ONLY DOLLARS MATTER

THE WORLD TRADE ORGANIZATION AND CANADIAN TRADE POLICY

A submission to the Standing Committee on Foreign Affairs and International Trade

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1. Introduction

The Canadian Environmental Law Association (CELA) is a non-profit legal clinic founded in 1970, specializing in environmental law. CELA provides legal representation to environmental groups and low income individuals affected by environmental problems, provides public legal education and leads law reform campaigns. We have analyzed and written about trade law and policy since 1988, regarding the Canada-US Free Trade Agreement, NAFTA, the WTO, and the Multilateral Agreement on Investment.

CELA welcomes this initiative of the Canadian government to consult with Canadians regarding trade policy. In our view, Canada's trade policy is now characterized by a one-dimensional pursuit of economic goals, without integration of the many social, environmental and health policies which are affected by it. We hope that this Committee examination will lead to fundamental reforms in Canadian trade policy.

At this time, Canada is involved in trade initiatives in both the Free Trade Area of the Americas and the World Trade Organization, but we consider that these initiatives are actually similar, with the WTO rules predominating in the FTAA agenda as well. We will therefore focus on the WTO in this review.

2. Secrecy of WTO Processes

One issue for which the trade regime has been consistently criticized throughout this decade is the secrecy of its negotiations and dispute resolution processes. Although there are various initiatives underway to increase transparency at the WTO, the current practice is to maintain confidentiality on ministerial deliberations, negotiations, and dispute panel processes. . NGOs have no access so that to the extent that public protections are challenged in WTO dispute panes, NGOs will have no opportunity to participate, or even to observe the process.

On this question, the Canadian government has played a positive role in promoting greater transparency in the WTO. However, these initiatives do not extend to the negotiation process or to dispute panel resolutions although secrecy in corresponding Canadian institutions (Parliamentary law-making and the courts) is not tolerated. This is particularly unacceptable since the WTO trade rules actually constrain national governments from passing laws to

protect the public. Further, it is clear that DFAIT consults with industry before and during negotiations and dispute settlement processes.

The process of the MAI negotiations demonstrates that public access to negotiations can make a difference in governmental decision-making. It is time for the Canadian government to stop blocking this access to everyone other than business.

Recommendation: that the Canadian government facilitate access to negotiating texts of WTO and FTAA agreements for all interested citizens, including Parliamentarians, not just to industry, and be prepared to consult meaningfully on their contents.

3. Impacts of Trade Agreements on Environmental and Health Standards

A fundamental goal of the current international trade regime (Canada-US Free Trade Agreement, NAFTA, and the WTO/GATT agreements) is to promote deregulated trade in goods, services, and investment through the removal of "barriers" to trade, both tariffs and "non-tariff barriers". Standards and regulations, such as those governing pesticides, food safety and environmental protection are frequently seen as non-tariff barriers to trade, and the trade negotiators consciously established disciplines on countries' scope to establish domestic standards. In both the WTO agreements and NAFTA, standard-setting is limited by the provisions of two chapters: Technical Barriers to Trade and Sanitary and Phytosanitary Standards.

3.1 Technical Barriers to Trade Agreement (TBT)

The chapter provides an entire scheme for the setting of regulations and standards in Articles 2 to 9. It requires that they not have the effect of creating unnecessary obstacles to international trade, although they should be permitted to meet legitimate objectives including "protection of human health or safety, animal or plant life or health, or the environment." With an emphasis on international harmonization of measures, the chapter requires that they should be based on science; and comply with international standards where such exist. Further, domestic standardizing bodies, both governmental and non-governmental, are to comply with the TBT and Code of Good Practice. (Article 4)

The Code of Good Practice for the Preparation, Adoption and Application of Standards[1] which is "open to acceptance" (Paragraph B) by standardizing bodies within WTO member countries. Those which apply it are to inform the International Standardization Association

[1] Agreement on Technical Barriers to Trade, Annex 3

(Para. C) In developing standards, these bodies shall treat imports as favourably as domestic products; shall not prepare, adopt, or apply standards to create unnecessary obstacles to trade; shall use international standards where they exist; and participate in international standard-setting bodies.

The TBT implicitly recognizes the ISO, the International Organization for Standardization, as an international standard-setter. It is an international organization of national standardization bodies which has established standards for many goods, facilitating commerce through certifying goods. Its standards are voluntary, and participating countries obtain certification that their products comply with the standards established. The ISO does not monitor or accredit certification bodies.

3.2 Sanitary and Phytosanitary Standards Agreement (SPS)

This agreement establishes a comprehensive set of rules to govern countries' domestic setting of SPS measures, which concern plant and animal health, including food safety and pesticide regulations. The chapter also names international bodies, including the Codex Alimentarius, a Rome-based UN agency, as the international standard-setters.

3.3 Agreement on Intellectual Property Rights

This chapter of the WTO Agreements is an exception to the general liberalization tenets of the trade regime, since it requires that a US-style intellectual property law be implemented globally, and includes strict enforcement mechanisms to ensure compliance.

Environmental and health concerns are focussed on the patent requirements in the Agreement[2] and their relation to the role of biotechnological products globally. The US is a world leader in allowing patents on living animals and plants, without even the slight possibility of ethical review of these decisions now possible under European patent law. Canada has not entirely followed the US model on this issue, since patents are available in Canada for single celled life forms, but not for multicellular higher life forms. The test case is now proceeding through the courts, namely, a patent application from Harvard University, for its genetically modified mouse, bred with an increased disposition to develop cancer for research purposes.[3]

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[2] WTO Agreement on Intellectual Property Rights, Section 5, Patents, Articles 27 to 34.

[3] President and Fellows of Harvard College v. The Commissioner of Patents, Federal Court of Appeal, Court File No. 334-98 (T-275-96) The Canadian Environmental Law Association is an intervenor in the case.

The expansion of US-style patenting through the WTO Agreement, together with the aggressive marketing of genetically-modified crops by Northern corporations, particularly in the South, has spawned a global controversy regarding the accompanying environmental, social, agricultural, and economic impacts. The current TRIPs Agreement permits countries to exempt animals and plants from patentability, but requires that they provide another form of patents or another property protection system for plant varieties.

The .US has signaled that it desires to remove the current exemption during the review of this chapter which will commence this year, while other countries and many NGOs oppose the inclusion of intellectual property rights in the agreement overall.

The Canadian government promotes and subsidizes the biotechnology industry in Canada. It is essential that in developing its position for the TRIPs review, the government consult meaningfully with the full range of individuals and groups which have concerns regarding this issue.

4 The WTO Treatment of Environmental Protection Measures

It is instructive to consider the WTO's treatment to date of two areas of public interest standards, those pertaining to environmental protection and health., since an "environmental and health clause" has existed in the GATT since l948 and could have been the basis of reconciling environmental, health, and sovereignty concerns.

4.3.1 WTO jurisprudence on Article XX: General Exception

Article XX provides a general exemption from the other disciplines of the WTO-GATT regime, including national treatment and most favoured nation principles. It "permits" countries to maintain standards deemed necessary for protection of "human, animal or plant life or health" and for "conservation of exhaustible resources" This article was included in the Canada-US Free Trade Agreement and NAFTA, and jurisprudence under the three agreements is relevant.

With the implementation of the expanded trade law regime following the establishment of the WTO, an increased number of trade disputes have arisen in which environmental or health standards have been in issue.[4] In every case, the domestic standard that was at issue

[4] In the Matter of Canada's Landing Requirement for Pacific Cost Salmon and Herring, 1989; US Restrictions on Imports of Tuna, GATT doc. DS21/R; Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, GATT Doc. 375/200; US Standards for Reformulated and Conventional Gasoline WT/DS2/AB/R 1996 and WT/DS2/R/1996; EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada,WTO WT/DS48/R/Can. And WT/DS48/AB/R/1998, US Import Prohibition of Certain Shrimp and Shrimp Products

has been found incompatible with GATT or the FTA leading to a requirement that it be rescinded.

It is important to understand that the GATT/WTO could have accommodated environmental and health concerns from the beginning, given the wording of Article XX. However, every case has gone against national standards, leading to the systematic elimination of governmental options previously thought to be available under the article.

Environmentalists are concerned about the problems inherent in the WTO requirement for risk assessment, the power of corporate lobbyists over government regulators, and the limitations of so-called science-based standard-setting. They also emphasize the loss of potential influence for local public interest groups seeking to improve local and national standards, given the dominance of trade law in domestic discussions, and the removal of standard-setting to remote, international standard-setting bodies including the International Standardization Organization and the Codex Alimentarius Commission, promoted by the GATT. They also note the undermining of environmental and health standards by an increased willingness to rely on corporate "voluntary initiatives" for environmental protection, a trend also discernable internationally, in promotion of "Codes of Conduct" for corporations, and the movement of the ISO into public policy areas where it has not previously worked, and for which it is ill equipped.

The need to align domestic standards with international ones raises many problems including that to be effective, environmental measures need to be ecosystem-specific, with protections designed to comply with unique ecological characteristics. A significant problem of reliance on international standards is that international standards will either be inappropriate to many specific ecosystems, including Canada's, or will be drafted in such general terms that they are not applicable in a meaningful, rigorous way on the ground. This is particularly true if they are drafted with trade considerations foremost.

In summary, the WTO dispute record on its environment and health clause and standards-setting chapters if negative, as regards protection of the environment and human health.

5. The Canadian Record on Trade and Environment at the WTO

An examination of the Canadian government position on issues related to environment and trade at the WTO reveals a single-minded commitment to furthering trade and an absence of action to protect the environment and human health.

5.1 WTO Committee on Trade and Environment

This is evident in reviewing proceedings of the WTO Committee on Trade and Environment, where Canada's contribution has consisted largely of attempts to extend the reach of the TBT chapter to all eco-labelling schemes, including those developed by "non-traditional bodies." This would presumably include private environmental initiatives such as the Forest Stewardship Council, organic growers and cooperative organizations both here and in developing countries.[5]

Canada has not made a positive contribution to resolving the large agenda of issues given to the Committee on Trade and Environment in 1994, on which virtually no progress has been made in five years of meetings.[6] Its contributions there have also largely dealt with attempting to discipline eco-labelling schemes.

5.2 WTO Review of Technical Barriers to Trade

Canada also participated in the recent first Triennial review of the Technical Barriers to Trade Agreement[7] Canadian goals for the TBT review, are instructive. They include pursuing strategies for further harmonization of measures, disciplining of standards-setters and coverage of management standards (like the ISO 14000 series) by the Code of Good Practice.

The TBT committee emphasized that "in the preparation of international standards, it was important...that trade needs were taken into account along with technical progress" as well as
the particular interests of Developing Country members regarding some products (Para 20) and reiterated the basic WTO requirements regarding technical measures: that they only be enacted if necessary; be limited to their specific requirements, accord with the TBT, and be aligned with international standards. (Para 23)

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[5]WTO Communication from Canada: "Elements of a Possible Understanding to the TBT Agreement," WT/CTE/W/21/G/TBT/W/21 February 21, 1996.

[6] These issues include: the relationship of WTO rules and multilateral environmental agreements; trade in domestically prohibited goods; impacts of the Trade in Intellectual Property Agreement; market access issues related to environmental measures; environmental taxes, eco-labelling schemes; and others.

[7]See WTO Committee on Technical Barriers to Trade: first Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade DRAFT, 14 November 1997 and David Shortall Summary of Triennial Review, (undated) provided to the author by David Shortall, Department of Foreign Affairs and International Trade.

These requirements constitute a veritable strait jacket for the establishment of strong protective standards.

5.3 Canadian Use of WTO Dispute Settlement Provisions

Canada, together with the US, used the SPS Agreement to successfully challenge European standards which ban hormone residues from beef[8] though the bans had been put in place over a ten year period due to European consumer demands. At this time, Canada is proceeding to WTO dispute settlement in an attempt to force France to accept Canadian exports of asbestos, a highly toxic substance. These cases demonstrate the disregard of Canada for the legitimate concerns of citizens in other countries, reflected in laws enacted for their protection.

6. Canadian Government Position on the Biosafety Protocol[9]

Canada has also used the WTO rules to aid in preventing the negotiation of an international treaty with important environmental implications. The Biosafety Protocol was mandated by the Convention on Biological Diversity, signed at Rio de Janeiro in 1992, to establish rules for the international trade of genetically modified living organisms (LMOs. It represented an opportunity to establish a precautionary approach to these products, given their possible dangers to biodiversity in receiving environments. It was explicitly both a trade and environmental treaty.

Safety concerns relate to the capacity of these reproducing organisms to disperse in the receiving environment, interbreed with local plants, transfer genes to other organisms, and interfere with naturally occurring ecosystems. Further concerns, especially in Southern countries, arise from the potential of these products, marketed aggressively by large Northern corporations such as Monsanto and Novartis, to replace current agricultural practices, with widespread negative social, economic, and environmental impacts.

The proposals for a Protocol focussed on an procedure of "Advanced Informed Agreement" which would have required exporters of genetically-modified living organisms (seeds, pharmaceuticals, viruses) to notify potential importing countries and obtain their consent before exporting. (With regard to new products, this is largely now the case, for Canadian companies such as major grain exporters.)

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[8] EC Measures Concerning Meat and Meat Products (Hormones) Complaint by Canada, WTO WT/DS48/R/Can and WT/DS48/AB/R/1998.

[9] The author was a member of the Advisory Committee on the Biosafety Protocol, to the Canadian government, and a member of the Canadian Delegation to two sessions of Biosafety negotiations.

The Canadian position during the negotiations, in common with 5 other exporter nations, was to oppose the proposals of 164 other nations, and insist on the primacy of WTO rules denying important and environmentally justifiable concerns from the South and the EU.This stance was the direct cause of the failure of the protocol negotiations in February 1999 in Cartagena.

Canada insisted on the exclusion of "commodities" from the approval requirements of the Protocol, thereby seeking to remove the largest amount of genetically-modified products now traded from this Protocol. The US could not sign the Protocol, since it did not ratify the governing Convention on Biological Diversity; however, as the world's largest producer and exporter of these products, it negotiated aggressively to limit the Protocol. Canada is now widely seen as having acted as the agent of the US in this process of subverting an environmental agreement that is widely supported internationally.

Canadian officials insisted that the WTO SPS rules should apply to trade in these products, without modification by a treaty which could have been enacted as an international standard to mesh with WTO rules in a positive way. Since the SPS was not enacted to protect biodiversity, and will not provide protection, this was an inappropriate argument.

Much remains to be said about the Canadian actions in this process, but they do provide a clear indication of how Canadian trade policy favours economic interests over the environment. Not only is the Canadian government using the WTO rules to remove other countries' domestic health and environmental standards (beef hormone residues, asbestos measures) but it also uses it to prevent a strong international environmental agreement which is supported by 164 countries.

7. Conclusion

With regard to Canadian trade policy, a full review of policy formation and implementation is long overdue, and the work of this Committee is welcome.

CELA recommends that you advise the government to conduct open, ongoing and comprehensive consultations with Canadians on all elements of trade policy as a permanent facet of policy development.

Further, the Biosafety Protocol negotiations demonstrated that the "economic" ministries, including DFAIT, Agriculture Canada and the Canadian Food Inspection Agency, and Industry Canada dominate trade policy, while other departments, such as Environment Canada, are under-represented or absent. Since trade rules now

play an essential part in all government policy formation, it is essential that other departments obtain the resources and expertise necessary to promote values other than product exports, including strong national health and environmental standards, and strong international law for public policy goals.

As outlined in our accompanying brief on liberalized investment, we consider that the investment chapter of NAFTA has had serious negative effects on Canada's regulatory powers, and like the MAI, is fundamentally flawed. Yet the Canadian government is not having much success in trying to curtail its impacts through negotiations with the US and Mexico; this demonstrates the difficulty of amending a flawed international agreement Further, other governments have recognized the deficiencies of a NAFTA-MAI type investment agreement. Therefore, Canada should not support negotiations of investment liberalization at the WTO.

With regard to the proposed "Millennium Round" of WTO trade negotiations, we endorse the attached **Statement from Members of International Civil Society Opposing a Millennium round or a New round of Comprehensive Trade Negotiations.** The statement calls for a moratorium on any further trade negotiations which would expand the WTO powers, and a full assessment, with public participation, of the impacts of the Uruguay Round agreements on marginalised communities, development, democracy, environment, health, human rights, labour rights and the rights of women and children. The assessment should be followed by appropriate amendments to the agreement.