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INTERNATIONAL TRADE and the ENVIRONMENT

**[An Environmental Assessment of
Present GATT Negotiations]**

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SUMMARY

The rules that govern the overwhelming proportion of world trade are set out in the General Agreement on Tariffs and Trade (GATT), which is presently being renegotiated. The result of those negotiations will be a comprehensive set of rules that will greatly influence global trade and economic activity for the decade to come. The rules of international trade will also influence, and perhaps undermine efforts to protect the environment, or manage natural resources in a sustainable manner.

Yet the GATT is being re-negotiated with virtually no consideration of its environmental implications. The agenda of current GATT negotiations is to "liberalize" international trade by reducing import and export controls, and by eliminating "non-tariff trade barriers". As long as the environment remains an externality that is ignored during the trade negotiation process, trade agreements will often institutionalize principles that are at odds with, and at times antithetical to, the objectives that are being pursued through international environmental agreements.

INTERNATIONAL TRADE AND THE ENVIRONMENT

Trade relationships and trade agreements substantially influence, and can undermine, national and international efforts to address ecological problems. Unfortunately, trade-environment linkages are rarely recognized and poorly understood.

Rules of international trade are embodied in many bi- and multi-lateral agreements. By far the most important is the General Agreement on Tariffs and Trade (GATT) which covers approximately 90 per cent of world trade among nearly 100 countries.

Initially drafted in 1947, the GATT is periodically amended by complex negotiations that may span several years. The current round of negotiations, known as the Uruguay Round, will conclude in December 1990. The result will be a comprehensive set of rules that will greatly influence global economic activity for the nineties. The decade that will, from an ecological perspective, be the most critical in human history.

For much of the world, trade practices will determine the scale and character of resource exploitation and use. The ways in which we use, or misuse resources, has of course, a great deal to do with the environmental crises that confront us, including global warming, deforestation, and desertification. It is apparent then, that the new GATT accord will have a considerable influence upon many of the world's most pressing environmental problems. In fact, it is arguable that the GATT may, to a greater degree than any other international instrument or treaty, determine whether we will be able to accomplish the sustainable environmental policies that are necessary for the very survival of our species¹.

Yet the GATT is being re-negotiated with virtually no consideration of its environmental implications and the governmental institutions that have responsibility for trade negotiations have no mandate or expertise to address environmental issues. Environmental organizations are not being consulted, or given an opportunity to comment on the various proposals that are being advanced by their respective governments. Rather, participation is restricted to large corporations and trade associations which pursue an agenda of economic growth, profit maximization and deregulation. The shroud of secrecy that surrounds trade negotiations allows these objectives to be advanced in private and without regard to their environmental consequences.

In the language of multilateral trade, the agenda of current negotiations is to "liberalize" international trade by reducing import and export controls, and by eliminating "non-tariff trade barriers". In many ways the objectives of liberalized or free trade represent an agenda for de-regulation, and the consequences of such a policy for the environment are very problematic. Because trade policies are being pursued without any assessment of, or effort to mitigate potential environmental effects, the results are quite likely to undermine environmental initiatives. For example:

Export Controls. Reducing or eliminating export controls will assure developed nations continued access to increasingly scarce natural resources. This will perpetuate the overwhelmingly disproportionate appropriation of global resources by developed countries that is a root cause of several pressing ecological problems. Conversely, by limiting the right of nations to restrict the export of vital resources and commodities, national governments lose important regulatory tools with which to accomplish resource conservation, and sustainable management policies.

Import Controls. Reducing or eliminating import restrictions will undermine pollution control regulation by making it easier for corporations to establish, or relocate operations to jurisdictions where the cost of doing business, including the cost of environmental regulation, is lowest. Not only will this discourage incipient efforts at environmental regulation in poorer nations determined to attract investment, but will as well create pressure for developed countries to reduce environmental standards to a lower, and more common, denominator.

Non-Tariff Barriers. Eliminating so called "non-tariff trade barriers" will render a host of environmental programs and standards vulnerable to attack as being inconsistent with trading obligations to facilitate the free flow of goods and commodities. Several environmental initiatives have already come under fire, and a recent successful challenge to Danish environmental laws concerning container regulation, illustrates how detrimental this type of attack can be for important environmental programs.

Controlling the Agenda. By substantially broadening the agenda of trade negotiations to include a variety of subjects and issues, such as environmental regulation, matters of vital public interest are removed to the private and often secretive processes of trade negotiations and dispute resolution. In the process, the fundamental prerogative of accountable and democratic institutions to determine matters of environmental policy and regulation, is undermined.

ENVIRONMENT, ECONOMY AND TRADE

In 1987, the report of the World Commission on Environment and Development, the Brundtland Commission, offered a chilling assessment of the ecological problems that confront us and presented various proposals for developing a response to them. Central to the Commission's recommendations is the call to integrate environmental and economic planning. The report repeatedly underscores the inter-relatedness of economic and resource policies to the environmental consequences that flow from them:

...it is impossible to separate economic development issues from environment issues; many forms of development erode the environmental resources upon which they must be based, and environment degradation can undermine economic development. Poverty is a major cause and effect of global environmental problems. It is therefore futile to attempt to deal with environmental problems without a broader perspective that encompasses the factors underlying world poverty and international inequality."²

The principle of integrated economic and environmental planning is now being taken up nationally and internationally. At the economic summit meeting of seven western leaders (the "G-7 group) in Paris in July 1989, for example, an unprecedented emphasis was placed on environmental matters.

The leaders' final communique from the Paris Summit devoted 8 of 22 pages to addressing the "urgent need to safeguard the environment for future generations"³. Among their recommendations was the following:

Environmental protection is integral to issues such as trade, development, energy, transport, agriculture and economic planning. Therefore, environmental considerations must be taken into account in economic decision-making. In fact good economic policies and good environmental policies are mutually reinforcing"⁴

Certainly many nations have begun to recognize the need for collective action in response to ecological crises that increasingly assume global dimensions⁵. This awareness is now being expressed in multilateral agreements such as the UN-sponsored Convention on Long-Range Transboundary Air Pollution, the Convention on the Law of the Sea, the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol (to freeze and then reduce CFC production). It is to be hoped that these and other developments may herald a new era of international environmental action.

Unfortunately, these initiatives have been limited to specifically identified "resource" and "environment" issues, and while the need to integrate environmental and economic planning is becoming accepted in theory, there are only tentative efforts to put this principle into practice. Important national and international "economic" institutions remain largely unaware of, or indifferent to, these policy developments. In virtually all cases the mandates of these institutions are far too narrow and fragmented to engender any consideration of the ecological dimension of managing economies⁶.

International trade is perhaps the most significant dimension of global economic activity. The value of world trade in 1987 was in excess of \$6 trillion and is growing⁷. Dependence on foreign trade is also growing, even though in many developing countries, where the impacts of ecological problems are already being keenly felt, trade represents more than 50 per cent of GDP⁸.

One of the very few sources of discussion concerning international trade as an environmental issue is the Brundtland Commission, which touches briefly on the subject. The Commission describes the trade - environment relationship, this way:

The main link between trade and sustainable development is the use of non-renewable raw materials to earn foreign exchange. Developing countries face the dilemma of having to use commodities as exports, in order to break foreign exchange constraints on growth, while also having to minimize damage to the environmental resource base supporting growth. The other links between trade and sustainable development; if protectionism raises barriers against manufactured exports, for example, developing nations have less scope for diversifying away from traditional commodities. And unsustainable development may arise not only from overuse of certain commodities but from manufactured goods that are potentially polluting.⁹

Despite this assessment and notwithstanding the invocation of the "G-7" leaders, however, there has been little, if any, effort to assess the environmental significance of international trade and trade agreements, and the negotiation of bi-and multilateral trading agreements remains virtually uninfluenced by the principle of integrating environmental economic policy. The risk here is that we are putting in place trade and economic policies that will make the substance of international environmental accords much harder to achieve.

As long as the environment remains an externality that is ignored during the trade negotiation process, trade agreements will often institutionalize principles that are at odds with, and at times antithetical to, the objectives that are being pursued through international environmental agreements. In the confrontations between trade and environmental objectives that may arise, recent experience indicates that there is no

reason to be sanguine about the prospects of the latter prevailing. It may be the final irony that, by ignoring the imperative to sustain our environment, trade agreements will actually undermine the very economic activity they are meant to inspire.

The Canada-US Free Trade Agreement. One illustration of the fundamental contradictions that can arise between environmental and trade agendas is illustrated by the recent Canada-US Free Trade Agreement. In June 1988 both the US and Canada participated actively in a world conference on "The Changing Atmosphere: Implications for Global Security." The conference concluded that global atmospheric problems were the product of "an unintended, uncontrolled, globally pervasive experiment whose ultimate consequences could be second only to a global nuclear war,"¹⁰ and recommended national efforts to reduce carbon emissions by 20 per cent by the year 2005. Energy policies and planning would also have to be fundamentally reoriented to favour energy efficiency and conservation¹¹.

Yet later that year the Canada-US Free Trade Agreement was ratified, entrenching energy and resource policies that are fundamentally at odds with the policy directions endorsed by representatives of the countries at the global warming conference.

Under the terms of this "free trade agreement" both countries forego, for as long as the agreement stands, the use of regulatory devices that could prevent the development of fossil fuel resources for export¹². In addition, subsidies for oil and gas exploration and development are given special status under the agreement and insulated from attack under the trade protection laws of either country¹³. Subsidies and other programs intended to encourage energy efficiency and conservation measures, are accorded no similar protection.

The first and already observable effect of the deal has been to prompt a new round of energy mega-projects in Canada intended to serve US markets. It is entirely likely that guaranteed access to Canada's energy resources will prolong the inefficient use of these non-renewable resources, forestall the imperative to concentrate on energy conservation and efficiency, and significantly increase carbon emissions to the atmosphere.

In effect the market is given pre-emptive rights to determine the course of resource development in both countries free from government regulation. By limiting the right of governments to regulate the development of natural resources, or to control that development to accomplish environmental objectives, the trade deal has undermined critical opportunities to accomplish goals that are necessary to abate global warming.

The agenda of "free" or liberalized trade that was given expression in the bi-lateral Canada - US trade agreement, is very much the same agenda that is pursued in present multi-lateral trade negotiations.

CONTROLLING EXPORTS

The Trade Negotiations Committee for the present round of GATT negotiations has set out certain goals as part of the mid-term review of GATT. Among the approved is the following:

participants will continue to pursue the objective of fullest liberalization of trade in natural resource-based products, including in their processed and semi-processed forms...¹⁴

Unfortunately the Mid-Term Agreement contains no reference to, or other recognition of, the need to consider the environmental consequences of such a policy. A failure to assess the environmental dimension of export trade will likely aggravate serious ecological problems for several reasons.

Commodity Trade, Land Degradation and Deforestation. Two of the world's most pressing ecological crises, desertification and deforestation, have been identified as directly related to non-oil commodity trade. Primary commodities other than petroleum, represent the major source of export earnings for many developing countries. Since 1980, prices for these commodities have fallen sharply. The UN Conference on Trade and Development's commodity price index dropped by 30 per cent from 1980 to 1985¹⁵.

For countries desperate to earn foreign currency and service international loan obligations, the pressures have been enormous to over-exploit indigenous resources. For example, according to the Worldwatch Institute the expansion of export agricultural trade in Brazil has:

greatly reduced the area of cropland available for subsistence farming, forcing many peasants to clear virgin forests to grow food.... One additional agent of forest destruction operates in Latin America: the lure of cattle ranching. Between 1961 and 1978, pasture in central America expanded 53 percent while forests and woodlands declined 39 percent. Much of this conversion was driven by US demand for cheap beef..¹⁶

At the same time as these trade policies were leading to the destruction of tropical rain forests they were also having a devastating impact on agricultural lands in the US. Depressed commodity prices exert similar pressures on US farmers to increase production whatever the long term ecological costs. Thus production is intensified and expanded by increasing the use of pesticides and fertilizers and by ploughing highly erodible and marginal land. The result has been an unprecedented loss of agricultural land to erosion. In fact estimates are that American farmers were losing 6 tonnes of topsoil for every tonne of grain they grow¹⁷.

Rights to control the export of resources. Just as import limitations such as tariffs may be used to protect domestic production, export limitations such as quotas, or taxes can be used to protect resources.

The ability to control the export of resources is vital to any country seeking to establish conservation policies to protect indigenous and non-renewable resources. Yet Article XI of the GATT restricts the right to limit exports. It provides that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the imposition of any product or the territory of any other contracting party *or on the exportation or sale for export of any product destined for the territory of any other contracting party* (emphasis added).

Limiting the right of nation states to restrict the export of resources is, not surprisingly, of considerable interest to developed countries that have co-opted the largest share of those resources, and that would like to ensure that they remain freely and cheaply available. North America, which represents 6 per cent of the world's population, now consumes 25 per cent of its energy resources. Developed nations, which represent approximately 20 per cent of the world's population, consume 80 per cent of its natural resources¹⁸.

Determination to prevent export restrictions is increasingly easy to observe in the agendas developed countries bring to trade negotiations. The major, and perhaps the most important, provisions of the 1988 Canada-US Trade Agreement (1988) concern export controls and fundamentally diminish Canada's sovereign right to restrict the export flow of its resources. In the words of the US Trade Representative, the Canada-US Free Trade Agreement met an essential priority of US trade policy, "secure supplies of energy at stable and reasonable prices" by proscribing future "government interference" in energy trade¹⁹.

The restrictions engendered by the agreement go far beyond those set out in GATT and oblige Canada to share its resources with the US even when it may be rationing them domestically, and notwithstanding the environmental impacts of exploration, development and use. The Canada-US Trade Deal has frequently been described as a prototype for other and multilateral agreements²⁰.

Export Controls and Food Security. The demand for an end to export restrictions for agricultural commodities is particularly disturbing. Currently Article XI 2(a) of the GATT provides an exception to the prohibition on export controls, allowing for "export

prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party" (emphasis added). Such temporary restrictions are of little avail to relieve chronic food shortages, but even this limited exception is in jeopardy because the US has proposed that it be abolished²¹. Thus countries would be precluded from imposing export restrictions on foodstuffs no matter how great local deprivations.

To appreciate the implications of such a demand, it is important to understand the role of transnational corporations in relation to the international trade of agricultural commodities. Transnational corporations control "80 per cent of the world's land cultivated for export oriented crops,"²², and the priorities of these corporations have a great deal to do with the expansion of agricultural production in the developing world to serve export markets, rather than the needs of local people. The Brundtland Commission observed,

In 1983-84, as drought and hunger were taking hold in the Sahel region of Africa, five Sahelian nations - Burkina Faso, Chad, Mali, Niger and Senegal - produced record amounts of cotton. They harvested 154 million tons of cotton fibre, up 22.7 million tons from 1961-62. The Sahel as a whole set another record in 1984: it imported a record 1.77 million tons of cereals, up from the 200,000 tons yearly in the early 1960s.²³

The impacts of such policies for the people of the developing world are evident and appalling. Less apparent, but probably even more destructive over the long term, are the ecological consequences of such policies. By putting valuable agricultural resources at the service of export markets, in countries that are not self-sufficient in food, enormous pressures are created for local peoples to over-exploit remaining and other resources simply to eke out the barest existence.

CONTROLLING IMPORTS

Trade liberalization policy is also being pursued with respect to import controls. In the words of the Mid-Term Agreement, the objective of present GATT negotiations is "a substantial reduction or, as appropriate, elimination of tariffs by all participants..."²⁴ There are several ways in which diminishing the right of governments to impose import controls may undermine efforts to establish or maintain tough environmental protection measures and standards in both the developing and developed world²⁵.

Export of Hazardous Industries and Toxic Substances. Trading relationships are increasingly shifting environmental and economic impacts associated with wasteful resource "management" practices from the developed to the developing world. For a country wanting to maintain tough environmental standards, while not undermining the competitiveness of its domestic industry, the choices are simple. They must establish import tariffs to offset pollution control costs so that domestic producers will not be at a disadvantage when competing with imports from jurisdictions without similar environmental regulation, or subsidize the cost of environmental protection with general revenues by underwriting pollution control costs.

Both options, however, are at odds with present GATT principles, which explicitly limit the right of governments to implement tariffs²⁶, and which prohibit the use of certain subsidies and renders others vulnerable to countervailing actions²⁷. The only alternative for creating a "level playing field" that does not violate the principles of liberalized trade, is the reduction of pollution control costs by de-regulation or by not regulating in the first place²⁸.

The failure of a government to regulate, has never been challenged as representing a subsidy, and there is no precedent for such a complaint²⁹. In fact, allowing industries to externalize the environmental costs of production is endemic to both developing and developed countries. Permitting polluters to appropriate common resources freely is probably the most common form of such "environmental subsidies", which can confer enormous benefits upon their recipients.

For developing countries this insidious form of "environmental subsidy" can present a critical opportunity to gain a comparative advantage in "pollution intensive" goods. The willingness to endure environmental and resource damage becomes a means of attracting investment and earning export currency. Developing countries desperate for economic growth have been willing, or persuaded, to endure environmental, public and occupational health costs associated with our most hazardous enterprises and specific instances of hazard export have been documented for asbestos, non-ferrous smelting and chemical industries³⁰.

A study undertaken for the Brundtland Commission estimates that in 1980, developing nations would have incurred over \$14 billion in pollution control costs if they had to meet the environmental standards then prevailing in the US³¹. For an industry able to export goods to the US free from tariff restrictions, this "subsidy" may be a very attractive incentive to relocate or establish operations where environmental or workplace regulation is modest or non-existent.

The same dynamics have encouraged a flourishing trade in hazardous waste. Disposal costs in some developing countries are as low as \$40 for wastes that would cost as much as \$250 to \$300 to dispose of in the US³². While efforts are presently under way

to negotiate treaties that would curtail the export of hazardous waste, efforts to weaken the regulatory authority to control exports that are being advanced through GATT run counter to these initiatives.

Disinvestment and job blackmail. Corporate polluters have often used the implied or explicit threat of disinvestment and plant closures to mobilize opposition to environmental protection and occupational health regulation³³. The authors of the only GATT study specifically to address an environmental dimension of international trade stated,

".. polluting industries in the countries with the most exacting standards would thus become relatively less profitable, their expansion would slow relatively to that of corresponding industries, and there would be a tendency for these industries to move out of countries with relatively heavy direct costs of pollution abatement..."³⁴

Similarly, the Canadian Chemical Producer's Association has "explained" in response to proposals to establish worker and community "right to know" legislation:

It is a fact that if unnecessary or excessive costs are introduced unilaterally by any country, (or province), innovation and development will simply cease or be transferred to jurisdictions with a more favourable business climate. Should this happen in Canada, it would be quickly reduced to a warehouse for chemicals.³⁵

Overt threats however, are often not necessary. Governments are keenly aware of the potential implications of new regulatory initiatives and have a strong inclination to accommodate corporate interests before the point of confrontation is reached. In many cases, regulators will simply anticipate and avoid the prospect of confrontation by not putting forward initiatives that will provoke a strong response from powerful and influential corporations or business associations³⁶.

The lowest common denominator. As restrictions to the international flow of capital, goods and services are reduced, pressures will increase to reduce environmental protection costs to the lowest common denominator. Negotiations of the Canada-US Free Trade Agreement offered several illustrations of the corporate community applying such pressure. In the US, the National Coal Association used the pending agreement as a rationale for calling for the removal of "regulatory disincentives" that stand in the way of new coal-fired power plants³⁷. In Canada the Ontario Chamber of Commerce argued that air pollution regulation be "relaxed" to enable business to compete under free trade³⁸. The implications for acid rain and global warming are obvious.

CONTROLLING NON-TARIFF BARRIERS

The objectives of liberalized or free trade are in many ways simply the agenda of deregulation³⁹. By the removal of export and import controls, and the elimination of "non-tariff trade barriers", the goals of economic growth and profit maximization can be pursued in a largely deregulated global environment.

As noted, trade agendas are often devised to suit the interests of influential corporations⁴⁰. Negotiations take place, and are concluded, in private. In many ways this scenario is reminiscent of the way in which environmental protection and resource conservation issues were addressed when only governments and business were regarded as having a legitimate interest in such matters.

By circumventing the accountable and democratic institutions that are increasingly willing to respond to public pressure to protect the environment and conserve resources, trade negotiations offer an opportunity to finesse this important public mandate. By characterizing environmental regulation as a non-tariff trade barrier, they can remove the discussion to a less public and more sympathetic forum. The result is a de facto deregulation of process, which effectively erodes the prerogative of democratic and accountable institutions, to consider and legislate matters of vital public policy.

About the only way that environmental programs or regulations do find their way onto the agenda of trade institutions is when they are assailed as non-tariff trade barriers. Examples include Danish waste reduction legislation and Canadian loan guarantees to the non-ferrous smelting industry for pollution control equipment.

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Disposable beer cans. A recent decision of the Court of Justice of the European Communities illustrates one type of contradiction that can arise between the objective of liberalized trade on the one hand, and environmental protection on the other. The case, which is one of the first to consider a complaint that national environmental legislation of general application is a non-tariff barrier to trade, establishes an unfortunate precedent. If the case is followed, national environmental regulation may have to take a back seat to a country's trade obligations⁴¹.

At issue was a Danish waste reduction regulation that had been in place since 1981. The regulation required all beer and soft drinks to be sold in returnable containers. To ensure that adequate systems were in place to recover used containers, only those containers approved by Denmark's Environmental Protection Agency could be marketed. No request for such an approval had been turned down.

The European Court noted that the Danish regulations were "highly effective" and made no distinction between beverages manufactured or bottled domestically and those imported to the country. Exemptions were also available for small distributors and to allow importers to test market their products. Over 99 per cent of the beer market was dominated by Danish products. However, other member states of the European Economic Community objected to the requirements, as did retail trade associations which complained about the costs of establishing collection systems and argued for the right to market non-refillable containers, including disposable beer cans.

In considering that complaint, the European Court noted the mandatory obligation established by the EEC treaty to preserve, protect and improve the quality of the environment. It found the Danish regulations to be just such a measure and accepted the regulations as a genuine, and successful effort to accomplish environmental objectives. On this basis the Court sustained the container deposit requirements of the

Danish law, but it also conceded that a recycling regime would not be able to achieve the same high standard of resource conservation as had Denmark's re-utilization laws.

Notwithstanding these findings, the Court went on to find that Denmark had failed to satisfy the onus of having to prove that its measures were "not disproportionate to achieve a legitimate aim." Acknowledging the fact that no actual restraint of trade had actually arisen, the Court reasoned that reuse regulations, which required that all marketers of containers establish return systems, could be more expensive for importers than for domestic producers.

Untroubled by the hypothetical nature of the problem it described, the Court concluded:

There has to be a balancing of interests between the free movement of goods and environmental protection, even if in achieving the balance the high standard of the protection sought has to be reduced⁴².

Denmark was found to be in breach of its obligations under the EEC.

It is difficult to imagine a situation in which an environmental regulation could be on a stronger footing. Yet despite the absence of any demonstrable impediment to trade, the European Court of Justice had no reservation about finding Denmark's container legislation inconsistent with the principle of free trade. By characterizing national environmental laws as non-tariff barriers to trade, opponents of strong regulation have a potent new weapon with which to assail these important initiatives.

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Irradiated food labelling. It is also likely that regulators will simply shy away from regulatory initiatives that might be challenged as barriers to trade. For example, Canada's Department of Consumer and Corporate Affairs has responded to Canadian concerns about irradiated foods with the following:

It is recognized that the labelling requirements of Canada and the USA may need to be further coordinated to avoid a potential non-tariff trade barrier.¹⁴³

* * *

Pollution abatement programs. US legislation implementing the the 1988 Canada-US Free Trade Agreement has already provided the non-ferrous metals industry with an opportunity to challenge Canadian pollution control programs which include loans and investment credits. The US based Non-Ferrous Metals Producers Committee (NFMPC) has assailed, as unfair trade practices, a variety of federal and provincial programs intended to reduce emissions from, and improve workplace safety in, several Canadian lead zinc and copper smelters. The US Trade Representative has determined that there is "a reasonable likelihood" that this complaint is well founded and is investigating these Canadian pollution control programs⁴⁴.

Should the NFMPC position prevail, Canada may well choose to abandon these environmental programs rather than face retaliatory action. It was precisely this path that the Province of British Columbia recently chose when it abandoned reforestation programs to avoid heavy export taxes. Those taxes had been imposed by Canada in response to US lumber industry claims that the programs represented unfair subsidies, although similar claims had failed to be borne out. Rather than challenge inconsistent rulings of the US trade administration, Canada chose to avoid the disruption and uncertainty of litigation and acquiesced to US industry demands⁴⁵. The softwood lumber dispute illustrates that the assertion of a trade grievance, whether ill-founded or not, can be sufficiently disruptive to prompt concessions from governments dependent on export trade.

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Harmonizing environmental standards. Efforts to harmonize standards on a global basis represent another way by which trade agreements may undermine efforts to establish environmental standards that reflect the priorities of the communities that will live with them. Irked by decisions such as Europe's ban of the importation of beef fed with growth hormones, the US has included as part of its GATT agenda the global harmonization of health and safety standards⁴⁶. While the development of international consensus around environmental standards may be a desirable objective, there are several reasons to suspect that the agenda of "free trade" is to lower environmental standards, while removing standard-setting processes to institutions that are less

accountable to the community and more amenable to corporate influence and control.

Again the Canada-US Free Trade Agreement offers insight into the nature of this agenda. Chapters 6 and 7 of the Deal obligate the parties to harmonize technical and agricultural standards. As part of the bargain Canada agreed to "work toward equivalence" with a risk-benefit regulatory model for pesticide registration. This regulatory approach is opposed by US and Canadian environmentalists and had, until the trade deal, been successfully resisted in Canada. The difference between US and Canadian regulatory approaches was quite real. Canada had registered 20 per cent fewer active pesticide ingredients and 7 times fewer pesticide products.

Negotiations between the US and Canada will soon be under way to implement the harmonization provisions of the Agreement. The results will significantly influence packaging-related standards, workplace health and safety regulations and other matters that have considerable environmental significance. Advisory committees have already been established to assist with those negotiations,⁴⁷ but as is true for present GATT negotiations, no environmentalists are participating in these discussions, nor have they been invited to do so⁴⁸.

CONTROLLING THE AGENDA

Trade negotiations and agreements may also adversely affect environmental conservation and protection policies by undermining the democratic and consultative processes that have grown up to allow full and public debate about important issues. The failure to identify the environmental significance of trade matters serves the interests of those who would rather pursue their agendas without having to account for the environmental consequences. Thus objectives can be successfully pursued within the context of trade negotiations that could not be advanced in more public decision-making processes.

The Canada-US Free Trade Agreement committed Canada to revising its approach to pesticide regulation, and undermined regulatory control of resource development and export. It is highly unlikely that either objective could have been achieved had it been presented as part of the customary parliamentary process. This further illustrates the way in which trade negotiations can accomplish goals of deregulation in both substance, and procedure - cloaking vital matters of environmental policy with the foreboding shroud of international trade.

Still another way in which the implications of trade agreements are obscured from public scrutiny is the result of the special rules that apply to their implementation. In the US for example, the Canada-US Free Trade Agreement was presented to Congress as a fait accompli, no amendments were possible, only approval or disapproval. Given the

fact that agreements reflect the lobbying efforts of the most powerful and influential corporations, any prospect of rejection is virtually theoretical. In Canada, implementation of the Free Trade Deal required substantial amendment of twenty-seven Federal Statutes, without the benefit of committee hearings, and with only perfunctory parliamentary debate.

ENVIRONMENTAL PROTECTION UNDER GATT

A review of GATT Instruments and materials confirms that the environmental dimensions of international trade have been almost entirely overlooked. For example, the word environment is not used in the GATT⁴⁹, and it would be extremely difficult to argue that GATT rules should be read as being subject to some overriding, and unarticulated concern for the environment.

In response to this criticism of the GATT it has been suggested that GATT does establish an environmental protection provision in Article XX(b), which provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- b) necessary to protect human, animal or plant life or health.⁵⁰

There are of course a host of environmental and resource conservation measures that would be very difficult to defend as measures to protect human, animal or plant life.

More to the point however, is the fact that this provision has never been invoked to justify environmental protection measures, nor was it intended for that purpose. Rather the legislative history of this provision makes it clear that it was intended to protect " quarantine and other sanitary regulations"⁵¹. Further, it is a fundamental tenet of legal interpretation that the meaning and application of an agreement be determined by the intent of parties at the time that it was concluded or amended. Environmental protection was simply not a public issue in 1947, when Article XX(b) was drafted, and no effort has been made since then to amend the Agreement to reflect contemporary priorities. It is simply not plausible to suggest that environmental protection be left to a forty year old GATT provision that was never intended, or used, for that purpose.

Strong policy support for these principles can be found in a host of national and international initiatives. There is also a dawning recognition of the need to integrate these objectives with economic policy and planning including trade matters. The recent

economic summit's recognition that "environmental protection is integral to issues such as trade,"⁵² is but one hopeful indication of this.

If GATT rules are to work in harmony with these objectives, the priority of environmental protection and resource conservation must be made explicit and set out clearly in the GATT agreement. One way of accomplishing this would be an amendment to the General Agreement, adding the following:

ENVIRONMENTAL PROTECTION

1. *Nothing in this agreement shall be construed to prevent any party from taking any action which it may deem necessary to protect the environment, including the establishment of import or export restrictions and the use of subsidies to:*
 - (i) *prevent or remedy adverse environmental effects, and/or;*
 - (ii) *conserve natural resources;*

2. *For greater certainty, "actions necessary to protect the environment" shall include national and international initiatives, including, but not restricted to:*
 - (i) *the establishment of regulatory regimes including environmental standards, objectives, guidelines and codes of practice;*
 - (ii) *approval processes relating to environmental impact assessment of projects or programs that may have significant environmental consequences, including the determination of whether approval for such projects or programs shall be granted;*
 - (iii) *measures intended to encourage public participation and standing in the decision-making processes that may affect the environment, and;*
 - (iv) *access to information on matters relating to the environment.*

3. *For the purpose of resolving or adjudicating any dispute that may arise under this agreement with respect to any action taken to protect the environment, the onus shall be upon the complainant to prove that:*
 - (i) *the action or measure was not taken in good faith, and;*
 - (ii) *is unreasonable.*

CONCLUSION

Environmentalists are committed to creating and strengthening bi-lateral and multi-lateral institutions that can express a global perspective on environmental problems. National, provincial and state borders often operate to encourage myopic and self-centred approaches to problems of environmental degradation that ignore extra-territorial impacts.

However, it would be folly to relinquish existing sovereign authority in the absence of strong and accountable international institutions with the responsibility *and authority* to manage our resources and protect the environment - nationally, internationally and globally. If nation states do not protect their environments or conserve vital resources, no one will.

While the general principles of the relationship between international trade and the environment can be discerned, and on occasion documented, environmentalists have had no opportunity to learn of, assess and respond to present trade initiatives. Trade negotiations proceed, and agreements are concluded without even the most perfunctory consideration of the enormous environmental consequences that flow from them.

This analysis has attempted to illustrate the need for comprehensive assessment of GATT negotiations in order to identify their environmental significance. What are the relationships between various trade proposals and the environment? How will trade negotiations and trading agreements influence or directly determine environmental or resource management and conservation policies? How, if at all, has the environment been taken into account by the institutions involved with matters of bi- and multi-lateral trade? Will the principles being enshrined in trade agreements make it easier or more difficult to achieve the objectives that are being set in international environmental accords?

If the agenda of liberalized or free trade continues to be pursued without regard for its environmental consequences, the result will be an agreement that enshrines principles of deregulation that will create significant obstacles to environmental and resource management initiatives. The task is to generate alternative trade proposals to amend the GATT so that trade can serve the objective of sustaining our ecosystem, rather than destroying it.

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NOTES

1. There is a considerable array of international agreements and treaties of which a growing number deal specifically with environmental matters. However, whether the measure is of the sheer value of economic activity that is subject to its provisions, or the volume of resources that are effected by it, the GATT is of a scale that overshadows most, if not all, other international agreements. While a comment attempting to compare the environmental significance of the GATT with other international agreements could be considered rhetorical, it is clear that the environmental implications of this trade agreement are far more profound than has been recognized.

2. World Commission on Environment and Development (WCED), Gro Harlem Brundtlan, chair, Our Common Future, Oxford University Press, (1987), p.3; herein referred to as "Brundtland").

3. Summit of the Arch, Economic Declaration, July 16, 1989, p.2.

4. Ibid. p.13 (emphasis added).

5. In its State of the World 1989 report, the Worldwatch Institute describes the ecological imperatives we face and offers this assessment of the decade ahead:

The global commons - the oceans, the atmosphere, the tropical forests - are now at risk. Ozone depletion, climate change, the oceanic pollution simply cannot be solved at the national level. Indeed, a world in which countries go their own way may not be worth living in. Whereas the seventies were marked by a series of national laws to address environmental problems, the nineties may well be marked by comparative initiatives at the international level.

Lester R. Brown et al. State of the World, 1989, A Worldwatch Institute Report on Progress Toward a Sustainable Society, (Norton & Company: New York, 1989) pp. 16-17.

6. Brundtland, supra fn.2, p.84.

7. UNCTAD, Handbook of International Trade and Development Statistics 1988 (New York, U.N. 1988).

8. Ibid.; see also Brundtland, supra fn.2, p.79.

9. Brundtland, supra fn.2, p.79.

10. Environment Canada, The Changing Atmosphere, Implications for Global Security - Conference Statement, Toronto, June 1988.

11. Ibid. p.5.

12. Article 904 of the Canada-U.S. Free Trade Agreement explicitly prevents either government from restricting the export of energy resources, for any other than "national security" reasons, unless supplies are rationed, to the same extent, domestically. The important right under GATT rules to use export taxes as a mechanism for resource management and conservation, is abolished by the agreement. For example, compare with Article XX of GATT. Bill C-130, that implemented the Agreement in Canada, abolishes a central tenet of Canadian energy policy and compels the National Energy Board (NEB) to

issue an export licence even in the face of Canadian shortages. While the NEB may attach terms and conditions to its approval in order to mitigate environmental impacts - it can not refuse a license for environmental reasons.

13. Article 906 provides: "Both parties have agreed to allow existing or future incentives for oil and gas exploration, development and related activities in order to maintain the reserve base for future energy resources." The only other category of government subsidy that is accorded this special status is defense spending.

14. Multilateral Trade Negotiations The Uruguay Round, Trade Negotiations Committee, Record of the Mid-Term Meeting in Montreal on December 5-9, 1988; MTN.MTC/8(MIN). See p.7.

15. UNCTAD, Trade and Development Report (New York: UN, 1986).

16. Lester R. Brown et. al. State of the World, 1988, (Norton & Company: new York, 1988) pp. 86-87.

17. Ibid. p.173.

18. David Suzuki, It's a Matter of Survival, (A five part radio series broadcast on the Canadian Broadcasting Corporation radio network, August and September, 1989) in particular Parts 1 and 2.

19. US President Reagan has made similar comments emphasizing, in his announcement of the bi-lateral trade deal, on October 4, 1987, that the agreement would "improve our security through additional access to Canadian energy supplies"; as quoted by John Dillon in "Continental Energy Policy", The Free Trade Deal; ed. Duncan Cameron, (Lorimer & Company: Toronto,1988).

20. See for example Giles Gherson; "Washington's Agenda" in The Free Trade Deal, Ibid.

21. US Negotiating Group on Agriculture; Elaboration of US Agriculture Proposal With Respect to Food Security, USTR, 4-14-88; and see press kit provided by the U.S. Department of Agriculture with Discussion Paper on Tariffication Submitted by the United States, MTN.GNG/NG5/W/97, 10 July 1989, Q's and A's on Tariffication, p.4.

22. See UN Centre on Transnational Corporations, Environmental Aspects of the Activities of Transnational Corporations: A Survey (New York: UN 1985). According to this survey:

"Eighty to ninety percent of the trade in tea, coffee, cocoa, cotton, forest products, tobacco, jute, copper, iron ore, and bauxite is controlled in the case of each commodity by the three to six largest transnationals."

Also see United Nations, Transnational Corporations in Food and Beverage Processing, ST/CTC/19 (United Nations publications, Sales No. E.81.II.A.2).

23. Brundtland, supra fn.2, p.68, Box 3-1.

24. Supra fn.13, p.4.

25. It is also true that the right to restrict imports can undermine environmental objectives by protecting unsustainable and environmentally unsound activities and business. The issue is not so much whether a particular trade measure is environmentally sound or unsound, but rather concerns a trade agenda that would restrict the ability of governments to use those measures to accomplish environmental or resource management objectives.

26. GATT Article XI. There is no provision of the GATT rules that would allow the imposition of a tariff to offset pollution control costs. For further discussion of the ambit of GATT exceptions see infra "Amending the GATT to Protect the Environment"; pp.22-23.

27. GATT: Article XVI.

28. Two other options could also compensate industry for comparatively higher pollution control costs: lower wage rates, or a devalued currency. However, both would have major fiscal and social implications and neither could be used with any precision to address the differential costs of environmental regulation. To be effective, compensatory mechanisms would have to be sector specific, and adjusted with respect to specific national regulatory regimes.

28. Kenneth S. Komoroski, "The Failure of Governments to Regulate Industry: A Subsidy under GATT?", Houston Journal of International Law, 10-2, Spring 1988, p. 189. Komoroski makes the argument that a US plaintiff could challenge an exporting government's failure to regulate, as a countervailable subsidy. A review of his article however reveals that such a proposition is entirely novel and unprecedented. In addition, to succeed the plaintiff would first have to establish the existence of an affirmative duty to regulate for the purposes of protecting the environment.

30. B. Castleman, "The Export of Hazardous Factories to Developing Nations", International Journal of Health Services 9(4), 1979, p. 570.

31. I. Walter and J.H. Loudon, Environmental Costs and the Patterns of North-South Trade, prepared for WCED, 1986.

32. State of the World, 1989 supra fn. 5, p. 70 and fn. 47 to Chapter 4.

33. Ted Schrecker, "Resisting Regulation: Environmental Policy and Corporate Power", Alternatives, Volume 13 Number 1, December, 1985. Also see infra "Disinvestment and Job Blackmail".

34. GATT: Studies in International Trade, Industrial Pollution Control and International Trade, (Geneva, July 1971), p.11. It is worth noting that the export of polluting industries to the developing world was not perceived by this GATT study as at all a bad thing:

...it would not seem desirable for any country to adopt measures designed to stem such flows of investment and trade as might result from international differences in pollution control norms.

35. CCPA, Position Paper on Confidentiality, reproduced in Appendix C of Roundtable Discussion on Toxic Chemicals Law and Policy in Canada, Toronto, Canadian Environmental Law Research Foundation, 1981.

36. Schrecker, supra fn. 33 and see infra fn. 42.

37. National Coal Association, Statement on Behalf of the National Coal Association on The Canada-U.S. Free Trade Agreement, before the Energy and Resources Committee, United States Senate, April 21, 1988.

38. James Carnegie, general manager of the Ontario Chamber of Commerce, as quoted in Andrew Nikiforuk, "Free Trading Our Environment", Nature Canada, 15(3) summer, 1986, p. 40.

39. For example, the Conservative Government of Canada has repeatedly described its agenda during its first tenure, as being a three pronged policy of privatization, deregulation and free trade. Each of these initiatives has as its central thrust: removing the prerogatives of government to "interfere" with the activities of business. Similar policies have been proclaimed by the Reagan and Thatcher Governments.

40. As noted, a great proportion of international trade is dominated by a handful of transnational corporations. It is hardly surprising that they would effectively assert their interests. See UNCTAD, *supra* fn. 22.

41. Re Disposable Beer Cans: E.C. Commission v. Denmark; the European Court of Justice, September 20, 1988. Reported in [1989] 1 C.M.L.R.(Common Market Law Reports), p. 619. One of the most interesting aspects of the case concerns the fact that it has been reported as a positive environmental precedent. See for example, "Greening Europe" The Economist October 14, 1989 which describes this case as a "victory" for the environment. The Economist article cites the refusal of the Court to strike down Denmark's deposit requirements as evidence of this victory. It makes no reference however, to the much less happy fate of the more important aspect of the Danish law which required containers to be reused.

42. *Ibid.*, p. 629.

43. Consumer and Corporate Affairs Canada, Communique no. 52, June 4, 1988.

44. Gatt Fly, U.S. Companies Use FTA to Attack Regional & Environmental Aid, (Toronto, September, 1989).

45. For a more detailed discussion of the Canada - U.S. softwood lumber dispute, see Christian Yoder, "Legal Aspects of Trade Distortion", in Alan Saunders, ed., Trading Canada's Natural Resources, (Toronto, Carswell, 1987).

46. See the "Uruguay Round" Mid-Term Agreement, *supra* fn.14 at p.13 C. 20.(1) "develop harmonization and phytosanitary regulations and measures". Also note Chapter 6 (technical standards) and Chapter 7 (agricultural standards) of the Canada-U.S. Free Trade Agreement. It is also worth noting, that the U.S. has characterized the European Economic Community's ban on growth hormones as a "clear non-tariff barrier" in a letter from Clayton Yeutter, Secretary of Agriculture for the United States Government, to the Honourable Ray McSharry, Member, Commission of the European Communities, July, 1989.

47. For example, negotiating teams are presently constituted to address standard harmonization for packaging. The results will have a significant bearing upon the ability of both jurisdictions to implement waste reduction initiatives. Yet no environmental group is represented, neither has any public notice been given of the exercise. Rather, negotiating teams are predominantly comprised of representatives of government and business (personal communication with Larry Dworkin, September 1989, who represents the Packaging Association of Canada on one of the packaging negotiating teams.)

48. The International Trade Advisory Committee (ITAC) which exists to advise the Canadian Government on GATT negotiations, includes no representatives of either environmental or consumer groups (personal communication with John Klassen, Senior Co-ordinator, Office of Multi-lateral Trade Negotiations and International Trade, October, 1989).

49. The word "environment" does not appear in the General Agreement itself. It is however used on one occasion in a collateral agreement on the interpretation of the prohibition against the use of non-export subsidies set out in Article XVI:3 of the General Agreement. In that collateral agreement the parties recognize, subject to several qualifications, the validity of subsidies that may be used to effect

the " redeployment of industry in order to avoid congestion and environmental problems." It should be noted that even this limited qualification would not protect a subsidy that was intended simply to protect the environment, reduce pollution or conserve resources. See Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade; Article 11.

50. In the debate that took place in Canada concerning the environmental implications of the Canada-US Free Trade Agreement, the Conservative Government made repeated reference to Article XX of the GATT. Even were there to have been substance to this assertion, it would have been of little avail under the Free Trade agreement, because the application of Article XX did not extend to those provisions of the Deal that were most problematic environmentally (Chapters 4 and 9).

51. See General Agreement on Tariffs and Trade, Analytical Index, Notes on the drafting, interpretation and application of the Articles of the General Agreement, (Third Edition), p.116.

52. The Paris Economic Summit, supra fn. 3.