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THE ENVIRONMENTAL IMPLICATIONS OF THE NORTH AMERICAN FREE TRADE AGREEMENT

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INTRODUCTION

In the current era of public debate in Canada, we are all made rightly aware of the economic crisis in which we live, and a great deal of attention and public policy debate is paid to that crisis. Political leaders have not yet acknowledged that we live in an era of unprecedented ecological crisis.

At the Canadian Environmental Law Association, we approach most questions, including questions of trade, from that perspective. The global ecological crisis has become clear. Global warming will have an enormous impact on our lifestyles, on agriculture, forests, fisheries, on sea levels, and on coastal regions around the world. Depletion of the ozone layer is already causing increased rates of eye diseases in Chile and skin cancer in Australia. We face catastrophic and increasing levels of poverty in the Third World, and we know this is both a cause and result of environmental problems. Industrialized nations including our own exploit resources at accelerating rates, and international problems of ecosystem pollution, of air, soils, and surface and groundwater, abound.

> Every major indicator shows a deterioration in natural systems; forests are shrinking, deserts are expanding, croplands are losing topsoil, the stratospheric ozone layer continues to thin, greenhouse gases are accumulating, the number of plant and animal species is diminishing, air pollution has reached health threatening levels in hundreds of cities, and damage from acid rain can be seen on every continent. (Lester Brown, in Ecodecision, 1992)

This is the context in which we at CELA examine the relationship between environment and trade, and the international trade agreements that provide the structure for the international

economy.

We consider that the proposed North American Free Trade Agreement repeats the environmental problems of the Canada-US Free Trade Agreement, and worsens some of them.

ENVIRONMENTAL PROBLEMS OF THE CANADA-US FREE TRADE AGREEMENT

Briefly summarized, the FTA:

1. Committed us to perpetual supply of the American market with all of our natural resources, including water,through the "proportionality clause", (Article 409) and explicitly repeated that commitment with regard to energy. (Chapter 9). This requirement applies even in times of shortage and creates enormous barriers to initiatives for conservation of natural resources.

2. The FTA required harmonization of our pesticide standard with the American one (Annex 708.1) in accordance with the American approach of risk benefit analysis, which requires the balancing of the health effects of a pesticide against the economic loss to producers of preventing its registration. This standard is a lower one than the Canadian standard, in the Pesticide Products Control Act, Regulation Section 18(d) which is exclusively based on health considerations.

Fortunately, this harmonization has not in fact occurred in its widest sense. At this time, those involved in designing the program to implement the recommendations of the Pesticide Registration Review will have to consider the harmonization problem. However, the strictly health based standard has been lost.

3. The FTA has been used to strike down a Canadian regulation under the Fisheries Act that required the landing of fish caught off the West coast for biological sampling. (The Salmon and Herring trade panel decision, 1989) It was also used by the Canadian government as part of the successful challenge to the plan of the US Environmental Protection Agency to phase out the use of asbestos in the US. (Corrosion Proof Fittings et al, US Court of Appeals for the Fifth Circuit, 1991)

These cases join the international jurisprudence in which numerous environmental standards have fallen due to challenges based on international trade agreements.

4. The FTA committed us to a dispute resolution process that entrenched the right of the US to continue to use its countervail and antidumping laws, unfettered by any agreement of what constitutes unacceptable subsidies. This has had a direct impact on the Canadian forest industry, in which we are now facing our third countervail action in nine years, initiated by the US. Previous cases focused on the Canadian stumpage system, but the current one is aimed at eliminating Canadian laws that prohibit the export of raw logs. These provisions were explicitly protected in the FTA, but are being challenged nevertheless.

Restrictions on the rights of Canadians to require local processing of resources for the purpose of economic diversification and job creation, stymie efforts to move to the conserver society, with an emphasis on conservation of resources, not accelerated primary extraction. Further, the best-paying jobs in the forest sector are not in the woodlands, cutting raw timber, but in the mills, processing it.

The lack of discipline, in the FTA, on the aggressive American use of its countervail laws, threatens these jobs, and the whole range of public policy options (local processing requirements, subsidies for environmental protection programs, government procurement policies, requirements of re-usable beverage containers for waste reduction, etc.)

5. The trade agreements now constitute an over-arching international legal regime that limits our governments' powers, and has invalidated laws passed according to our democratic processes. Nevertheless, the agreements are negotiated in secret, and trade dispute panel processes are also secret.

Access to information and to accountable government standard-setters are crucial to the environmental movement in achieving further environmental protection. Since trade agreements have the effect of making new laws and striking down current ones, their secret processes undermine campaigns for better environment protection.

ENVIRONMENTAL IMPLICATIONS OF THE NORTH AMERICAN FREE TRADE AGREEMENT

1. The NAFTA continues the requirement of perpetual supply of the American market with all of our resources, including energy, (Article 605) while granting Mexico an exemption from that requirement regarding energy, (Annex 603.6) and other resources (Annex 316). Canadian difficulties with conservation initiatives remain.

2. The NAFTA provides a limited protection for trade-related actions taken pursuant to three international environmental agreements: the Convention on the International Trade in Endangered Species; the Montreal Protocol on Substances that Deplete the Ozone Layer; and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. Also incorporated are the Canadian-American agreement on transboundary hazardous waste and the US-Mexico one regarding the border area.

The protections are limited in that, in applying those agreements, we must use the strategy that least contravenes the NAFTA.

There are many other important initiatives at the international level regarding environmental protection, including those from the Rio conference which the US would not sign. These have been excluded from the NAFTA.

3. The NAFTA includes a very comprehensive program of harmonization of standards, in

sections dealing with Sanitary and Phytosanitary Standards (Chapter 7) and Technical Barriers to Trade (Chapter 9).

a. Sanitary and Phytosanitary Standards (SPS)

This section is subject to the overall federal responsibility to ensure provincial compliance (Article 105) and so marks a new incursion into provincial SPS-related standards. It also extends to non-governmental standard-setting bodies such as the Canadian Standards Council, Canadian Standards Association, etc. (Article 753)

SPS measures are given a broad definition (page 7-49 to 50)
but basically concern plant and animal health standards, including pesticides, and as they apply to humans, food additives.

Although the word "harmonization" is not used, the chapter outlines a comprehensive approach to the harmonization of these standards by a group of international bodies. (Article 755, para 5). Some of these bodies have not previously been engaged in setting standards. Codex Alimentarius is an experienced standard setting body, but its members include large corporate producers.

None of the organizations include consultation with the public and environmental groups in their processes.

While the chapter does allow Parties to set SPS standards higher than those set internationally, (Article 754), those standards must be based on scientific principles as defined in the chapter and on risk assessment.

Parties have the right to determine their "appropriate level of protection" but only in accordance with Article 757 which establishes stringent conditions ie. risk assessment, including consideration of international methodologies of risk assessment and economic factors such as loss of production or sales from presence of a pest or disease.

In setting SPS standards, Parties remain subject to an overall obligation not to create "a disguised restriction to trade between the Parties". (Article 754, para 6)

This is the same standard applied by dispute panels in the past, and ensures that any future SPS standards may be subject to the same treatment in trade dispute panels. Essentially, the power of the panels to determine whether a standard will be upheld, still remains.

In setting new SPS federal standards, our government will need to give notice to the US and Mexico, and consider their comments on it (Article 760). It must also take "appropriate measures" to require provinces to do the same. (Article 760, para 2).

These requirements will require additional government resources, and raise concerns that back-room deals with other governments are going to defeat SPS initiatives here.

Overall, despite the words that reserve our rights to set our own standards, we consider that the obstacles within the agreement are considerable, and that higher, different standards will be in danger from trade challenges.

Furthermore, numerous environmentalists consider that our government doesn't intend to set separate higher standards. The Foreign Policy Framework of External Affairs and International Trade (October 1991), entitled "Managing Interdependence" stated

> Strong environmental standards are compatible with encouraging development of a more competitive Canadian economy. However, we shall have to pay attention to adjustment costs **and move in step with our major trading partners to avoid the risk of being undercut by environmentally irresponsible competitors. We must also be wary of "green protectionism", given our vulnerability in the resource sector. (p.11)**

Plans to move "in step" with trading partners suggests using the same standards they use. With regard to "green protectionism", we would not need to be wary if we dealt with the environmental problems caused by our resource sectors.

b. Technical Barriers to Trade (Chapter Nine)

This chapter pertains to an even broader range of standards related measures (defined at page 9-16) and to environmentally-related issues such as packaging. Specifically, it pertains to measures including those relating to safety,protection of human, animal and plant life and health, the environment, and consumers, and measures to ensure their enforcement or implementation. (Article 904)

Like the SPS subchapter,it contains a comprehensive approach to harmonization of these measures, with some rights for separate standards reserved. Parties may establish levels of protection as they consider appropriate (Article 904, para 2) but must do so in a non-discriminatory manner, and without creating a disguised restriction on trade. (Article 907, para 3).

The protection for national levels of protection does not extend to protection against challenges under the "nullification and impairments of benefits section" (Annex 2004, p.20-19) even if those measures otherwise are consistent with the NAFTA. (The right to establish the level of protection is "Notwithstanding any other provision of this **Chapter", not "this Agreement". Article 904, para 2)**

Nor can such measures have the effect of creating an unnecessary obstacle to trade (Article 904, para 2).

The legitimate objectives for which measures may be adopted include safety, plant and animal health, the environment, and sustainable development. (Definitions, 9-15) Parties are to use international standards but can also use higher levels of protection, as required to meet a legitimate objective. (Article 905)

The chapter contains further requirements for consideration of compatibility and equivalence of standards, risk assessment, conformity assessment, and notification of intended new

measures.

Whether or not this chapter in fact allows Canada to use different and higher standards than those arrived at by the named international bodies will not be clear until trade panels rule on any possible challenges. What is clear is that there is room for challenges, and the rights to establish national standards are significantly qualified.

The standards in question are very important environmentally. Subcommittees will be examining standards concerning packaging, uniform chemical hazard classification, good laboratory practices, assessment of environmental hazards of goods, risk assessment, and testing of chemicals, including industrial and agro chemicals, pharmaceuticals, and biologicals. (Article 913, para. 5)

5. The NAFTA contains the same entrenchment of US trade remedy law (Chapter 19) as the FTA, with ongoing consultations to occur, including for further "disciplines" regarding use of government subsidies.

It does contain provisions not in the FTA regarding trade disputes involving environmental issues. Parties challenged with regard to SPS or other standards-related measures, or in relation to actions related to the named international environmental agreements may require that the NAFTA dispute mechanism be used, in preference to GATT, and the mechanism

provides for scientific panels to advise on environmentally-related matters. (Articles 2005, 2015)

In choosing the experts to sit on those panels, parties and international bodies will be contacted, not environmentalists. It has been the experience of many of us in trying environmental cases that in any discipline, there exists a range of opinions, naturally, among experts. Frequently, the experts who testify on behalf of environmental groups bring a perspective to such proceedings that is very different than those provided by government and industry. We are concerned with the exclusion of such individuals (and the exclusion of the public, including environmental groups) from these secret judicial processes.

6. The negotiations for NAFTA, like those for the FTA,were carried out in secrecy, with minimal consultation with a few environmentalists, and the trade panels will continue to operate in secrecy and publish decisions with no disclosure of minority or majority opinions. (Articles 2012, 2016 and 2017)

7. Investment provision:

Although an attempt was made to prohibit actions that would encourage investment on a "pollution haven" basis, it was unsuccessful, and the NAFTA merely discourages such practices. (Article 1114)

CONCLUSION

The NAFTA falls for short of containing provisions that would allow us to respond to the enormity of the ecological crisis that confronts us in Canada and in the world. By constraining our governmental powers to regulate exports and imports of resources, to use local and regional development strategies, local content requirements, subsidies, and strong, locally based environmental standards, it is an environmentally damaging agreement.

We need to significantly change our economic practices, not entrench them for all time. In signing an agreement with a less developed country, we need to offer technical and economic assistance, not in parallel accords, but in the agreement itself, rather than constraining the Mexican government's powers to act in the interest of the majority of its people.