



Food System Transitions Stream

Do trade agreements substantially limit development of local / sustainable food systems in Canada?

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Abstract

A common view in policy and business circles is that certain elements of trade agreements (General Agreement on Tariff and Trade rules, the World Trade Organization Agreement on Agriculture, and the North American Free Trade Agreement) and the Canadian Agreement on Internal Trade significantly limit the policy and program instruments available to support the development of local/sustainable food systems. This exploratory textual analysis of select trade articles, filtered through a local/sustainable lens, suggests that Canadian governments can put in place more substantial policy and program drivers without triggering trade disputes. Of particular note is that local/sustainable foods may not be considered equivalent to imported conventional ones, and therefore many provisions of the trade agreements may not be applicable. Equally important, the rules do permit certain kinds of support, there are numerous exemptions and thresholds for application of measures, and many current actors in local/sustainable implementation may not be subject to the agreements. Based on this textual analysis, pertinent instrument design features are proposed that would allow governments and other parties to support local/sustainable food systems without triggering trade disputes.

Keywords: local/sustainable food; trade agreements; instrument choice, Canada

Introduction

The shift from primarily locally to globally distributed foods is a longstanding process, dating back some 500 years in the European world (Coleman, 2008). Although much of the global food supply remains local (in 2004, only 8% of global agricultural and food products were exported [Anderson and Croser, 2010]¹), in the industrial world, production efficiencies have produced volumes beyond domestic food requirements. This has helped trigger a shift in many jurisdictions away from policies of domestic self-reliance in basic foods to international movement of goods. Agriculture was originally part of the trade rules established under the General Agreement on Tariffs and Trade (GATT) but there were so many loopholes that it was effectively exempt until the 1994 Uruguay round agreement resulted in its full inclusion (what became the Agreement on Agriculture when the WTO was founded in 1995). Subsequent multilateral agreements have GATT rules at their core and have applied many of these rules to agriculture.

The role of the trade deals in food globalization is open to some debate (Bonnanno and Constance, 2008), but at a minimum they have helped cement the shift away from the local and regional supply chains that provided basic foodstuffs up until the 1960s (Friedmann and McMichael, 1989; Hendrickson and Heffernan, 2002). Although not the focus of this paper, food regime theory is useful to gain further understanding of the wider geopolitical and economic context of this process and whose interests it served (see AHV 2009 26(4), especially Pritchard, 2009).

Many still question the benefits of including agriculture in international trade agreements (Rosset, 2006; Smith, 2009; Burnett and Murphy, 2013). Some critics promote regional self-reliance and local food distribution as an alternative approach, in part because local/sustainable systems are thought to counter many of the negative effects of the industrial, global model, with enhanced regional economic development, environmental improvements, and a higher quality food supply the likely result (Bendavid-Val, 1991; MacRae et al., 2014a,b). This heightened interest in such food systems has analysts exploring the many policy obstacles and opportunities to enhance their development, including examining the role of trade agreements, both domestic and international (COG, 2007; Carter-Whitney, 2008; Friedmann, 2007). This paper focuses on the main agreements affecting Canada.

Canada appears committed to the trade agreements in the near term, since the federal government views their benefits, including economic opportunities for many agri-food firms and consumer choice, as vastly superior to the disbenefits (those firms penalized by the deals, including those engaged primarily in local/sustainable food supply chains, socio-economic and environmental perturbations). Canada's participation in the World Trade Organization (WTO) Agreement on Agriculture (AoA) represented a shift from a national state-assistance approach to agricultural development—the idea that agriculture had some exceptional characteristics requiring unique state interventions—to partial adoption of a neo-liberal paradigm (Skogstad, 2008). However, Skogstad (2008) cautions against viewing this as a paradigm change, arguing that it represents a shift, but not a rejection, of the state assistance model. And she argues that such shifts have not exclusively been a product of the trade arrangements, influenced as well by changes in policy communities, state budgets and other domestic factors. Given that the state assistance model has provided some protection for domestic food production, processing, and

¹ Note that this estimate excludes intra EU trade.

distribution, the retention of that paradigm may afford some support for local/sustainable systems.

A commonly expressed view in policy and business circles is that some trade articles and disciplines do significantly limit the range of policy and program instruments that can be applied by governments². The trade articles selected for examination (in the General Agreement on Tariffs and Trade [GATT], several WTO agreements, including the AoA, and in the North American Free Trade Agreement [NAFTA]) are those commonly named by Canadian government officials as reasons not to support local procurement and domestic producers interested in transitioning to sustainable practices and marketing (Carter-Whitney, 2006). An additional component of this discussion concerns the role of the Canadian Agreement on Internal Trade (AIT), a domestic agreement complementary to Canada's international trade arrangements (Doern and MacDonald, 1999) and also potentially constraining to local/sustainable food systems.

This is a very preliminary textual analysis because no trade case law exists (e.g., WTO disputes) that directly relates to the research question (see discussion below), and trade texts are ambiguous and open to interpretation. There are numerous ways to examine the texts, including policy analysis (Hajer, 2003), through the lens of economic and political globalization (Coleman et al., 2004), food regime theory (Pritchard, 2009; Otero and Pechlaner, 2010), analyzing economic risks and benefits across food chain actors (Kerr and Gaisford, 2007), and trade deals as "roll back" neoliberalism, or the use of neoliberal concepts and actions to rollback certain dimensions of social progress (Peck and Tickell, 2002). The approach taken here, however, is modelled after Swinbank (2006) and Daugbjerg (2012) who both addressed related questions (animal welfare and organic food, respectively) in trade agreements. Because the loss of instrument choices is commonly identified as the reason why the state cannot support the evolution of local/sustainable systems, I read select trade articles through a local/sustainable food system lens (see the discussion below on the parameters of such a lens) to identify how they might impact instrument choice for Canadian governments³. I rely on triangulation from different sources and face validity, convergent or discriminant validity, catalytic validity, and whether the work is useful and illuminating (Reason and Rowan, 1981)⁴.

I offer an argument that Canadian governments have far more instrument latitude than is typically acknowledged, and, although there are restrictions, more substantial drivers can be put in place than currently exist without triggering trade disputes. In other words, the trade agreements are not entirely restrictive for a variety of reasons related to partial adoption of neoliberal ideology, the challenges of finding common ground amongst so many nations that also have to attend to domestic voters, associated current disagreements over pertinent issues, and the enormously complicated nature of food supply chains and their governance. It is beyond the scope of this paper to examine why the federal government persists in arguing that it cannot act

² The author has heard this argument put forward for years in meetings with government officials and agri-food firms and organizations.

³ Note that it is not the purpose of this study to determine the merits of local/sustainable systems, nor to identify the winners and losers should such systems be widely adopted.

⁴ Face validity (whether it looks right to the discriminating observer); convergent or discriminant validity (defined by Reason and Rowan [1981:240] as .. "when a number of measures which purport to measure the same thing all point in the same direction"); contextual validity (how any piece of data fits in with the whole picture); catalytic validity (allowing individuals or groups to take action based on the study results); whether the work is useful and illuminating (providing some clarity on a topic that was not previously apparent).

without violating trade agreements, but current institutional and economic arrangements and ideological commitments admittedly make overt implementation of such local/sustainable support measures unlikely in the short term. It may be important for advocates of such systems to be well informed on the trade agreements should they wish to make their case in the mid to long term.

The analysis suggested here is an intermediate line of inquiry because much of the current opposition of local/sustainable food advocates to trade regimes in Canada focuses on the need to withdraw from them, or to substantially alter their construction, and these are clearly long term agendas. For example, the Toronto Food Policy Council (TFPC, 1994) used food security, community health and agro-ecological frameworks within Hill and MacRae's (1995) Efficiency-Substitution-Redesign transition frame to set out how trade agreements need to be redesigned if health and sustainability are the ultimate public policy objectives. While this is an important line of reasoning, this paper has more modest ambitions. In the short to medium term, can local/sustainable food systems be supported within the current trade environment? Can efficiency-stage initiatives be proposed that still comply with trade arrangements?

The state of local/sustainable food system development in Canada

Although some attention is given to localization and sustainable production independently, it is less common for integrated local/sustainable systems to be considered. The driving idea behind integrated local/sustainable food systems is to maximize the environmental, social and economic benefits that can accrue with a greater emphasis on regional food systems that are environmentally sustainable (MacRae et al., 2014 a,b). Such benefits are more robust than those associated with just local or sustainable systems.

There is, of course, much debate about how to define local/sustainable foods. For this analysis, it is sufficient to categorize local as sub-national food supply chains, conforming to provincial boundaries or smaller regions (Louden and MacRae, 2010), that employ sustainable production meeting the following definition (MacRae et al., 1990):

Sustainable agriculture is both a philosophy and a system of farming. It has its roots in a set of values that reflect a state of awareness of ecological and social realities and of one's ability to take effective action. It involves design and management procedures that work with natural processes to conserve all resources, minimize waste and environmental impact, while maintaining or improving farm profitability. As well, such systems aim to produce food that is nutritious and uncontaminated with products that harm human health. In practice such systems have tended to avoid the use of synthetically compounded fertilizers, pesticides, growth regulators, and livestock feed additives. Instead, sustainable agriculture systems rely on crop rotations, crop residues, animal manures, legumes, green manures, off-farm organic wastes, mechanical cultivation, and mineral-bearing rocks to optimize soil biological activity, and to maintain soil fertility and productivity. Natural, biological and cultural controls are used to manage insects, weeds, and diseases.

The local/sustainable food sector in Canada is significantly understudied, with limited data on its scope and scale. While some data exist on the adoption of environmental Best Management Practices (Eilers et al., 2010), there is little information on the adoption of sustainable farming systems consistent with the above definition, except for certified organic production and processing. The certified organic sector in Canada covers a wide range of raw and processed foods but remains small, 1–2% of land use and retail markets (Macey, 2010). A significant amount is exported and the percentage produced for and distributed in local markets is poorly understood.

Equally unclear is the general state of local food production and distribution, even when not combined with sustainability criteria. In broad strokes, Agriculture and Agri-food Canada (AAFC, 2011) reports that roughly 70% of Canadian consumption is met with domestic production and that 50% of domestic production is exported, particularly live animals, bulk grains and oilseeds. There are reports on local food initiatives, largely direct sales (COG, 2007), but limited information on how much food flows through sub-national supply chains. AAFC (2003) also reported a decade ago that only about 1% of retail food sales were direct marketed, but direct marketing is a small subset of local distribution. Even if those numbers have doubled in the past decade, it still represents a small part of the Canadian food system. Canada's supply managed commodities (primarily dairy, eggs, chicken and turkey) are largely organized provincially, with restrictions on cross-border trade. However, only a very small percentage of production is certified organic (Macey, 2010). British Columbia (BC) estimated that its producers provided 48% of the food consumed in the province but what percentage would also qualify as sustainable is unknown (BCMAF, 2006). Undoubtedly the sector is larger than these statistics suggest, but its exact size remains obscure.

Although also understudied, the potential of local/sustainable approaches seems significant. There have been a few studies addressing the theoretical potential for self-reliance in Canada and some of its regions, though without assessment of the national and international policy context (Warkentin, 1976; Warkentin and Gertler, 1977; Van Bers, 1991; Van Bers and Robinson, 1993). Subsequent to a largely qualitative inquiry, Warkentin (1976) concluded that Canada would need to make substantial changes to land use to ensure a sustainable agriculture scenario, but would always require significant imports of fruits and vegetables. This study did not address, in detail, associated changes to the Canadian diet and food demand. Warkentin and Gertler (1977) drew similar conclusions, particularly regarding the need for land reallocations.

The most comprehensive national work, though dated, was carried out by Van Bers (1991). She examined changes in Canadian demographics to the year 2031, optimal changes to the Canadian diet for health promotion (as defined by Canada's Healthy Eating Guidelines), and sustainable food production systems. Her assessment revealed heightened levels of self-reliance nationally and regionally in all major categories, calculated by the percentage of optimal consumption supplied from domestic production. Overall, Canada could still be exporting grains, pulses, oilseeds and potatoes. Due to changing human dietary patterns, the domestic need for animal products could be met, but some importation of fodder crops would be required. Production deficits would still exist for vegetables, fruits, and apples. Desjardins et al. (2010) followed a similar approach to Van Bers in a regional study, and concluded that there were significant opportunities to expand local/sustainable production in the Waterloo Region of Ontario.

Canadian governments are currently playing a relatively modest role in the evolution of local/sustainable food systems. While environmentally-friendly agriculture production is rhetorically a priority, federal environment pillar provisions under the Agricultural Policy Framework (APF) and Growing Forward represent a relatively small percentage of total federal transfers to farmers (AAFC, 2013). Little of the programming in this pillar links agri-environmental improvements to fully integrated regional food supply chain approaches. Jurisdictionally, local and regional systems are primarily a provincial domain. The provinces do participate in environment pillar programming, in addition to offering grant programs for local infrastructure development, and many offer generic ‘buy local’ marketing and occasional procurement programs, but few of these initiatives link local with sustainable production.

A 2009 survey identified only 24 local food procurement policies implemented by public institutions and local governments across the country, some of which also prioritized organic food purchases (CCA, 2009), but the number of programs was likely underreported given the challenges of such inquiries and they have likely expanded considerably since then. The nature of local/sustainable food procurement at sub-national levels is particularly interesting. Provinces and the Municipal, Agency, Schools and Hospital (MASH) sector typically procure through food service operators. When in place, the requirement for local/sustainable food is usually only a small part of the tendering process and does not have much impact on which firm wins the bid. Given the current limited state of local/sustainable development, setting high procurement targets is unrealistic because of insufficient supply, further reducing the overall significance of these provisions on the bid outcome.

Significant roles are being played by private and NGO actors, and sometimes private and para-public foundations (COG, 2007). Sometimes these actors are collaborating with governmental or para-governmental agencies.

Even more poorly understood are the levels of sustainable food imports. There are reports that 60–85% of the organic foods consumed in Canada are imported (MacRae et al., 2009), but very limited data exist on foods meeting other definitions of sustainability. Organic imports may represent less than 1% of all imported foods. The vast majority of imported foods would thus be produced conventionally.

Shifts in instrument choice

The trade agreements have reduced instrument choice, though not consistently and coherently (Guthman, 2008; Hatanaka et al., 2012). In Canada, many pre-AoA programs directly associated with increased production intensity have been altered in part because of trade agreements (Skogstad, 2008). These include income stabilization schemes that were deemed production distorting, such as the Western Grain Stabilization Program and provincial meat stabilization programs⁵, regional production supports and development schemes, and subsidies to specific production sectors that were deemed underdeveloped or prime export opportunities (Wiebe and Wipf, 2011). Associated with these program changes have been overall reductions in support to producers (as defined by the Producer Support Equivalent) since the mid-80s (AAFC, 2013). These instruments were part of the state assistance paradigm that somewhat protected agriculture from market forces and indirectly supported local food systems. Such instruments, if they still existed, would now likely be categorized as red or amber box by the WTO Agreement on

⁵ See Schmitz (2008) for a history of shifts in federal and provincial stabilization programs.

Agriculture (AoA) and restricted (see below). Instead, the favoured tools for the federal and provincial governments are tripartite-funded business risk management programs, sectoral contribution agreements, and information programs to drive market development. The contribution agreements are not typically framed around very specific program parameters, but rather serve multiple purposes. These measures typically qualify as blue, green, and amber box (see below), and are therefore more acceptable to AoA signatories. As measured by two indices, Canadian policies are only very modestly trade-distorting compared to most other industrialized countries (Anderson and Croser, 2010), again reflecting the reconstruction of state interventions to comply with trade agreements.

A review of trade articles and agreements, and their implications for local/sustainable supply chains

Given the instrument choice focus of this analysis, this section provides a review of key trade articles and agreements of the GATT, NAFTA, WTO and AIT viewed through a local/sustainable lens. The focus is on currently favoured instruments, and those proposed by local/sustainable proponents, including public procurement, private and government voluntary eco-labelling schemes, government-funded programs, and direct payments to farmers. For example, a government might wish to impose local/sustainable food purchasing targets in food service contracts. A government-NGO partnership might certify local/sustainable farmers and processors and have a label that alerts buyers to the different attributes of the products to differentiate them from conventional products. Governments might construct direct payment schemes for farmers to encourage them to shift to sustainable production practices and sell their products to local purchasers. Such instruments generally fall into the WTO categories of market access and domestic support/subsidies (see below), though numerous complications arise for this analysis from having many instruments affected by multiple trade provisions. This will be highlighted through the rest of this section.

GATT Articles (and associated WTO agreements and disciplines)

Many GATT rules remain the foundation of trade agreements. They are given ‘discipline’ by many subsequent agreements developed under the aegis of the WTO. Although many rules were first enacted when agriculture was de facto exempt, they were applied to agriculture with the GATT Uruguay Round Agreement on Agriculture, then institutionalized within the WTO when that body was created in 1995. Two GATT articles are particularly pertinent to this discussion.

GATT 1947 Article III (and the WTO Technical Barriers to Trade (TBT) agreement)

Article III of the GATT is based on the idea that ‘like products’ have to be treated similarly, regardless of source. This article is referenced in many WTO documents to support its provisions.

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation,

distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production. (Article III (1)) (GATT, 1947)

Governments cannot apply a wide range of instruments—including taxes, charges, or non-tariff trade barriers (NTBs)—to imported products to support their domestic industry. Historically, country disputes regarding this rule have been triggered when such tariffs, charges and NTBs are involved. They include those measures currently used and proposed to support local/sustainable foods.

But are local/sustainable products ‘like’ with imported conventional products?⁶ Neither GATT articles nor WTO agreements explicitly define ‘like’ (Vranes, 2011). Extending Swinbank’s (2006) discussion of like products and animal welfare, when products have ecological and ethical values embedded as credence characteristics in the minds of consumers, then GATT’s concept of ‘like’ is not so clear.

Vranes (2011, p.11), a trade legal scholar, stated: “Article III should be understood as being primarily concerned with products that are in ... a *competitive relationship*” and further added that other articles and notes focus on those products that are also substitutable. Swinbank (2006, pp.697–8) recounted that a 1970 GATT working party proposed four criteria for case-by-case assessment of like: “the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature and quality; and the tariff classification of the product”. By these measures, the first three criteria would have different expression for local/sustainable compared to conventional product. As well, these criteria suggest that consumer perceptions of likeness are important, much more so than regulator ones (Vranes, 2011). Vranes (2011, p.10) also argued that the relevant provisions of the WTO Technical Barriers to Trade (TBT) agreement (which gives discipline to Article III) reflect the same purpose as the GATT articles. It can be argued that local/sustainable products are not closely competitive with imported conventional and therefore not actually ‘like’. They appeal to different market segments, often have different supply chains, and serve different economic and environmental purposes. They are also not substitutable.

Trade experts have named at least four WTO disputes (WTO, undated) as somewhat pertinent to these questions, although none of them address local/sustainable production and distribution directly. The absence of pertinent disputes suggests some latitude for governments. In the dolphin-safe tuna dispute between Mexico and the US (ds381) and then later the EU, an example of how instruments can be affected by multiple provisions, the dispute panel did not rule on Mexico’s claims of violation under Article III, but this dispute ultimately left open the possibility that Article XX(b) and (g) (see below) could be used to craft a WTO compliant measure (Swinbank, 2006)⁷. In the Canada-EU dispute over the approval and marketing of biotech products (ds292), most of the dispute centred on articles of the Sanitary and Phytosanitary (SPS) agreement. This dispute was resolved among the parties so Article III was also not addressed by the dispute panel. A trade market dispute between the EU and Australia on

⁶ Note that the arguments that follow do not apply when comparing local vs. imported sustainable products.

⁷ Swinbank (2006) also reported in the shrimp and sea turtles case that Article XX(g) might also be invoked if the environmental legislation was suitably constructed.

geographic indications (ds290) did find that the procedures of establishing such indicators did not accord national treatment to countries outside the EU and was therefore a violation of GATT III:4. However, the panel concluded that overall there was no substantial violation of WTO obligations. The EU agreed to make some amendments to their legislation and such designations remain permitted. In the Country of Origin Labeling (COOL) dispute (DS384,386) between the US and Mexico and Canada (with others as participants), the original panel and subsequently the appeal panel, concluded that US COOL legislation was according less favourable treatment to imported livestock (beef and pork) than to like domestic livestock and required that the US alter COOL. This dispute continues to be active as the US has failed, in the eyes of the complainants, to comply with the WTO decision. This case only addresses local, not local/sustainable, but would appear to support the view that bundling local with sustainable affords protections that are not available when measures are just designed to support local production and processing.

Additionally, paragraph eight of Article III allows for exemptions for government procurement of products for government purposes without resale. This might cover, for example, food purchased for hospitals, prisons, and in some cases government employees. However, recent dispute panel rulings on Ontario's Green Energy Act suggest a close reading might be required to determine how to structure the language of provisions in these cases so as not to trigger a complaint (Bell-Pasht, 2013).

Another arena under discussion that is potentially pertinent to the question of 'like' is process and production measures that are non-product related (npr-PPMs). Much of the architecture of 'like' revolves around physically similar products and product-related process and production measures (PPMs). Some analysts argue that non-product related PPMs, for example sustainable production practices that do not affect a product in obviously material ways, are grounds for discriminating between products, i.e. using npr-PPMs as a way to distinguish products in the market place would not violate Article III (Vranes, 2011; see also Daughbjerg, 2012). However, this issue remains largely unresolved in both trade and academic circles⁸ (see the next section for additional dimensions of this debate).

If not deemed 'like', then Article III would not be broadly applicable to instruments supporting local/sustainable foods, however the argument would not apply in cases where governments might be favouring domestic sustainably produced foods over international sustainably produced ones. Currently, that scenario might only arise around certified organic foods.

GATT 1947 Article XX (and the Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) agreements)

This article sets out exemptions from the GATT, including measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." Such measures must not be applied in a way that "would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" (Article XX, GATT, 1947). This exemption is a basis for imposing environmental requirements that must be met by both domestic and international producers.

⁸ Note that Vranes (2011) has concluded from a legal interpretation of the pertinent texts that PPMs, whether npr or not, do not per se represent discriminatory treatment.

Article XX is enforced through the SPS agreement, but it only deals with process and product measures (PPM), not npr-PPM (Daughjberg, 2012). Consequently, the SPS agreement is unlikely to address issues of sustainability, including organic trade, since these are generally viewed to be npr-PPMs. Similarly, the TBT agreement is intended to cover technical standards, and it is clear that it does cover PPMs, but less clear that it was designed to address npr-PPMs. Vranes (2011) argues that it does, but that the TBT agreement does not per se find them discriminatory. Canada has argued similarly, but many countries do not agree and there is also debate in the academic literature. An additional interpretative complication is that the TBT does not specifically name the exception provided by Article XX, though Vranes (2011) believes it is in effect. This situation suggest that using Article XX to justify supports for local/sustainable food is permissible.

The SPS and TBT agreements use international standards, many set by Codex Alimentarius, to bring rigour to their articles. For example, Article 2.4 of the TBT Agreement states:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

According to Daughberg (2012), however, it remains unclear how WTO rules relate to private standards, especially when they are not under consideration by Codex. Codex is not apparently developing standards for sustainable production and processing systems other than organic. In Canada, other than certified organic standards and regulations, sustainability standards are largely private, with limited state facilitation and enforcement. The implication is that private standards for local/sustainable, given the lack of attention from Codex, are in a grey zone (Swinbank, 2006). Programs with standards often also have eco-labels and according to Swinbank (2006), labelling for quality attributes, including npr-PPMs, is highly contentious within the WTO and currently unresolved.

WTO Agreements

Under the WTO, several agreements have been adopted that affect local/sustainable food development. This section focuses on two, the Agreement on Agriculture and the Agreement on Government Procurement.

Agreement on Agriculture

With the Agreement on Agriculture (AoA), governments are supposed to remove barriers to trade. The agreement emerged out of GATT rules and agreements, including the Subsidies and Countervailing Measures (SCM) Agreement. The SCM was a component of GATT 1947 rules, and defined a subsidy as a transfer of funds to private firms and beneficial to that firm. In cases,

however, where the benefits are society-wide, as with subsidies for environmental improvements beyond the farm, and where the subsidy only covers part of the farms costs associated with implementing environmental improvements, there is a legitimate question about whether it would be considered a farm subsidy. These questions appear to have coloured the structure of the domestic support provisions in the AoA (see below). The SCM agreement also prohibited export and import substitution subsidies, but interestingly, the WTO AoA, which further developed rules against export subsidies (see below), does not explicitly mention import-substitution subsidies.

The Agreement has a somewhat tortuous negotiating history. The Doha Round that commenced in 2001 to update the original rules has never actually been completed. Negotiations were stalled until very recently⁹, and the AoA is still operating largely under rules agreed upon in 1995. The three guiding pillars of the AoA are:

- Market access: elimination of import quotas and non-tariff trade barriers (NTBs), replaced with tariffs that are progressively reduced. Of particular significance, Canada reduced tariffs on supply managed commodities by 36% in the 1995-2000 period.
- Export subsidy (red box) reductions: each country had different reduction targets depending on volume or value. The original intent was to eliminate the red box, but this has yet to happen, even though the US and EU have proposed it at the negotiating table since 2004.
- Domestic support reductions (sorted into three categories: Amber, Blue, and Green).

Regarding market access, much of the focus of the agreement is on import quota and tariff reduction, which could affect supply managed commodities, but many currently proposed supports for local/sustainable food systems would likely be considered NTBs. However, the structure of the AoA appears to offer numerous opportunities to exempt such supports or position them as non-distorting. The agreement does not specifically apply to the Municipal Agencies, Schools and Hospitals (MASH) sector. Nor does it say anything about non-governmental organizations. Multi-actor programs, a common feature of current development efforts (as described above), might not then be covered by the agreement, even if the state was part of the partnership. However, as Vranes (2011) cautions, under GATT rules, the activities of non-state actors can be attributed to the state, when influenced by state incentives and disincentives.

Export subsidies are not directly applicable to this discussion, but domestic supports are very pertinent. Under the agreement, green box (or environmental measure) support is permitted, so it is feasible to design local/sustainable programming for this category, since if properly constructed, such measures can also generate significant environmental improvements. Even if local/sustainable provisions fall into the amber box, governments are allowed to provide a considerable amount of subsidy, but not exceed the limits imposed by the AoA. The federal government's spending on amber box programs has been substantially below the agreed upon limit for much of the 2000s (Holden, 2005). Canada's most recent domestic support notification to the WTO (deposited in 2012 and covering 2009) reveals that spending was only about 32% of its commitment level for the period in question (WTO Committee on Agriculture, 2012). In part, this is because when a specific program costs less than 5% of total farm income in the targeted

⁹ The Bali mini-deal of December 2013 has some significant features, but does not affect the arguments presented here (http://wto.org/english/thewto_e/minist_e/mc9_e/tempdocs_e.htm).

commodity area, it is not counted, known as the *de minimus* provision (Brink, 2009). Many small support programs are, thus, not counted as part of the commitment.

WTO Agreement on Government Procurement (AGP)

Canada is one of a limited number of signatories to this agreement that applies to central agencies and provincial governments and their affiliated agencies. It is in effect for central government contracts valued at over CAD\$204,750 (Sept. 23 2013 SDR/CAD\$ exchange rates) and sometimes higher for sub-central agencies. This agreement is primarily about tendering procedures, supplier qualification and selection, and awarding of contracts, and may limit the choice of supplier for a contract, but the AGP does permit proposals with technical specifications regarding performance (as opposed to design or descriptive characteristics), particularly when based on international standards, national technical regulations, or recognized national standards (Bell-Pasht, 2013).

The AGP, as with many agreements, has a general exception for public interest measures to protect human, animal or plant life or health and Canada has exempted procurements with set-asides for small and minority businesses or contracts for agricultural products that further agricultural support programs or human feeding programs. Some sub-central agencies are also exempt if the procurement relates to regional development and environmental quality objectives. The provisions cover many provincial departments, but equally many MASH entities and NGOs are exempt, depending on the province.

NAFTA

A deal between Canada, the USA and Mexico, NAFTA was actually the first free trade agreement to apply GATT-like rules to the agriculture sector (Doern and MacDonald, 1999). Its provisions for food and agriculture are generally aligned with GATT and WTO requirements (tariff reduction, elimination of export subsidies), except that it is largely silent on the kinds of domestic support measure restrictions set out in the AoA (Konforti, 2010). It did, however, largely protect the supply managed industries. The agreement also regulates government procurement (Chapter 10), largely also aligned with GATT non-discriminatory rules. The procurement rules between Canada and the US, however, are still only applicable at the federal level for goods valued at more than USD\$25,000. Provisions were originally non-binding at the municipal and provincial levels (Carter-Whitney, 2008) but provinces are now subject to the rules of the WTO AGP. Municipal procurement remains excluded under NAFTA.

Agreement on Internal Trade (AIT)

This agreement governs trade between Canadian provinces, and is designed to remove barriers to the movements of people, goods, and services within the country. It was consistent with the free trade visions of the late 80s and early 90s, and was inspired by the view that provincial governments were exercising excessively interventionist policies that needed to be curtailed (Doern and MacDonald, 1999). It came into effect in 1995, with some revisions enacted over time (the latest approved in 2007). A general principle of the AIT, similar to GATT Article III, is reciprocal non-discrimination,

Subject to Article 404, each Party shall accord to goods of any other Party treatment no less favourable than the best treatment it accords to:

- (a) its own like, directly competitive or substitutable goods; and
- (b) like, directly competitive or substitutable goods of any other Party or non-Party (Article 401.1, AIT).

The agricultural and food goods provisions are concerned primarily with establishing common standards and removing technical barriers to trade, including requirements that provinces not use sanitary and phytosanitary provisions as disguised trade restrictions. The barriers negotiated included such technical matters as provincial regulation of margarine colouring, grading of potatoes, standards for imitation dairy products, and bulk shipment of fruits and vegetables (Doern and MacDonald, 1999).

There are a number of exceptions/exemptions to the AIT under which local/sustainable food procurement might fall. First, the aforementioned Article 404 (Legitimate Objectives) states (AIT, undated):

Where it is established that a measure is inconsistent with Article 401, 402 or 403, that measure is still permissible under this Agreement where it can be demonstrated that:

- (a) the purpose of the measure is to achieve a legitimate objective;
 - (b) the measure does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective;
 - (c) the measure is not more trade restrictive than necessary to achieve that legitimate objective; and
 - (d) the measure does not create a disguised restriction on trade.
- (Article 404, AIT)

If local/sustainable development is properly framed to meet provincial environmental and regional development objectives, then it may qualify under this provision.

Second, the procurement provisions of the AIT are about the processes of tendering contracts and who is eligible to win the bids. They are designed to reduce the possibility that governments will favour bidders from their province, including using local content rules to favour local suppliers. Local/sustainable requirement technical provisions in the tender and subsequent contracts can, however, be constructed so they are not discriminatory to the bidders. Note that it is permissible to establish Canadian content rules, as long as they are consistent with Canada's international obligations (Article 504). Also important is the procurement exemption for regional development (Article 508) and environmental purposes (Annex 502.4) (Carter-Whitney, 2008; Shrybman, 2009).

Third, any good being resold to the public is not covered by the AIT (Article 507). Since the food purchased by food service companies is typically resold to the public, it would appear to be exempt.

Fourth, NGOs are typically exempt, unless the state has delegated them legal authority to conduct specified activities (Article 102). Thus, most of the work currently conducted by NGOs

to promote local/sustainable procurement would not appear to be explicitly covered. Certain components of the MASH sector may be covered, but even so, are typically exempt for contracts under \$100,000 (Annex 502.4). For both NGOs and exempt MASH entities, governments are encouraged to ensure compliance with the spirit of the agreement, but it is not mandatory.

Shrybman (2009), a legal analyst and lawyer, has argued that it is feasible for municipalities to craft local food procurement provisions that are entirely consistent with the spirit of the AIT and its contract dollar value thresholds. Presumably, local/sustainable procurement measures could be similarly consistent. And, ultimately, if Article III of the GATT is not applicable, as discussed above, then local/sustainable products would not be considered 'like' with conventional foods from other jurisdictions.

The Canada – EU Comprehensive Economic and Trade Agreement (CETA)

The recently announced signing of CETA adds potentially new dimensions to this discussion, but many deal details have yet to be worked out or released. The agreement in principle¹⁰ builds on existing agreements but has some features that might affect the line of argument presented here. The text:

- does have a sustainable development and trade section, a trade and environment section, and a trade and labour section, and CSOs are to participate in monitoring the provisions when worked out;
- calls for a ban on export subsidies pending tariff reductions;
- proposes collaborating on regulatory measures, including animal welfare, and technical; standard equivalency through the TBT process;
- sets out immediate EU tariff elimination on some foods, mostly processed;
- sets out quota duty free access for certain goods to each other's market;
- has no changes to supply management, except increased cheese and milk proteins access for European producers.

The procurement provisions are perhaps the most significant. Gerry Ritz, the minister of agriculture, had indicated earlier that he saw nothing in the negotiations that would jeopardize buy local programs (CBC News, 2011) and news reports prior to the announcement implied that some protections would continue to exist for local purchasing (Clark et al., 2013). Shrybman (2010) had argued, from earlier released drafts, that the CETA would go beyond the WTO AoA and AIT in changing municipal procurement provisions which could then also shift rules around food. Access to sub-national purchasing provisions was thought to be a prime interest of EU negotiators (Sinclair, 2011). The procurement provisions of the agreement in principle:

- are broadly based on the WTO-GPA;
- maintain a nation's ability to set technical standards and social and environmental criteria and favour eco-labels;
- provide broad exceptions for key concerns regarding human, animal, plant life, and health;
- allow Canada to maintain exclusions for regional economic development, health care and other public services, and agricultural goods as part of food programs;
- cover federal, provincial, and municipal governments, an expansion of application beyond many aspects of the WTO-AGP;

¹⁰ <http://actionplan.gc.ca/sites/default/files/pdfs/ceta-technicalsummary.pdf>

- set varying thresholds for contracts to which rules are applied: high value contracts at \$560,000; federal, crown, and arms-length contracts at \$205,000; the provinces and MASH sector at \$315,000 (these thresholds are higher than the AIT);
- put in place some restrictions on geographic indications (GI) to protect EU GIs.

How agricultural goods are defined and whether food resold to the public will be covered under procurement provisions are open questions. Although provinces have indicated preliminary agreement, the adoption process will likely take several years and could be fractious (Clark et al., 2013). Numerous Canadian municipalities have already passed council resolutions seeking exemptions from CETA provisions (Council of Canadians, 2011). Because the EU has used exemptions provided by the AGP on which to base Fair Trade and regional development initiatives (Rourke, 2011; Bell-Pasht, 2013), and has a 20-year history of supporting in more substantial ways than Canada adoption of sustainable food production and distribution measures, it may not want to settle on final language that compromises current initiatives, leaving Canada also freer to support local/sustainable food systems development.

Efficiency-stage strategies to support local/sustainable food systems

In the Hill and MacRae (1995) framework, efficiency-stage strategies would be feasible within the confines of existing trade rules. This analysis identifies several avenues for promoting local/sustainable food, presented as program and policy design elements. These elements are structured around current rules, permitted exemptions and ambiguities in trade text language. As this analysis has shown, a bundling of local and sustainable food systems is critical because it reduces the likelihood that such foods will be considered 'like' with conventional foods. Broadly speaking, the two main opportunities for supporting local/sustainable systems are targeted support programs and procurement rules and processes.

Targeted support programs

Canada appears to have subsidy opportunities under the WTO AoA. The heightened scrutiny of red and amber box measures appears to create some space for environmental supports because red and amber measures are both trade distorting and they intensify conventional production and associated environmental problems. This occurs sometimes directly because of the subsidy and sometimes indirectly because the subsidy exists within a policy environment where environmental regulations are typically poorly designed, enforced or adopted (Mayrand et al., 2003). It appears that Canadian governments could impose increasingly demanding sustainability requirements on producers and supply chain actors to protect Canadian resources, beyond current environmental programming.

To minimize the likelihood of a trade challenge, any measure would ideally have several of the following design elements.

- It should adhere to the green box criteria, with framing based on GATT Article XX that identifies exemptions for farmer support programs that deal with conservation of natural resources. To do this properly means linking environmental measures along the supply chain so that the product benefits are enhanced by their regionality. For example, the environmental benefits of Integrated Pest Management (IPM) or organic adoption in fruit and vegetable production are augmented by shortening supply chains with innovative distribution, reducing cooling and refrigeration requirements, and reducing supply chain

waste (Lynch et al., 2011). An integrated strategy allows for additional GHG reductions and energy use efficiencies. In fact, such supply chain improvements can exceed the on-farm environmental benefits and also those of longer-distance supply chains (MacRae et al., 2013).

- If the measure is categorized as amber box, it should cost less than the *de minimus* threshold; however, even more expensive programs could still be designed and counted in Canada's permitted amber box commitment because spending is significantly below the established limit, as long as a large number of expensive measures were not adopted at the same time.
- It should explicitly be an import substitution program, possible because the AoA does not explicitly prevent them, likely making them permissible Amber Box measures under the AoA.
- It should involve a wide array of state and non-state actors in program execution, but with attention to the degree to which the state might be viewed as the facilitator of the initiative, making all other NGO activities accountable to trade disciplines. For many disciplines, sub-national governments and para-governmental agencies may be exempt, so initiatives with these organizations in the lead may be acceptable.
- It should incorporate the additional discipline of necessity. Even when a measure is non-discriminatory, is it the most effective way to produce a desired outcome? (Vranes, 2011). In other words, the more effective the measure is at accomplishing its objectives, the less contested it may be.
- It should rely on private standards to drive change, which may be more suitable than state standards, unless an international body such as Codex is developing an international version. Vranes (2011), from his legal analysis of relevant trade texts, advises against use of mandatory eco-labels, but suggests that voluntary ones are not per se discriminatory.

Procurement

Regarding procurement, the AGP does permit tenders to outline technical specifications regarding performance (as opposed to design or descriptive characteristics), particularly when based on international standards, national technical regulations, or recognized national standards. Many EU member states support the expansion of local/sustainable food systems, and the EC appears to be supporting this through its Rural Development Strategy and other policy recommendations (European Union, 2011; Bell-Pasht, 2013). In the US, states have used language associated with exemption provisions for child feeding to favour local product in procurement contracts. This approach is not directly linked to sustainable performance requirements, in contrast to the European approach (Bell-Pasht, 2013). Key elements of this approach include:

- Using technical specifications of procurement contracts, related to the performance of the product or the process by which it was produced, to favour local food systems development, not broad principles and instruments, and to redefine value for money within procurement processes to include wider environmental and social benefits (Clark, 2011). For example, freshness criteria could be imposed that would make it difficult for long-distance goods to meet the requirement (Konforti, 2010). Other possibilities include specifying varieties of crops that do well regionally, or distance travelled and environmental performance.

- Using the principles underlying an eco-label as technical specifications rather than using a label itself. European states are advised not to rely on eco-labels since they may be viewed as discriminatory.
- Dividing food contracts into smaller lots to facilitate access by smaller producers. Certification of performance is encouraged but not the only performance measure considered (Bell-Pasht, 2013).
- Creating procurements with set-asides for small and minority businesses or contracts for agricultural products that further agricultural support programs or human feeding programs. The AGP general exception for public interest measures to protect human, animal, or plant life or health has permitted Canada to undertake such approaches.
- Exploiting exemptions for government procurement of products for government purposes without resale. This might cover, for example, food purchased for hospitals, prisons, and in some cases government employees. However, a close reading might be required to determine how to structure the language of provisions in these cases so as not to trigger a complaint.
- Given thresholds in many agreements, designing programs to fall under thresholds, and paying particular attention to which units are covered by the agreements.

Conclusion

In conclusion, there would appear to be numerous ways to promote local/sustainable food system development without running afoul of trade agreements. Bundling local and sustainable production together may create new opportunities for exemptions and re-categorization of initiatives to non-discriminatory status. Sub-national governments, para-governmental agencies, and NGOs are often exempt, an important consideration in an era of increasing regulatory pluralism (Koc et al., 2008), though the design of initiatives must be mindful of how non-exempt entities may be facilitating the initiative.

Ultimately, innovative ideas to promote local/sustainable food that do not fall under existing categories or clauses may not attract attention because they are not sufficiently significant to trigger a dispute. However, given the ambiguity described above, advocates will need to argue that the political risks of interventions of the type outlined here are minimal.

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