

PPP and Trade Agreements

**The Canadian Council for Public-Private Partnerships
Public-Private Partnerships and Trade Agreements**

Guidance for Municipalities



THE CANADIAN COUNCIL
FOR PUBLIC-PRIVATE
PARTNERSHIPS

LE CONSEIL CANADIEN
DES SOCIÉTÉS
PUBLIQUES-PRIVÉES

PUBLIC-PRIVATE PARTNERSHIPS AND TRADE AGREEMENTS
GUIDANCE FOR MUNICIPALITIES

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FOREWORD

The Canadian Council for Public-Private Partnerships (“CCPPP”) is a non-profit and non-partisan organization that promotes the concept of public-private partnerships (“PPP” or “P3’s”) as an alternative to the traditional delivery of government services and infrastructure in Canada.

CCPPP has been working in the PPP field for over 10 years. During that time opponents of PPP have employed an extensive array of arguments in an attempt to dissuade governments from using the expertise of business in the co-operative delivery of government activities. *“Public-Private Partnerships and Trade Agreements: Guidance for Municipalities”* has been published by The Council to clarify the most recent set of misconceptions that have been launched against PPP – those related to matters arising out of trade agreements.

The language of trade agreements is sufficiently vague so as to lend itself to such misinterpretation. However, legal experts practicing in the field of international trade law believe the level of uncertainty and risk suggested by some is unfounded. This publication is an attempt to give an objective overview of the issues related to trade and PPP and to provide some general guidance in this particular field.

This document has been prepared by Robert K. Paterson, Associate Dean and Professor of Law at the University of British Columbia for The Canadian Council for Public-Private Partnerships. Professor Paterson is a member of the bars of BC and New Zealand. He holds a LL.B. degree from Victoria University of Wellington in New Zealand and a J.S.M. degree from Stanford University Law School. Professor Paterson is a trustee of the B.C. International Commercial Arbitration Centre and a roster member under Chapter 19 of the NAFTA. He is co-author of the text *“International Trade and Investment Law in Canada”* (1996) as well as having written dozens of other books, papers and articles on the topics of international trade law, corporations and the law of cultural property. He is also the B.C. head of the Canadian Branch of the International Law Association.

Mr. Paterson was selected by The Council for his obvious expertise in this particular field of law and for the degree of objectivity he could bring to this issue. Several legal firms specializing in international law have provided comment throughout.

Sincere appreciation is extended to Mr. Paterson for his work and his professional approach to the issues. Thanks are also extended to Mr. Paul Lalonde, Partner, Heenan Blaikie LLP, who has permitted The Council to include a presentation that he made to a CCPPP hosted conference in November 2001 on this topic (Appendix IV).

As stated above, this document is a reference for those who seek to familiarize themselves with the basic issues related to trade agreements and Public-Private Partnerships. Although the primary focus of the document is on international trade agreements, a brief section has also been included on the Agreement on Internal Trade (AIT). The AIT is an agreement between the provincial, territorial and federal governments that aims to remove barriers to internal trade within Canada.

CCPPP would advise users of the document to obtain legal counsel as suggested throughout the document on issues specific to their particular projects.

INTRODUCTION

Public-private partnerships are co-operative ventures between governments and private businesses. The Canadian Council for Public-Private Partnerships defines them as follows:

“A cooperative venture between the public and private sectors, built on the expertise of each partner, that best meets clearly defined public needs through the appropriate allocation of resources, risks and rewards.”

Such operations have been increasingly popular in Canada and are a well-established phenomenon in many other countries. Projects take many forms and involve many different levels of private sector participation. At one end is outright privatization, where all of the risks, responsibilities and rewards for delivering a particular product or service are transferred into private hands. At the other are limited agreements where the public sector makes only modest use of goods or services from the private sector.

Public-private partnerships (in certain areas at least – such as water supply and distribution) have generated considerable controversy in Canada. Despite significant public support there has been focused opposition from such groups as trade unions. As well as concerns about possible job losses, arguments have been raised about new restrictions on municipal jurisdiction arising from Canada’s participation in various international trade agreements (such as the North American Free Trade Agreement (NAFTA) and the Agreement Establishing the World Trade Organization (WTO)). Those harbouring these concerns have found valuable allies in groups opposed to trade agreements in their own right. There is concern as well that the federal-provincial *Agreement on Internal Trade* (AIT) only exacerbates these perceived threats. Groups such as those opposed to bulk water exports to the United States have joined those pursuing an anti-globalization/nationalist agenda.

Despite the efforts of groups espousing these concerns, there continues to emerge little evidence to suggest that their arguments are well founded. In fact:

- ▶ With declining public expenditure on physical infrastructure in Canada (especially during the 1970s and 1980s) recourse to private partnerships has become a virtual necessity in economic terms.
- ▶ Job losses and declines in product quality have sometimes been alleged in the case of privately managed systems although little evidence supports this position.
- ▶ There is more evidence than not that trade agreements provide enhanced opportunities for Canadian local governments. Through the combined effect of the WTO, the NAFTA and the AIT, local governments have enhanced access to a broad range of providers of goods and services worldwide.
- ▶ Free and fair trade rules seek to maintain openness and fairness in international economic transactions by limiting government measures that undermine these priorities. One hundred and forty-four countries (including Canada) have endorsed these principles by joining the WTO. It is perhaps this overwhelming vote of confidence in free trade that most confounds sceptics.
- ▶ The WTO rules are careful not to mandate that international trade only be carried on by private parties (after all, several Eastern European countries were GATT members prior to 1989). Instead, the objective of the WTO (and the NAFTA) is simply to require transparency and non-discrimination in international business, whoever carries it on. This is one of the reasons why it is misleading for critics to say that trade agreement rules can be avoided if municipalities keep their projects in public hands.

CHAPTER SEVEN

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QUESTION AND ANSWER SECTION

1) What is an international trade agreement?

An international trade agreement is a treaty that seeks to liberalize barriers and apply standards to trade in different forms (goods, services or investment) between two or more countries on a reciprocal basis. See Chapter 1.3.

2) Are international trade agreements binding on local governments?

Generally not. These agreements only bind the nation-states that sign them. The actions of a province or a municipality may, however, result in the government of Canada being in breach of its obligations under such agreements. See Chapter 2.

3) What is NAFTA, Chapter 11?

Chapter 11 is the part of the NAFTA that sets out certain rules regarding how each NAFTA government must treat investors from other NAFTA countries. Chapter 11 also allows such investors to claim damages if a NAFTA Party is in violation of these rules. See Chapter 4.4.

4) Does Chapter 11 restrict a municipality's ability to regulate matters within its jurisdiction?

No. Any level of government in Canada – from federal to municipal – can continue to legislate and regulate in good faith within the scope of its jurisdiction. Chapter 11 cannot force the removal or lowering of these standards. The only issue is whether what a municipality has done can amount to a violation of one of the specific obligations in Section A of Chapter 11 (see Appendix 1).

5) How will NAFTA affect municipalities' ability to use public-private partnerships for government procurement?

A public-private partnership where a government contracts for the supply of goods or services will be a government procurement. Existing NAFTA and WTO rules on government procurement do not apply to the procurement of goods or services by provinces, territories, regional governments or municipalities. See Chapter 3.2.

6) What rights do companies have under NAFTA, Chapter 11?

Mexican and American investors are entitled, under Chapter 11, to be treated according to certain standards. They are entitled to claim compensation if their investments are expropriated or nationalized and they have the right to sell their investments and remove the proceeds from Canada. Canada still maintains restrictions on the entry of certain such investors, but once in Canada they are protected from discrimination based on their national origin.

7) Should municipalities fear being the target of Chapter 11 claims?

Chapter 11 only extends to Mexican and American investors in Canada the same rights as are expected by Canadian businesses in Mexico and the U.S. It seeks to provide the same level of legal security afforded Canadians to investors from our NAFTA partners. Only the federal government can be the subject of a Chapter 11 claim by an American or Mexican investor. The federal government would work closely with municipal or provincial governments where it was their actions that appeared to be the grounds for any particular claim.

8) Has Canada compromised its own economic and social values by being party to NAFTA, Chapter 11?

No. Canadian laws have not been systematically repealed, modified or reduced in their overall effectiveness because of Chapter 11. Laws and regulations in place before NAFTA remain in force. Chapter 11 merely seeks to assure Canada's NAFTA partners that they will not be treated more harshly or differently because of their status as foreigners. Canada can still raise or change its environmental, health and safety and other social standards as long as the new standards are applied equally and without discrimination.

9) What does the recent NAFTA, Chapter 11 decision in the *Metalclad v. Mexico* case mean to a municipality's ability to implement zoning and other by-laws?

The arbitral tribunal in *Metalclad* based its findings on a complex set of facts involving the actions of several levels of Mexican government. Nothing in the case suggests that municipalities cannot regulate in good faith on health or environmental grounds. The only issue in a Chapter 11 case will be whether a violation of any of the investment rules established by that Chapter can be proven. The exercise of municipal regulatory powers *per se* is unaffected by these rules, however, a violation of Chapter 11 could be based on regulatory measures if they operated in a way that constituted a violation of a specific Chapter 11 obligation (e.g., not to render an entire investment useless through regulatory measures that amount to expropriation under Article 1110 – which is what happened in *Metalclad*).

10) Will Chapter 11 be abandoned?

It is inconceivable that any NAFTA signatory would withdraw from the agreement. The same is true in relation to the WTO. These treaties are critical to Canada's economic security and to the extent they are flawed or need modification that will occur in the future as their parties continue to negotiate new provisions and new agreements.

APPENDIX VII:

OBTAINING LEGAL ADVICE

The contents of this report were prepared for The Canadian Council for Public-Private Partnerships for the sole purpose of information and discussion and should not be relied upon as a substitute for obtaining separate legal advice.

Local governments seeking advice on matters relating to public-private partnerships and trade agreements should contact The Canadian Council for Public-Private Partnerships for the names of law firms specializing in this type of law.

Extra copies of this publication may be purchased by contacting:

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