

11. GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

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The purpose of this report is to provide information on the current General Agreement on Trade in Services (GATS) negotiations at WTO and potential repercussions for local government.

INTRODUCTION

The current negotiations on the General Agreement on Trade in Services (GATS) being conducted by the New Zealand Government with other governments in the World Trade Organisation (WTO) could have repercussions for local governments.

GATS rules are binding on all levels of government and constrain the ability of central and local government to regulate economic activity in pursuit of social or environmental goals. However, there has been little if any consultation with local government about the negotiations and their implications.

Previously the Christchurch City Council has argued that policy regarding the regulation, funding and provision of essential services should be made democratically by governments at the national and local level, and that such services should not be included in trade agreements.

The Council has called for full transparency and consultation on GATS with local government.

Recently a number of Australian local authorities (including Melbourne City Council, Yarra Council and NSW Local Government Association and the Australian National Local Government Association Conference¹) and over 70 Canadian municipalities (including West Vancouver) have called for the exclusion of public services from the GATS, particularly local government community services and water services. They have requested that national governments fully consult with local government about the implications of the GATS.

BACKGROUND

The General Agreement on Trade in Services (GATS) is an agreement signed in 1994 under the World Trade Organisation (WTO) which administers the agreement. GATS rules apply to 160 service sectors, many of which are the responsibility, directly or indirectly, of local government.² They include:

- licensing the provision of services (food outlets)
- regulations on services (waste disposal, building control, transport)
- planning permission/permits (including discretionary powers to apply conditions or negotiate provision of social housing)
- discretionary powers in general (e.g. giving preference to local employment, using procurement decisions to promote the local economy, placing environmental/sustainability conditions on contracts).

The purpose of GATS is to encourage freedom of international trade, and to promote competitive markets for all goods and services including those which have previously been outside the market sector. It aims to remove government regulations which are regarded as “unnecessary” barriers to trade and inherently anti-competitive. By signing the GATS in 1994, governments are committed to engaging in the current negotiation process which aims to achieve “a progressively higher level of liberalisation” in the service sectors.³

¹ These bodies have not only debated it themselves, but have written to the Federal Trade Minister raising their concerns and requesting consultation

² GATS was signed, by all 140 members of the then General Agreement on Tariffs and Trade (GATT) as part of the Uruguay Round of negotiations, in 1994. In 1995 GATT was succeeded by the World Trade Organisation (WTO). The former Director General of the WTO, Renato Ruggiero, has stressed that the scope of governments’ obligations under the GATT was extended considerably by the WTO. The new obligations “extend the reach of the Agreement into areas never before recognised as trade policy”. The General Agreement on Trade in Services (GATS): Possible Implications for Local Government An LGA/LGIB Briefing Paper

³ World Trade Organization, Trade in Services Secretariat, (March 2001) GATS: Fact and Fiction, Geneva, available on the WTO web site at <http://www.wto.org>.

OECD, Working Party of the Trade Committee, (September 3, 2001) Open Services Markets Matter, TD/TC/WP(2001) 24/PART1/REV1.

GATS includes two different levels of obligation:

- General Obligations: rules which apply “horizontally” to all service sectors in a WTO member country, including all government measures in the form of a law, regulation, rule, procedure, decision, administrative action of any other form⁴
- Specific Commitments: rules which apply only to those services which a government chooses to include.⁵ Each WTO member lists in its national schedule those services for which it wishes to guarantee market access and non-discrimination (“national treatment”) to foreign suppliers.

GATS requires that countries make their measures available (transparent) to others, and extend the same trade advantages to all foreign companies that they extend to companies from any one foreign country (the most favoured nation principle).

Schedules may reserve the right to limit the degree to which foreign services providers can operate in the market, for example limiting commitments on market access (Articles 16(2)(a) to (f)) or on national treatment (Article 17).⁶ However, all limits and exceptions must be set when a country initially offers a sector. A nation only can set later new limits on the number of investors or how they operate in a GATS-covered sector if the nation can negotiate compensation with all countries who have a right to enter that market (Article 11).

The GATS applies to measures taken by any level of government. While negotiated exclusively by national governments, its restrictions cover measures by “*central, regional, or local governments and authorities*” (GATS Article I:3.a.i). The GATS also applies to “*non-governmental bodies in the exercise of powers*” delegated by any level of government (Article I:3.a.ii). However, any dispute would be lodged by one or more WTO member governments against the central government whose local authorities’ measures were the subject of complaint; that authority itself would have no right of representation in the hearing.

Negotiations are currently taking place on the extension of GATS at WTO Headquarters in Geneva. By June 2002, all WTO members were to have told other countries what sectors they wanted them to add to their existing GATS commitments. By March 2003, WTO members are to identify what they are prepared to give up in return. The public, including elected local government representatives have no right to this information and it can be withheld under New Zealand’s Official Information Act. However, some countries have been more forthcoming than New Zealand, which claims it must treat all requests and offers as confidential. For example, the UK has posted on a government website the service sectors for which it has received ‘requests’ without identifying the countries making the requests, and has called for comment on the effects of opening these sectors – see <http://www.dti.gov.uk/worldtrade/service.htm>.

⁴ No government action, whatever its purpose (e.g. protecting the environment, safeguarding consumers, enforcing labour standards, promoting fair competition, ensuring universal service, or any other end) is, in principle, beyond GATS scrutiny and potential challenge.

⁵ Governments commit service sectors to these specific commitments through a series of negotiations. First they submit ‘requests’ for service sectors they would like other countries to include under GATS; then they make ‘offers’, stating which of their own services they will allow to be covered by GATS rules. These discussions initially happen on a country-to-country or bilateral basis, but any agreement reached then applies across countries, or multilaterally. Following negotiations a deal is concluded, which is binding. Once a service is committed with GATS any government (and by extension local government) regulation which actually or potentially restricts the market and discriminates (even inadvertently) against foreign companies is open to challenge within the WTO rules. Legally binding guarantees for stable regulatory conditions are constraints on future governments to change or reverse a liberalization process if they identify that economic and social policies need a change - and therefore poses a threat to democracy.

⁶ These can include limitations on the number of suppliers, the total value of transactions, the number of services operations, the number of persons to be employed, the types of legal entity permitted and the share of foreign capital. The entry “none” in a schedule is an undertaking that limitations of these kinds will not be imposed (World Trade Organization, Trade in Services Secretariat, (March 2001).

Governments are being asked to increase the range of services included in the GATS agreements. There are proposals to reduce the right of governments to regulate and to provide and fund public services, including proposals to change these rules and reduce the right of governments to regulate by declaring the some regulations of services should be "least trade restrictive" and introducing new necessity transparency agreements⁷.

GATS AND LOCAL GOVERNMENT

There is considerable uncertainty about the exact implications of GATS for local government services. GATS has some rules which recognise the right of governments to regulate services and to provide and fund public services. However, ability to regulate depends on governments knowing how, and when, to make exceptions and impose limitations when they commit sectors to liberalisation. There is uncertainty regarding the interpretations of "services supplied in the exercise of government authority" (Article 1(3)(c)). This section examines some areas of particular concern to the Christchurch City Council.

Extensions of Services

Governments are free to choose the services which they will make commitments guaranteeing access to foreign suppliers⁸. However, recent studies by the Canadian Environmental Law Association identified areas of local government services and regulation which could be affected by the GATS negotiations⁹. The services identified included:

- water and sewerage services,
- waste
- management,
- zoning regulations,
- library services,
- community services, such as childcare,
- signage

For example, the European Union has identified extensive additional commitments it wants to add to countries existing GATS commitments in its request to other countries, including New Zealand¹⁰.

Any additional services will be subject to the National Treatment and Market Access rules.

⁷ (e.g. "Application of the necessity test: issues for consideration", 8 October 1999, Job No.5929, Informal note by the WTO Secretariat; and "Market Access: Unfinished Business", WTO, p,123, available on the WTO Website).

⁸ Each Member must have a national schedule of commitments, but there is no rule as to how extensive it should be. There is agreement among all Governments that in the new round of negotiations the freedom to decide whether to liberalise any given service will remain. However, "the principle of progressive liberalization will be maintained." World Trade Organization, Trade in Services Secretariat, (March 2001) GATS: Fact and Fiction, Geneva, available on the WTO web site at <http://www.wto.org>.

⁹ Michelle Swenarchuk From Global to Local: GATS Impacts on Canadian Municipalities Canadian Centre for Policy Alternatives, Ottawa, 2002 <http://www.policyalternatives.ca/>

Sinclair, Scott, GATS How the World Trade Organisations's new "services" negotiations threaten democracy, Canadian Centre for Policy Alternatives, Ottawa, 2000, <http://www.policyalternatives.ca/>

¹⁰ A widely publicised leak of a near-final draft of the European Union request included requests to New Zealand to increase commitments in area of the professional sector (New Zealand has committed professional sector only partially); research and development sectors including natural science and social science; postal and courier services (New Zealand has not undertaken commitments in postal and courier services); telecommunications (New Zealand has only partially committed telecommunications) and goods and services (where New Zealand already has one of the most wide-ranging commitments of any WTO member). New Zealand has not undertaken GATS commitments in environmental services, although it did in the CEP with Singapore, which may indicate a government intention in GATS, and the negotiating agenda agreed at Doha has a specific focus on environmental services. EC requests New Zealand to commit the following subsectors; Water for human use & wastewater management; Solid/hazardous waste management; Protection of ambient air and climate; Remediation and cleanup of soil & water; Noise & vibration abatement; Protection of biodiversity and landscape (From AD HOC 133 COMMITTEE SERVICES MD : 044/02 GATS 2000 Request from the EC and its Member States (hereinafter the EC) To New Zealand) <http://www.guardian.co.uk/globalisation/story/0,7369,685670,00.html>

National Treatment rule requires governments to offer at least the best treatment given to domestic services (or service providers) to like foreign services (or service providers). It is unclear if local government policy which, for example, imposed limits to conserve resources or protect the environment would be GATS-consistent.¹¹ Some examples of measures identified as potentially modifying the conditions of competition in favour of domestic services or service suppliers include:

- Requirements that retailers recycle packaging could be argued to constitute de facto discrimination if the impact on cross-border, mail-order retailers were deemed more burdensome than the impact on domestic retailers selling through local outlets.¹²
- Requirements that toxic waste be treated on-site or at a local facility could be argued to disadvantage foreign industries or foreign waste treatment companies that have invested in facilities outside the local region¹³.
- Requirements that publicly-funded research and development produce benefits in the local or national economy.¹⁴

Market Access - GATS Market Access rule prohibits governments from placing restrictions on the number of service suppliers or operations; the value of service transactions; the number of persons that may be employed in a sector; and, significantly, the types of legal entities through which suppliers may supply a service. Article 16 also prohibits limits on foreign capital participation.

For example, if environmental services were committed (as they are under the Singapore CEP), the Canterbury Waste Services (etc) arrangement for the Kate Valley landfill would almost certainly be GATS-illegal because it restricts the number of service providers which can create landfills, and prescribes a certain type of legal entity for those that can (the joint venture companies), among other things.

Limitations on the number of street markets, and limitations as to their type of ownership, may well also be a problem since the retail sector is committed. So might, for example, a limit on the number of suburban malls (particularly since many are overseas owned).

Restrictions on Domestic Regulation

Regulatory measures, whatever their form or purpose, must conform with the GATS provisions in the main text and a member's specific commitments.¹⁵ While the preamble of the Treaty contains a clause that "recognizes the right of members to regulate," this language has limited legal effect. It may not be construed as providing legal cover for regulations that would otherwise be inconsistent with the substantive provisions of the treaty. Governments retain their freedom to regulate only to the extent that the regulations they adopt are compatible with the GATS.

For example, GATS Article 6.4 specifies that members shall develop any "necessary disciplines" to ensure that "measures relating to qualification requirements and procedures, technical standards and licensing procedures do not constitute unnecessary barriers to trade in services." Sub-paragraph (b) of Article 6:4 further specifies that such disciplines shall aim to ensure that regulatory measures are "not more burdensome than necessary to ensure the quality of the service."

¹¹ Measures considered 'necessary' to protect animal or plant life or health and which are not considered 'a means of arbitrary or unjustified discrimination' may come within the General Exceptions Article XIV. But there is no reference to conservation or environmental protection per se.

¹² Scott Sinclair and Jim Grieshaber-Otto (2002) Facing the Facts. A Guide to the GATS Debate and Michelle Swenarchuk From Global to Local: GATS Impacts on Canadian Municipalities Canadian Centre for Policy Alternatives, Ottawa, 2002.

¹³ Scott Sinclair and Jim Grieshaber-Otto (2002) Facing the Facts. A Guide to the GATS Debate and Michelle Swenarchuk From Global to Local: GATS Impacts on Canadian Municipalities Canadian Centre for Policy Alternatives, Ottawa, 2002.

¹⁴ Drawn from non-conforming measures listed as limitations to national treatment in the Canadian and US GATS schedules or from illustrations of inconsistent measures in the GATS scheduling guidelines (S/CSC/W/19). (Sinclair and Grieshaber-Otto 2002)

¹⁵ Regulations are clearly listed among the wide range of government measures restricted by the GATS.

"GATS establishes a framework of rules and disciplines to ensure that members regulate their services sector in a manner which avoids that any ensuing trade restrictions and distortions are more burdensome than necessary." and "Governments are free in principle to pursue any national policy objectives provided the relevant measures are compatible with the GATS" (Moore 1999)¹⁶

There are reportedly WTO members who view local regulations, such as hours of operation and zoning as a problem and seek new grounds to challenge these (Gould 2002). In discussing barriers to trade in the construction industry, the European Community reportedly cited differences in building regulations as a problem.¹⁷

Proposals to Expand Restrictions on Domestic Regulation

Changes to GATS rules on regulation of services, now being negotiated in Geneva, could mean that local councils face complaints about their regulations through the WTO complaints system. GATS Working Party on Domestic Regulations (WPDR) has developed proposals to expand restrictions on "domestic regulation" in ongoing negotiations under GATS Article 6.4.¹⁸ Since 1999, the working party has been developing a "necessity test" to be applied to licensing, standards, and qualification requirements set by governments at any level. The test is intended to be a legally binding revision to the GATS. Such a revision to the GATS would be a WTO-imposed requirement that would go far beyond its trade mandate, since regulations judged to be not really "necessary" would become violations of the GATS (Gould 2002).

Unfair treatment of foreign companies is already prohibited under other sections of the agreement.¹⁹ This clause extension would impose an absolute constraint on regulation that would apply even when foreign and local companies are treated exactly the same.

If these new restrictions on domestic regulation were agreed to, they would constitute an extraordinary intrusion into democratic policy-making. Under a necessity test, local councillors would be required to:

- Have an objective that a trade dispute panel would accept as "legitimate".
- Choose the least burdensome or the least trade-restrictive means of achieving their objective that is "reasonably available" to them.
- Ensure the measures taken and the objectives they are supposed to meet are an appropriate fit.

If a regulation was challenged a WTO dispute panel would decide whether the objective was worthy²⁰ and whether measures were not the least trade restrictive option, whether other less burdensome options were "reasonably available", and whether more effective measures could have been taken to meet the objective.

Decision-making on such matters is passing from democratically-elected governments (including local governments) to appointed tribunals and dispute-settlement panels at the WTO in Geneva. It could be argued that a trade panel determining the appropriateness of "regulations" from safety standards for manufactured goods to the licensing of hospitals to public water quality testing, is undermining governments' sovereignty.

Governments can complain about the laws or regulations of other governments to a panel of trade law experts. There is no right for local authorities to complain or defend themselves in these situations. A local authority being challenged would have no right to present to the panel its reasons for passing a particular regulation nor could it comment on the practicality of "less burdensome" options.

¹⁶ "Liberalization? Don't reject it just yet", Mike Moore, *Guardian*, 26 February 2001.

¹⁷ http://docsonline.wto.org/gen_search.asp for WTO Document Symbol: S/CSS/W/36)

¹⁸ When the GATS was signed in 1994, negotiators had not completed the disciplines on domestic regulation. A specific group of trade officials (the GATS Working Party on Domestic Regulation) is drafting language to enable WTO members to challenge each others services regulations through the WTO dispute system.

¹⁹ Articles stipulate that domestic regulations, licensing requirements, and technical standards must not constitute an "unnecessary barrier to trade in services" (Art. IV, S. 4). They also requires that these regulations must not be "more burdensome than necessary to ensure the quality of the service" (Art. IV, S. 4 (b)).

²⁰ The only objectives currently recognised as legitimate exceptions to the GATS (12) could be used only in extreme cases for measures to protect life or national security. Objectives of maintaining the character of neighbourhoods or reducing traffic noise may not meet this standard.

Monopolies and Exclusive Service Suppliers

GATS Article 8, Monopolies and Exclusive Service Suppliers, is one of the GATS general obligations that applies in principle across all sectors. The GATS imposes restrictions on monopolies and exclusive service supplier arrangements. In fact, monopolies (such as in postal services, electricity supply, health insurance, water distribution) and exclusive supplier arrangements (common in post-secondary education, health care and other social services) are inconsistent with GATS provisions and must be listed as country-specific exceptions in covered sectors. Governments wishing to designate new monopolies in listed sectors are required to negotiate compensation with other member governments.

There are concerns that pressure is being put on governments to privatise or liberalise public services. European Union, for example, is demanding full-scale privatisation of public monopolies across the world as its price for dismantling the common agricultural policy in the new round of global trade.²¹

Subsidies

Negotiation of 'disciplines' on non 'trade-distorting subsidies' are also underway (pursuant to Article XV). The position on subsidies is slightly ambiguous. The New Zealand government tends to the view that subsidies are not covered by the national treatment and market access rules, even where a service has been included in the schedule. However, this is contrary to the guidelines to negotiators drafting the original GATS schedules and the OECD's analysis of the agreement in 1994. It is also inconsistent with the negotiating guidelines agreed at the WTO in March 2001.²² Specialist on GATS at the OECD Trade Directorate, Pierre Sauve, also identified that subsidies which have not been explicitly reserved in a country's schedules are covered by the agreement.²³

Government Procurement

GATS negotiations on government procurement in services have also started. GATS Article 13 excludes government procurement from the MFN, national treatment and market access restrictions. However, the GATS does not clearly and comprehensively define government procurement.

New Zealand is not a signatory to the WTO Agreement on Government Procurement. But there are moves to broaden that agreement, so it is worth anticipating a change of the government's position on signing this agreement – it may even become a compulsory part of the WTO, like GATS itself.

The Council may wish to advocate that their procurement decisions and procedures not be subject to GATS procurement restrictions. Council may wish to also urge trade officials to ensure that New Zealand's commitments under the WTO Agreement on Government Procurement are not extended to cover local-level procurement

Procurement is used by local authorities to support small to medium businesses, provide incomes to residents, or to promote environmentally friendly products and services. Council may wish to seek assurance that any government procurement clauses would preserve the freedom of government and the Council to continue to exercise choice in order for decisions to be made in the best overall interests of its community.

Consultation with local government

As stated earlier GATS applies to measures taken by any level of government. While negotiated exclusively by national governments, its restrictions cover measures by "*central, regional, or local governments and authorities*" (GATS Article I:3.a.i). The GATS also applies to "*non-governmental bodies in the exercise of powers*" delegated by any level of government (GATS 14 Canadian Centre for Policy Alternatives Article I:3.a.ii).

²¹ John Vidal, Charlotte Denny and Larry Elliott "Secret documents reveal EU's tough stance on global trade" The Guardian, Wednesday April 17, 2002

²² Council for Trade In Services, Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services, 23 March 2001 [S/I/92]

²³ Paper to the OECD/US Forum on Trade in Education Services, May 2002

There has been limited dialogue between the national government and local governments which will be directly affected by the commitments being made.

Commitments and limitations have not been open for public consultation and debate.

COUNCIL POLICY

The Christchurch City Council has previously stated that it is inappropriate to constraint local authorities by an agreement to which local government is not a party and has sought exemption from such agreements (April 1998, May 2001).

The Council has sought assurance that that any government procurement clauses would preserve the freedom of the Council to continue to exercise choice in order for decisions to be made in the best overall interests of its community. This has included a request for assurances that there will be no restrictions on local governments rights regarding achieving social ends in procurement and no restrictions regarding conditions on suppliers that would "encourage local development or improve the balance of payments accounts by requiring domestic content, licensing of technology, investment, counter-trade or similar requirements" (September 2000, May 2001).

The Council's policies on preference for local suppliers are as follows: "That the Council adopt a policy of active preference within a small financial cost for local firms for the supply of goods and services, and actively seek out quotes from local firms for all possible supplies" (25/6/90) and "That all future tender documents be worded in such a way as to enable a comparison between New Zealand and overseas produced goods, where relevant" (19/11/90).

In practice most tenders are from local firms so the issue of giving them preference does not arise. The Council has adopted a balanced, pragmatic approach, sometimes awarding a contract to a local supplier, sometimes preferring an offer from an overseas company, and sometimes choosing a combination.

The Council has also noted that the requirement to award a tender on the basis of "value for money" alone does not even make good commercial sense (May 2001). It also noted that increasing attention is being given in the theory and practice of purchase and supply to building relationship, and formation of partnerships, in business and between businesses and public agencies. There is a growing body of experience in the commercial world showing that relationship contracting between buyers and sellers produce significant economic and strategic benefits in the form of lower costs of doing business and greater ability to meet strategic goals, and to do both on a sustainable basis. The shift in business practice is from managing contracts to managing relationships²⁴. Comparative growth figures show that countries that followed more benign or pragmatic policy regimes have fared much better economically and socially (reference ?).

POLICY OF OTHER LOCAL AUTHORITIES AND MUNICIPALITIES

NSW Local Government Association Conference last month passed resolutions asking for local government exclusion and for the Australian Federal Government to consult about the implications for local government of the WTO negotiations on Trade in Services (GATS). Melbourne City Council and Yarra, Port Philip, Moreland Council in Victoria and the Marrickville, Waverly and Leichhardt Councils in NSW have passed resolutions critical of the possible impact of GATS on local government services, and calling for full disclosure and information on the negotiations.

All Australian opposition parties, Australian Labour Party, Democrats and Greens now have policies critical of GATS, calling for all the requests and offers in the GATS negotiations to be made public, and supporting a Senate Inquiry into GATS.²⁵

Seventy Canadian municipalities through the Federation of Canadian Municipalities have made similar appeals to their national government.

²⁴ References to managing contracts to managing relationships

²⁵ On November 13 the Australian Senate passed a resolution supported by all the Opposition parties calling for requests and offers in the GATS negotiations to be made public, which was reinforced by a formal request to the government to table these documents on November 15. On November 18 the Australian government refused to table them.

COMMENT FROM MINISTRY OF FOREIGN AFFAIRS & TRADE AND PROFESSOR KELSEY FROM AUCKLAND UNIVERSITY AND DR BILL ROSENBERG

Officials from the Ministry of Foreign Affairs and Trade were asked to comment on the issues raised in this report. The Ministry response is attached to this report (Appendix 1). A letter which the Minister sent to LGNZ in September 2002 is also attached (Appendix 2). The Council was not aware of this letter prior to the Ministry response.

Professor Jane Kelsey from Auckland University and Dr Bill Rosenberg were also asked to comment on the issues raised in this report. Their comments are included in the discussion regarding the MFAT response in Appendix 3 (attached).

Staff

Recommendation: That the Council write to the Minister for Trade Negotiations and the Minister of Local Government stating that:

1. The Council believes that it is inappropriate that local authorities be constrained by an agreement to which local government is not a party.
2. The Council believes public policy regarding the regulation, funding and provision of essential services should be made democratically by governments at the national and local level.
3. That Council believes that no restrictions should be placed on local government's rights regarding achieving social and environment ends in procurement.
4. The Council requests that the Government support the clear exclusion of public services at central and local levels from the GATS, including local government community services, environment and water services.
5. The Council requests that the Government oppose any proposals which would reduce the right of local government to regulate services, including the application of a "least trade restrictive" test to regulation.
6. The Council requests that the Government seek to eliminate the ability of WTO trade rules to overturn nation-state laws and practices that protect health, the environment, development and human rights.
7. The Council requests that the Government seek:
 - (a) an amendment to the schedule, for example entering a reservation in the horizontal commitments to exclude local government; or
 - (b) a carve out for local government by amending the GATS; or
 - (c) an interpretation or clarifying declaration by WTO members that local governments are exempt from GATS.
8. The Council requests that the Government commission an independent retrospective review on the WTO's impact on development, democracy, environmental sustainability, health, and human rights

The City Manager's recommends:

1. That a copy of this report be forwarded to LGNZ and other local authorities for their information and possible action.
2. That LGNZ advocate to central government on behalf of local government regarding the above concerns.

Chair's

Recommendation: That the above recommendation be adopted.