified levels of stocking.

The Act authorizes regulations regarding the manuals, and also for licensing forest lands and mills, record-keeping, auditing, etc.

Both the Act and regulations specify that certain forest-related functions must be performed by accredited individuals, including certification of forest management plans by professional foresters. (Section 8(3)

In summary, the Act provides an extensive regulatory framework for the provision of services relating to forestry including specific standards for quality (stocking levels for silviculture) and professional accreditation requirements for various service-providers. Environmental protection involves both pollution controls and

resource use and conservation. The forest-related services regulations are indicative of the importance of standard-setting regarding resource extraction. Regimes regulating other Canadian resource sectors also require examination.

2.4 Regulations regarding education in community colleges

The Ontario *Ministry of Colleges and Universities Act* (S.O. 1980, Chapter M.19) provides for the establishment of community colleges and allows the Minister to prescribe, by regulation, *inter alia* the type content and duration of programs; granting of certificates (degrees) and for qualifications of teaching staff. Regulations also govern fees payable by students, including particular fees for students from outside Ontario.

Here again, the law establishes standards for the program content of the educational service and qualifications of the service providers. It also governs costs for cross-border service consumers.

3. Concluding commentary

These few examples of regulation of services are meant to provide an illustration (only) of the extent to which regulatory standards exist and are important components of public policy in Canada. We emphasize that services negotiators need to review fully **all** sectors of governmental activity to have a comprehensive view of what is at stake. This task is clearly beyond the scope of what NGO lawyers can be expected to contribute.

We are deeply concerned at the apparent lack of such a comprehensive review by DFAIT and Industry Canada, and at the stated intention to rely on "necessity" tests as potential future defences of Canadian domestic measures. Such a defence is clearly non-existent. Given the lessons to be learnt from decided trade cases, Canadian service negotiators should not support the development of any increased disciplines over domestic regulation under GATS VI(4) or in any other aspect of current negotiations.

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[1] The cases to March 1999 are summarized in *Background Document to the WTO High Level Symposium on Trade and Environment*, accessible at www.wto.org/english/tratop_e/envir_e/tr_envbadoc2.doc