

Submissions of the Council of Canadians to Walkerton Inquiry

Concerning Public-Private Partnerships and Other Privatization Initiatives Concerning Water Services

September, 2001

Maintaining public ownership and control of water resources is an important priority for the Council of Canadians. We have convened local, national and international meetings to discuss the importance of these goals, and have published several reports concerning water and the impacts of economic globalization. We will soon be adding to our list of publications with a detailed assessment of the impact of the General Agreement on Trade in Services (GATS) on public policy, and law concerning this vital resource.

For this reason, we have followed with great interest the debate about the impact of international trade agreements on privatization initiatives concerning public services and water. We have reviewed the legal opinions filed by Canadian Union of Public Employees (CUPE) and by the Canadian Council for Public Private Partnerships (CCPPP) addressing the question of water privatization in the international trade context. While our views on this subject are very much in accord with those of CUPE, we wanted to present our own perspective on this critical issue. We do so on behalf of more than 100,000 Canadians who currently support our work.

The Modern Reach of International Trade Agreements

The first point that needs to be made about the new generation of trade agreements, is that they have much less to do with international trade than most people would imagine. In fact the advent of international treaties concerning investment and services, has dramatically expanded the reach of international trade disciplines to encompass broad areas of domestic policy that have little if anything to do with international trade in any conventional sense.

Commenting on this phenomenon, Renato Ruggiero, the first Director General of the World Trade Organization (WTO), described the expansion of international trade regimes as so ambitious, that governments and industries had yet to fully appreciate their scope. Describing the GATS, which is one of the Agreements housed within the WTO framework, Mr. Ruggiero put it this way:

the GATS provides guarantees over a much wider field of regulations and law than the GATT; the right of establishment and the obligation to treat foreign service suppliers fairly and objectively in all relevant areas of domestic regulation extend the reach of the Agreement into areas never before recognized as trade policy. I suspect

*that neither governments nor industries have yet appreciated the full scope of these guarantees or the full value of existing commitments.*¹

Moreover, Mr. Ruggiero's comments would have to be amplified, had the subject of his candid remarks been NAFTA investment and services rules because these go even further than the GATS in extending the reach of trade rules into domestic policy and law. The result of these remarkable international developments has been to transform what were domestic policy issues, such as the privatization of local water services, into matters that must now also be understood in the context of Canada's international trade obligations.

The Nature of Corporate Interests in Water

We believe that the implications of privatizing water services, must also be assessed in light of the agendas of the transnational corporations that now dominate this service sector. These are the same corporations that play a key role on the trade advisory groups that inform international trade negotiations, and which were also instrumental in founding such groups as the CCPPP and its US counterpart, the National Council for Public-Private Partnerships.

As is true for virtually every other sector of the global economy, the water services industry is dominated by an increasingly small number of large and growing corporations. Of these, the two largest are French-based transnationals that together comprise more than 50% per cent of the global water market. These and other global water corporations are also emerging as key players in the Canadian context as well, as water privatization initiatives are pursued in several regions of the country.

Driven by the imperatives to increase shareholder value, these global water giants are pursuing growth objectives on two fronts that are relevant to this Inquiry. The first concerns the acquisition of water rights - which often requires the transformation of water from its status as a public natural resource to that of a commodity subject to proprietary claims. While Canadian fresh-water resources are predominantly owned by provincial governments, these rights of ownership are increasingly being assigned to private interests. For example, in Ontario, water taking permits have been issued that authorize the withdrawal of 18 billion litres (4.8 billion gallons) of water each year from groundwater sources for bottling purposes alone.²

The second strategic area for corporate growth concerns the delivery of water services. To date, much of this growth has been accomplished by corporate mergers with, and acquisitions of other private utilities and water companies. For example, the world's largest water corporation, Vivendi, through its subsidiary Générale des

Eaux, now represents a conglomeration of more than 3,000 companies located around world.³ In this way local and regional water service companies have been transformed into global service conglomerates.

But much of this private sector consolidation is now complete, and because most water services are still provided as public services,⁴ the new frontier lies in privatizing these public services. But there are several obstacles that stand in the way of this strategic corporate objective. Thus, to finesse public resistance to the loss of control over water and sewer services, a strategy of incremental privatization has been developed in the form of public-private partnerships on terms that greatly diminish the role of public sector partners. Accordingly, joint ventures are formed between these transnational water corporations and local or regional governments, with contracts for terms as long as forty years - or in other words, for what is likely to be the entire useful life of the water facilities.

Privatization and Globalization

When privatization or quasi-privatization initiatives proceed in the current economic context, they often involve the participation of large transnational corporations. Because these corporations qualify as foreign investors and service providers under NAFTA and GATS rules, they benefit from the exclusive rights these regimes accord. Thus the participation of these transnational corporations as private partners in P3 relationships, transforms what would otherwise be a matter of domestic regulation and contract into one also governed by international rules concerning services and investment.

This means that when foreign corporate interests are introduced to the equation, P3 partnerships or other privatization initiatives, become subject to international trade rules. This understanding is crucial, because under NAFTA and the WTO, foreign investors and service providers are accorded rights and remedies that have no equivalent in Canadian law, which as the CCPPP concedes, includes the right to privately enforce the provisions of a treaty to which they not even parties.⁵

The GATS as an Agenda for Privatization

As noted, now that mergers and acquisitions have consolidated control of most private water utilities by a small number of international conglomerates, the new frontier for growth in this sector lies in privatizing public water services. Standing in the way of this corporate ambition is a framework of institutions, policies, programs and regulations that seek to exclude the market forces in order to achieve broader societal goals such as universal access, affordable service, and public accountability - through the provision of public services. But by intervening in the market to discriminate in favour of public sector solutions, these measures fundamentally cut

against the grain of trade liberalization objectives and are vulnerable to challenge under both NAFTA and the WTO.

Ignoring the status of water services under NAFTA, the CCPPP argues that public sector services, such as water supply, are safe from the corrosive influence of GATS disciplines. It points to the only general exception allowed under the Agreement, which is for "services delivered in the exercise of government authority." But the meaning of this term is fraught with controversy and is likely to be narrowly interpreted. Moreover, rather than seek clarification of the meaning of this exception, the federal government plans to leave the future of Canadian public services to vagaries of WTO dispute bodies which have been relentless critics of any government interference with the operation of international market forces.

Moreover, as the CUPE opinion points out, whatever claim public water services might otherwise have to this exemption, it is certain to be compromised if water services are privatized, or subject to quasi-privatization agreements such as public-private partnerships. Finally, unlike the GATS, the services disciplines of NAFTA apply to virtually all services unless these are explicitly exempt - water services are not.

Privatization, not Trade

The rationale for public sector service delivery varies from context to context. The creation of public infrastructure, such as water and sewer systems, has often simply been beyond the capacity of the private sector. In other instances, it is the need to provide universal access to public "goods" that has mandated public proprietorship - public health care and environmental protection services are good examples- so is water. In the case of natural resources such as water, public ownership is essential to maintaining the integrity of the global commons. In yet other cases accountability strongly argues in favour of public management and control - the tragic events that gave rise to these proceedings provides more than an ample reminder of this fact.⁶

As noted by the CUPE opinion, the privatization or "pro competitive" bias of the WTO and NAFTA is woven into the fabric of these trade regimes. Admittedly, only a few provisions of these trade agreements directly challenge the right of governments to choose or maintain public sector environmental services.⁷ Rather, these regimes assail the underlying policies, programs, regulatory and funding arrangements upon which the maintenance of public services depends. This is accomplished in several ways, including through trade disciplines concerning:

Competition Policy: These rules impose the same constraints that limit the prerogatives of government, on Crown corporations and other public entities - and are set in NAFTA provisions concerning competition policy and by the GATS under the heading *Monopolies and Exclusive Service Suppliers*. These are the rules which

have recently been invoked by United Parcel Services of America to challenge Canadian policy concerning postal services and the activities of Canada Post.⁸ The case offers concrete evidence that NAFTA investment rules will now be an important factor in determining the future of Canadian public services. It also offers a reminder that in many ways Canada has abandoned the right of governments at all levels to decide such public policy issues in the interests of their constituents. Under NAFTA investment disciplines, this authority has now been effectively delegated to international tribunals before which only the federal government and transnational corporations have participatory rights.

The Right of Establishment: Both investment and services rules guarantee foreign corporations the right to establish businesses in Canada. But the very existence of a public sector monopoly operates as an impediment to this right. Therefore unless explicitly reserved, such public monopolies offend the rights of foreign investors to gain unfettered access to Canadian markets. While Canada has attempted to create an exemption under the GATS for some public services,⁹ the effectiveness of this safeguard has yet to be established. Moreover, it has no real equivalent to this safeguard in NAFTA. Finally, in both contexts, the participation of the private sector in providing public services is likely to defeat these important safeguards.

National Treatment: This obligation imposes the requirement that foreign service providers be accorded treatment "no less favourable than is accorded to domestic services and service suppliers." By failing to distinguish between private and public sector services suppliers, the trade regimes provide little latitude for policies, programs and regulations that may explicitly or effectively favour public sector service providers.

Finally on this subject, debates about the merits of public ownership have been taking place for years, and we agree that public sector service delivery is by itself no panacea for ensuring accountability or sound environmental practice. But in the face of growing number of privatization initiatives which have failed, these trade regimes would simply foreclose the possibility of maintaining, or re-establishing public-sector water service monopolies no matter how compelling the case for them might be.

An Agenda for De-regulation

While the CCPPP may decry the characterization, it is inescapable that NAFTA and WTO rules represent an agenda for de-regulation. To begin with, trade rules concerning services and investment are not really about services or investment at all, but rather about the capacity of governments to participate in, or regulate, these sectors of the economy. In simple terms, trade agreements are comprised of little more than an extensive catalogue of *measures*, which governments at all levels, may not adopt or maintain. Moreover, *measure* is broadly defined to include virtually any

form of government action that even indirectly affects services or investment. For water, the effect of these international disciplines is to constrain the role of government as both service provider and regulator.

Furthermore, and as noted by the CUPE opinion, several provisions of both the NAFTA and the GATS impose broad constraints even on **non-discriminatory** domestic measures. By doing so, these regimes abandon the historic justification for imposing trade constraints on the exercise of sovereign government authority - which was simply to prevent governments from discriminating against foreign goods, investors, and service providers.

In addition, by establishing broadly worded and ill-defined constraints on non-discriminatory domestic regulations, international trade adjudicators are empowered to simply substitute their judgement for those of elected representatives and other public officials. The effect is to disparage all domestic regulation, however fair in design and application such measures may be.

We believe that evidence of the impact of these regimes can be found in the flight from environmental and public health regulation that has characterized both federal and provincial agendas since the advent of free trade agreements. In our view, this is an important part of the context within which the events leading to the tragedy in Walkerton must be understood.

NAFTA's Expropriation Rule

Further evidence of the adverse impact of trade liberalization on environmental regulation can be found in the way in which NAFTA's rule on expropriation has been used successfully to challenge environmental regulations. While the CCPPP would like us to discount the threat posed by these NAFTA investment rules, we note that on two occasions these provisions have been invoked by corporations to challenge government measures intended to protect groundwater regimes.

The first of these claims is by Canada's Methanex Corporation and concerns a ban on the use of a fuel additive that has proven to be a groundwater contaminant of the first order - MTBE¹⁰ Methanex is seeking almost \$ one billion in damages arguing that a ban on the use of MTBE by California and other states, offends several of the rights it is accorded under NAFTA investment rules.

The other case is the one involving the successful claim by Metalclad Inc. against the government of Mexico. The Tribunal in that case found that a local municipality had no right to deny Metalclad a permit to establish a large hazardous waste site because of concerns about environmental impacts including groundwater contamination. Yet

the site in question was seriously contaminated with hazardous waste which had already contaminated groundwater in the community.

Moreover as the legal opinion tabled by CUPE points out, in the course of reviewing the Metalclad award, the Supreme Court of British Columbia confirmed many Canadians' worst fears about this investment regime when it described the Tribunals decision this way:

The Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110. In addition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that **expropriation under the NAFTA includes covert or incidental interference with the use of property** which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably to be expected economic benefit of property. **This definition is sufficiently broad to include a legitimate rezoning by a municipality or other zoning authority. However, the definition of expropriation is a question of law with which this Court is not entitled to interfere** under the *International Commercial Arbitration Act*. [emphasis added] ¹¹

We believe that it is remarkable that in providing a detailed response to the CUPE opinion, the CCPPP makes no reference to this precedent-setting decision. We suppose its failure to do so simply reflects the fact that there was no way to discount the enormous public policy implications that necessarily follow from the Court's decision.

In addition to these two cases, yet others investor claims have challenged environmental regulation in Canada, and on two other occasions with success. The first was the challenge by Ethyl Corporation to Canadian federal regulations concerning the use of toxic fuel additive. The other resulted from a claim by S.D. Myers Inc., another US based hazardous waste company, concerning a ban on PCB exports by Canada.

The CCPPP position that governments needn't be concerned about the impact of these rules on environmental and public health policy and law, is simply impossible to square with the reality of the cases which have already demonstrated the destructive effect of NAFTA's investment regime.

Conclusion

The Council of Canadians shares CUPE's commitment to the preservation of public sector water and related services. We believe there are several very sound reasons to resist privatization initiatives for water, whether this is accomplished directly or through quasi-privatization arrangements such as public-private partnerships. In

addition to the historic justification for public ownership and control, there is now the threat posed by Canada's commitments under international trade and investment agreements. These pose very serious constraints on the public policy and regulatory options that are needed to ensure that safe water is provided as of right to all Canadians.

In a global economy, privatization will almost certainly involve the participation of transnational corporations which enjoy rights and remedies under international trade agreements that have no equivalent in Canadian law. Moreover, because these agreements were established to serve an agenda of privatization and de-regulation, they undermine competing policy objectives including maintaining public ownership of water and public sector provision of water services, as well as the regulatory authority of governments to control water use and polluting activities.

However, both NAFTA and GATS rules establish certain exceptions or safeguards for non-conforming policies and practices. These may allow Canada to rebuff trade challenges and foreign investor claims that would otherwise prove fatal to public policy priorities concerning water. However, it is only by maintaining water as part of the global commons and by preserving intact the public, not-for-profit character of water services, that governments may preserve the safeguards which protect their public policy and regulatory options concerning water.

The social and ecological imperatives of our time point undeniably to the need for more determined interventions by government. Yet at the very moment when the need for such initiatives is clearest, trade liberalization such as those entrenched in NAFTA and WTO rules would permanently take the tools needed for this task from the hands of those we elect to protect. the public interest.

*Submitted by the Council of Canadians
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Endnotes

¹ Ruggiero 1998 - *Towards GATS 2000, A European Strategy* - Address to the Conference on Trade in Services. Brussels , June 2.

² *Protection of the Waters of the Great Lakes, Final Report to the Governments of Canada and the United States*; February 22, 2000.

³ Gil Yarron, *The Final Frontier*, published by the Polaris Institute n 1999.

⁴ See WTO, *Environmental Services: Background Note by the Secretariat*, S/C/W/46, July 6, 1998.

⁵ These are the enforcement procedures provided by NAFTA investment rules.

⁶ This is one reason why Canadian environmental assessment laws apply disproportionately to public sector undertakings.

⁷ See for example, GATS Market Access [Art.XVI] which prohibits *measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service* - in other words, by governments, Crown Corporations or public agencies.

⁸ UPS, the U.S. courier company, has invoked similar provisions of NAFTA to support a \$160 million investor-state claim against Canada concerning Canadian postal services. UPS argues that Canada Post is taking advantage of its monopoly mail delivery infrastructure to support competitive parcel and courier services. The same challenge might just as readily be made with respect to the use of public sewer, water, waste, and energy infrastructure.

⁹ See for example, Canada's reservation for *The supply of a service, or its subsidization, within the public sector is not a breach of this commitment*, which is listed to its Schedule of Commitments under the GATS.

¹⁰ The facts of this and other NAFTA based investment claims is related in *Private Rights, Public Wrongs* which was published in 2001, by the International Institute for Sustainable Development. It is available on the group's web site at <http://iisd1.iisd.ca>.

¹¹ The United Mexican States vs. Metalclad Corporation, 2001 BCSC 664, reasons for judgement of the Honourable Mr. Justice Tysoe, released May 22, 2001 at para. 99.