



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

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Mr. Blair Seaborn
Panel Chair
Nuclear Fuel Waste Management Review Panel
Canadian Environmental Assessment Agency
Fontaine Building, 13th Floor
200 Sacre-Coeur Blvd.
Hull Quebec
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BY FAX

Dear Sir:

RE: The relationship of trade law to nuclear waste disposal: How do GATT, NAFTA, and the Canada-US Free Trade Agreement (FTA) affect Canada's capacity to restrict imports of US nuclear waste?¹

The Canadian Environmental Law Association is a non-profit legal clinic, funded by the Ontario Legal Aid Plan, with a mandate to represent groups and low-income individuals in matters of environmental law; advocate for improvements in law; and provide public legal education. We have analyzed and studied issues of trade and environment since 1988.

We have been informed that during the public hearings your panel is conducting, references have been made to provisions of trade law relating to imports to Canada of US nuclear wastes.

We are writing to provide an overview of the provisions of the three agreements (Canada-US Free Trade Agreement, NAFTA, and GATT/WTO) which apply in this matter. Not having access to technical details of the types or components of waste produced by the US, we are not offering a specific opinion regarding these matters. Rather, we wish to inform you of the general trade provisions which would apply in the determination of whether trade restrictions could be maintained. We would be pleased to provide further information upon request.

¹References are to: The Canada-US Free Trade Agreement, Minister of Supply and Services Canada, 1988; The Canada-US Free Trade Agreement Tariff Schedule; American Free Trade Agreement Final Text, CCH Canada; WTO Final Text of the GATT Uruguay Round Agreement, Rome, 1995.

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ENERGY GOODS

Energy goods related to nuclear energy production which are subject to the FTA and NAFTA are those listed in the tariff schedules, as specified in the energy chapters of both agreements. Specifically, Article 901 of the FTA and Article 602 of NAFTA extend coverage of the agreements to products listed in the tariff schedules as:

- subheading 2612.10;
- subheadings 2844.10 through 2844.50 (only with respect to uranium compounds classified under those subheadings); and
- subheading 2835.10.

The substances described by those subheadings are attached as Annex A.

NATIONAL TREATMENT

Both agreements adopt the principle enunciated in the GATT of national treatment of traded goods² meaning that like goods, once imported, must be treated similarly in the importing country. In effect, if Canada imports nuclear goods from the United States, Canada cannot regulate them differently than Canada regulates Canadian nuclear goods, subject to the possible exceptions discussed below.³

IMPORT RESTRICTIONS

The FTA and NAFTA⁴ incorporate GATT Article XI which prohibits (with some exceptions not relevant here) quantitative restrictions on imports of goods from one Party to another Party, whether those restrictions are imposed by quotas, import licences or other measures. Duties, taxes or other charges are permitted under the article. The same articles of the FTA and NAFTA also exclude minimum import-price requirements, as a mechanism to restrict imports.

The term "restriction" is defined in both agreements⁵ to include:

any limitation, whether made effective through quotas, licenses,

²FTA Article 105; NAFTA Article 301

³See GATT Article XX exceptions below

⁴FTA Article 902; NAFTA Article 603

⁵FTA Article 909; NAFTA Article 609

permits, minimum (NAFTA only: or maximum) price requirements or any other means. (emphasis added)

NAFTA further provides that energy regulatory measures are subject to these disciplines: national treatment, the limits on import and export restrictions, and export taxes.⁶

NAFTA and FTA⁷ also restrict the use of a "National Security" argument for restrictions on energy imports and exports, otherwise permitted under GATT Article XXI, except as necessary for: military supplies, crucial defense contracts, situations of armed conflict, or to

- (c) implement national policies or international agreements relating to the non-proliferation of nuclear weapons or other nuclear explosive devices; or
- (d) respond to direct threats of disruption in the supply of nuclear materials for defense purposes.

Therefore, it appears that establishing a regulatory regime that excludes from Canadian disposal sites US nuclear wastes that include goods specified in the tariff headings above, could provoke a challenge from US producers wanting to export their waste to Canada, if the exclusion is based on the origin of the goods (ie. that they come from the US).

POSSIBLE EXCEPTION

Both NAFTA and GATT incorporate Article XX of the GATT⁸ (attached as Annex B), although its application of export measures is partially limited by both agreements.⁹ NAFTA specifies:

GATT Article XX and its interpretative notes...are incorporated into and made part of this Agreement.¹⁰ The Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.

⁶NAFTA Article 606.

⁷FTA Article 907; NAFTA Article 607

⁸FTA Article 1201; NAFTA Article 2101

⁹FTA Article 904, NAFTA Article 605.

¹⁰Article XX continues in effect, despite the conclusion of the Uruguay Round of GATT, pursuant to Article I, General Agreement on Tariffs and Trade 1994.

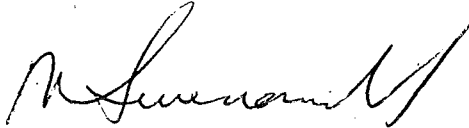
Therefore, it may be possible to devise restrictions or bans of US nuclear waste if there is a rationale that the restrictions are necessary for purposes of environmental protection, within the terms of Article XX. If so, the Canadian government would need to be willing to rely on that argument and exemption, develop a regulatory regime on that basis, and raise the argument, should the US challenge it under the agreements. We offer no comments regarding whether such a rationale actually exists, scientifically.

If not, Canada's capacity to limit imports of US those types of nuclear wastes specified in the Tariff Schedules appears to be limited.

Thank you for your consideration of these comments.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

A handwritten signature in black ink, appearing to read "Michelle Swenarchuk". The signature is fluid and cursive, with a large initial "M" and "S".

Michelle Swenarchuk
Executive Director

Annex A

Tariff Schedule of Canada

Item	Article Description
2612.10.00	Uranium ores and concentrates.
2844.10.00	Natural uranium and its compounds; alloys, dispersions (including cermets), ceramic products and mixtures containing uranium or natural uranium compounds.
3844.20.00	Uranium enriched in U235 and its compounds;...alloys, dispersions (including cermets), ceramic products and mixtures containing uranium enriched in U235...or compounds of these products.
2844.30.00	Uranium depleted in U235 and its compounds;...alloys, dispersions (including cermets), ceramic products and mixtures containing uranium depleted in U235...or compounds of these products.
2844.40.00	Radioactive elements and isotopes and compounds other than those of subheading no. 2844.10, 2844.20 or 2388.30; alloys, dispersions (including cermets), ceramic products and mixtures containing these elements, isotopes or compounds; radioactive residues.
2844.50.00	Spent (irradiated) fuel elements (cartridges) or nuclear reactors.
2845.10.00	Heavy water (deuterium oxide).

Annex B

GENERAL AGREEMENT ON TARIFFS & TRADE

Article XX: General Exceptions

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:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;...
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;....