

Selling Canada's Environment Short:

The Environmental Case Against The Trade Deal



An analysis endorsed
by environmental groups
from across Canada.

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This "DEAL" Is About The Environment

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This analysis of the environmental implications of the Canada-U.S. trade deal represents the views of environmental groups from every region of Canada. The environmental movement has always included a great variety of perspectives and constituencies and counts among its adherents members of all political parties—a fact we note to discount any suggestion that the concerns we express are motivated by partisan or regional biases.

The following analysis of the trade agreement reveals that it has profound and disastrous implications for the Canadian environment, and may fundamentally undermine the principles of environmental protection and sustainable resource management.

Not surprisingly, the Conservative government is doing what it can to conceal the deal's environmental significance and has dismissed questions about its environmental impacts by stating:

"The free trade agreement is a commercial accord between the world's two largest trading partners. It is not an environmental agreement. The environment was not, therefore, a subject for negotiations nor are environmental matters included in the text of the agreement."

John Crosbie and his colleagues make similar claims when they say that water exports are not in the trade pact and that its impacts upon the Canadian energy sector will be "modest".

As our analysis indicates, the enormity of the trade deal's environmental implications is truly breathtaking. Indeed there are very few environmental issues that are likely to be untouched by the agreement. Its effects promise to be varied, wide-ranging and adverse.

You will find in the analyses that follow, several common themes that underscore the trade deal's environmental significance:

1. Under the deal, Canada abdicates forever its right to use important regulatory tools to manage Canadian resources in a sustainable manner and in the Canadian public interest. Our ability to implement resource allocation and pricing policies is forever constrained by

the agreement. Because the deal guarantees the U.S. perpetual access to a proportionate share of Canadian resources, once we turn on the tap, we have agreed never to turn it off again.

2. Canadian subsidies and incentives intended to promote environmental and resource management objectives, such as acid pollution abatement or reforestation, are presently vulnerable to attack by U.S. business interests as non-tariff barriers to trade. Under the agreement U.S. trade remedy law is left entirely intact—in fact the U.S. may add to it.
3. New economic pressures will be created to reduce costs by lowering environmental requirements. In fact, the deal has already prompted calls by U.S. and Canadian businessmen to lower environmental standards on both sides of the border and Canada has already agreed to concessions with respect to Canadian standards that are currently tougher than in the U.S.

Under international law, the provisions of the trade deal will take precedence over Canada's domestic legislation. If, for example, an aspect of Canadian environmental law was found to be at odds with the provisions of the deal, Canada would have to amend our law or face retaliation.

The Canada-U.S. trade deal *is* about the environment because it is about our ability:

- to develop environmental and economic policies that promote sustainable resource management;
- to allocate Canadian natural resources—energy, water, agricultural, forestry and mineral resources—as we, from time to time, determine to be in the public interest;
- to establish environmental standards, regulations, subsidies and incentives that reflect our own values and priorities, or the uniqueness of Canadian ecosystems.

In fact, the potential impacts of the trade deal are so far reaching that it should essentially be regarded as an environmental statute.

The government has described the trade agreement as part of an overall economic policy for Canada, the other two elements of which are privatization and de-regulation. This agreement is **not** about giving over Canada's right to control the environment to some international regulatory institution, like the IJC, nor is it even about giving up Canadian authority to the U.S. EPA—rather the agreement represents an unprecedented surrender of regulatory control—on both sides of the border.

This deal is about the environment in a way that no other economic, constitutional or legislative event in Canada's history has ever been. If you care about the environment, we implore you to make every effort to stop this deal. Its adverse impacts will overwhelm the progress that we are all working for.

Resource Conservation: The Principle Of Sustainability

In 1987, the report of the World Commission on Environment and Development, commonly known as the Brundtland Commission, was welcomed by environmentalists around the world as an unprecedented endorsement of the principles of environmental protection and sustainable resource management.

The Brundtland report's principal recommendations have now been echoed by our own National Task Force on Environment and Economy. As noted by the Task Force, the concept of sustainable development embraces two principles:

1. That governments act as trustees of the resources we will pass on to future generations. Governments must therefore exercise comprehensive and far-sighted leadership in supporting and promoting sustainable economic development.
2. In accepting this responsibility governments will have to change the way they approach the environment and the economy. They must integrate environmental input into decision-making at the highest level.

As Canada's Minister of the Environment, Tom McMillan, proclaimed in a speech to the United Nations General Assembly, the report of the Task Force has now been unanimously endorsed by the federal government, all ten provinces and both territories. Canada's posture internationally could not be more unequivocal in its support for the principles promoted by the Brundtland Commission Report.

There could be no greater indictment of this government's true "commitment" to the principles that it so publicly embraces than its complete and resounding failure to give them any effect during the negotiations of the trade accord. By its own admission, it gave no consideration to, nor did it discuss, the environmental consequences of the deal during negotiations.

Yet in the most fundamental way, the trade deal will foreclose Canadian options for implementing the principles of integrated economic and environ-

mental planning in aid of sustainable resource management.

- Where the Brundtland Commission calls for conservation strategies, the trade deal will, the government has told us, encourage resource exploitation while reducing regulatory controls. The legacy for our children is likely to be an environment impoverished of the energy, forestry, agricultural and water resources we have always taken for granted.
- Where Brundtland has called for a 40% reduction of North America's enormous energy appetite by the year 2000, the government has stated that our "biggest [energy] problem is not shortage but abundance" and has touted as among the deal's benefits, a new round of energy mega-projects.
- Where Brundtland has advocated the overarching need to integrate environmental and economic planning, the government has refused to do so during the trade negotiation process itself and is now steadfast in its resolve to deny the overwhelmingly apparent environmental consequences of its work.
- Where Brundtland has invited governments to recognize an obligation to develop policy initiatives that will advance equitable environmental and conservation strategies, the trade agreement offers the U.S. and market forces pre-emptive rights which will determine the allocation of Canadian resources, for as long as they last.
- Where Brundtland calls upon the developed nations to break with past patterns that have radically altered our planet in a way that threatens its ecological viability and the lives of many species, including man, the trade deal intends to entrench as Canada's "economic constitution" the very approaches to development and the environment that are identified as being responsible for our present predicament.

Between the government's public posture in support of the Brundtland Commission and the recommendations of its own National Task Force on Environment and Economy on the one hand and its private negotiations with the United States on the other, there is the most profound disparity.

ACID RAIN

The most likely effects of the Canada-U.S. trade agreement will undermine Canadian efforts to control acid rain and, if anything, actually worsen current acid deposition problems.

First, as most Canadians know, U.S. law requires far less by way of acid gas pollution control than do Canadian abatement programs and the U.S. has vigorously resisted efforts to reduce emissions from U.S. facilities.

Chapter 6 of the agreement encourages the harmonization of U.S. and Canadian federal standards. In spite of the high priority given to SO₂ pollution control, Prime Minister Mulroney has failed to persuade the U.S. to adopt Canadian abatement objectives. Now the agreement may actually undermine our own progress as new pressures will exist to move Canada toward a lower U.S. denominator.

Second, diminished provincial and federal authority to regulate energy exports will create pressure to increase coal-fired electrical power generation to meet increasing export commitments. Article 904 of the agreement guarantees the U.S. access to Canadian energy resources in perpetuity and notwithstanding domestic shortages. As domestic demand grows, provinces may have to actually increase electrical energy production to meet export quotas "guaranteed" by the deal even where no contractual obligation exists to supply the U.S. market. This result, in Ontario, would require Ontario Hydro either to increase coal generation, and consequently sulphur dioxide emissions, or build additional nuclear generation capacity.

Third, Canadian subsidies for acid pollution control are now vulnerable to challenge under U.S. trade protection law as unfair trading practices. Thus, exports by Algoma Steel, Inco or Noranda are vulnerable to retaliatory action (anti-dump or countervailing-duty measures), if those companies are receiving subsidies to assist with acid pollution abatement. Chapter 19 of the trade agreement leaves these trade remedies intact and expressly allows each party the right to add to them.

In fact the trade agreement has given new impetus to such challenges, recently by the U.S. smelting industry that has complained that Canadian

producers have an unfair advantage because of subsidies for pollution control. Their answer has not been to seek out similar subsidies, but rather to refer to U.S. trade law.

Fourth, the Canada-U.S. trade deal will limit the options available for achieving yet further reductions in acid gas emissions. Currently, Canada is the U.S. coal industry's single largest foreign customer. U.S. coal is, however, significantly higher in sulphur content than our own supplies from Western Canada. Should regulation or subsidies encourage the use of low sulphur coal to reduce acid gas pollution, either or both could be challenged as unfair or discriminatory barriers to U.S. soft coal imports. Recent federal announcements about subsidizing transportation costs to help Ontario Hydro afford Western coal may put this issue to the test in the near future. The importation of GATT rules by Articles 902 and 1801 of the agreement will facilitate such a challenge if it is forthcoming. Again the effect may be to inhibit our ability to achieve acid rain reductions with a made-in-Canada policy.

Finally, the U.S. coal industry is already arguing that provincial power utilities enjoy an unfair advantage over U.S. utilities because they are crown corporations and pay no corporate tax. The coal industry's answer is to call for a weakening of U.S. environmental regulation to balance the scale. The National Coal Association has used just this argument in its submissions to the Senate Committee on Energy and Natural Resources on the Canada-U.S. trade pact. It has asked that appropriate agencies (which would include the Environmental Protection Agency) be *directed* to address these regulatory "disincentives". The implications for Canada's acid rain problem couldn't be clearer.

Acid pollution abatement is an urgent priority. There is nothing in the Canada-U.S. trade agreement that offers any hope that progress will be speeded and much to suggest that the effects of the agreement may actually undermine our acid rain control objectives.

WATER

"The Prairie drought puts a lie to the myth that Canada is a water-rich country. With 7% of the world's land mass, we have 9% of its fresh water. So, we have just about our fair share. Even that balance is misleading because most of our water flows northward, far from our major population centres. And where our population is located, in a narrow ribbon along the U.S. boarder, our water supplies are becoming increasingly polluted."

Tom McMillan, June 1988.

Present Canadian Policy will not stop water exports to the United States.

John Crosbie has stated that "nothing in the agreement obligates Canada to sell water to the U.S.". His assertion is certainly misleading and probably incorrect. To begin with, certain Canadian politicians and businessmen have needed no encouragement to pursue the profits that may be made from the sale of this vital Canadian resource. A scheme endorsed by Premier Bourassa and publicly supported by Simon Reisman, would direct massive quantities of Canadian water from James Bay to the parched U.S. southwest. In fact, a Vancouver company has already obtained a licence to export fresh water by supertanker to Southern California.

Indeed under scenarios that are likely to arise, Canada might well be *obligated* to export water whatever its policy on the matter. For example, there are numerous water diversion projects presently in place in Canada. Some exist to serve Canadian agricultural needs. Should Canada refuse a U.S. offer to purchase water for the same purpose, and on the same terms that it is made available in Canada, it is not unlikely that its actions would be regarded as discriminatory under the agreement.

After all, Article 2011 entitles the U.S. to dispute any measure that impairs a **benefit that it reasonably expected to derive, even indirectly, from the deal — even where there is no conflict with its provisions.** The argument that such a benefit was "reasonably expected" would go this way:

- Article 409 of the agreement explicitly proscribes the introduction of any export restriction with respect to any good unless

justified under GATT trading rules. Even Mr Crosbie concedes that water is a good under GATT rules.

- Every other Canadian natural resource is subject to the provisions of the trade deal and there is no exclusion for water. Where the agreement intends to exclude a matter or good, it does so explicitly as in the case of logs.
- Water is explicitly included as a tariff item in the schedules annexed to the agreement (see item 22.01 of the Canadian Tariff Schedule).
- While Canada might from time to time have a policy against large scale inter-basin transfers of water, the agreement would override such a policy.

Should an arbitrator find in favour of this argument, the Federal Government would then be obligated under Article 103 to "insure that all necessary measures are taken in order to give effect" to that finding, notwithstanding any Federal or Provincial policy to the contrary.

Amendment to Bill C-130 will also fail to safeguard Canadian water.

The government has responded to public concern about water exports by putting forward an amendment to Bill C-130, which implements the trade deal. It is clear however, that under international law, such unilateral action will not alter the provisions of a bilateral agreement — in this case the Canada-U.S. trade deal. The only way to make certain that water will not be subject to the deal is to amend the agreement itself — action this government is steadfastly refusing to take.

Once the tap is turned on it can never be shut off again.

Under Article 409 of the agreement Canada may impose quantitative restrictions on the export of water where sanctioned by GATT rules. Even then however, **exports may be restricted only to the same extent that water supplies are rationed in Canada.** As with other resources, once exports begin, the U.S. is guaranteed proportionate access in perpetuity.

While GATT rules allow export restrictions for the purposes of conservation (if domestic consumption is also rationed) **the rules do not sanction export limits for the purposes of protecting the environment.**

John Crosbie states that water is not in the trade agreement. Every independent analysis that we are aware of, disagrees. If Simon Reisman is correct, however, we may not have to wait long to find out who is right:

"The fact is that countries look after their national interests to the extent that they are capable of doing so and when the devil drives, watch out. Sooner or later the U.S. is going to go after our water."

(In a statement made shortly before being appointed Canada's trade negotiator.)

ENERGY

Canada is the most energy intensive industrial country in the world. Our climate, size and population density make adequate supplies of energy critical to our survival and the viability of Canadian industry.

The Canada-U.S. trade agreement is about many things, but it is primarily about unconstrained U.S. access to Canadian natural resources. Of those resources, energy is by far the most strategic. It is clear that the trade deal, if implemented, will effect an unprecedented surrender of essential Canadian energy resources and will represent an abject abandonment of the government's responsibility to manage these resources in the public interest.

In the words of the office of the United States trade representative, the Canada-U.S. trade agreement assures an essential priority of U.S. economic and trade policy, "secure supplies of energy at stable and reasonable prices..." by proscribing future "government interference" in energy trade. The U.S. of course is referring to Article 904 which obligates Canada (the world's most intensive energy economy) to supply the United States (the world's largest energy consumer) with proportionate access to our energy resources as long as they last; whatever any future Canadian government may feel about the matter, and no matter how serious the impact of shortages in Canada.

Environment Canada has described the perception that we have abundant and secure supplies of non-renewable energy resources, as an "illusion". It is obviously an illusion that has the Conservative Government mesmerized as it describes Canada's biggest energy problem as being that of abundance. Non-renewable energy resources are, of course, finite. Conventional oil reserves have dropped by more than 60% since 1969 and the National Energy Board has predicted that proportional sharing with the U.S. could lead to significant natural gas shortages within the decade.

By any objective appraisal the effects of the trade agreement on Canadian energy security will be disastrous, yet the government persists in describing the deal's impact on the energy sector as "modest" — a claim that is no more credible than its repeated protest that the agreement is not about the environment.

Of course, Canadian energy production is responsible for several of Canada's most significant environmental problems. Coal-fired electrical generation is a major source of acid rain. Nuclear power, uranium mining or high level radioactive waste disposal problems are among our most controversial environmental issues. Hydraulic generation mega-projects have devastating impacts upon local eco-systems and native populations. Oil and gas exploration has diverse and often serious environmental impact from the Alberta foothills to Hibernia and the Beaufort Sea.

Because of the singular importance of the agreement's energy provisions, we have examined its implications for natural gas and electricity exports, nuclear power generation, and for energy conservation and efficiency. The following provisions of Chapter 9 of the agreement affect all energy sectors.

Article 904 may actually obligate a province to increase production to meet export "commitments" it has no contractual obligation to satisfy. For example, several long-term hydro contracts will expire over the next several years. By that time domestic demand may have grown to the point that surpluses no longer remain. But Article 904 guarantees continuing U.S. access to a proportion of Canadian reserves that it had been purchasing during a preceding three-year period — contract or no contract. Thus, unless local users can outbid U.S. purchasers, increased domestic demand will actually have to be met with new production while U.S. needs are satisfied with existing supplies.

Article 906 specifically preserves Canadian subsidies for oil and gas exploration. Because of the investment and national treatment provisions of Chapter 16, a future Canadian incentive program could be challenged if it discriminates in favour of Canadian companies. Canadians therefore will be in the position of subsidizing major multi-national energy corporations to develop Canadian energy resources for U.S. markets and will be prohibited from taxing back the subsidy at the border.

ELECTRICITY EXPORTS

Electricity exports have been important to Canada for many years, and in 1986 six Canadian provinces exported electricity to the United States producing \$1.08 billion in export revenue. To ensure that electricity sales are in keeping with the public interest and to guard against excessive export commitments, a number of safeguards have over the years, been built into the Canadian regulatory process. The Canada-U.S. trade agreement either specifically dismantles or undermines these safeguards in a way that obliges Canada, in certain circumstances, to serve American needs in preference to its own.

Reluctant Provincial Utilities may be compelled to export energy.

85% of Canadian electricity is generated by provincially owned utilities which must obtain provincial approval for prospective export commitments. It is likely that the U.S. will argue that no distinction be made between the actions of a provincial crown corporation and that of its only "shareholder" the provincial government.

Should a provincial utility decline a U.S. offer to purchase power, or should a provincial government refuse its consent for an export contract, the U.S. may well take the position that such action is discriminatory under Article 905 or 2011 of the agreement. If an arbitration panel finds that the utility's reluctance to supply American markets is discriminatory because, for example, it is providing energy to another province, then under Article 103 Canada would be obligated to take "all necessary measures" to compel an unwilling provincial utility to supply the U.S. market.

Canada will be obliged to maintain electricity exports notwithstanding domestic shortages.

In addition to the approval required of provincial governments, a licence must also be obtained from the NEB for electricity exports. Before granting such a licence, the NEB must find that the proposed energy export is surplus to "reasonably foreseeable Canadian needs." The justification for this provision couldn't be more clear: Canadian consumers and industry should have the benefit of inexpensive electricity before it is offered for sale in the United States.

Article 904(a) and Bill C-130 abolishes this central tenet of this long-standing Canadian energy policy and compels the NEB to issue an export licence even in the face of Canadian shortages. Under the

agreement, export restrictions may now be introduced only by order or declaration of the federal cabinet and then only if the restriction does not reduce the proportion of the electricity exported to the United States relative to the total supply in Canada for the most recent 36-month period.

The NEB must issue an export licence even for electricity that is wanted and needed in Canada.

The NEB's "first offer requirement" prevents the export of electricity from one province when a market for that electricity exists in another. It has recently been applied to deny both New Brunswick and Hydro Quebec export licenses. Under the trade deal, the first offer requirement would almost certainly be challenged as discriminatory under Article 904 or 905. If successful, a U.S. purchaser could acquire Canadian energy from a provincial utility at a cheaper price than that electricity could be generated in a neighboring province.

Put another way, the guaranteed access accorded the U.S. to a particular provinces energy resources, is not accorded to other provinces. The result is that under Article 904 a province may be compelled to meet export commitments in preference to domestic requirements of a neighboring province.

In its breadth and scope, the energy concessions of the trade agreement are breathtaking. The Conservative Government has claimed that "the immediate impact of the agreement on the energy sector will ... be modest ..." and that it will affect electricity least — a claim that could not be further from the truth.

NUCLEAR ENERGY

There are several reasons to expect that the Canada-U.S. trade agreement will increase the likelihood that additional nuclear generation stations will be built in Canada — facilities that may be needed for no other reason than to satisfy U.S. export quotas as local demand grows.

First, there remains a substantial infra-structure of Canada's energy industry committed to the establishment of additional nuclear generation stations. No factor has been a greater impediment to the ambitions of the Canadian nuclear establishment than uncertainty about future demand; uncertainties that have made governments queasy about underwriting the enormous capital costs associated with

new facilities. Now, Canada's obligations under the agreement to supply U.S. markets, whatever its own domestic needs, will add an important impetus for future nuclear development.

In addition, Annex 905.2 of the agreement eliminates the "least cost alternative" test of the National Energy Board Act Regulations, which limited the discount at which exported electricity could be sold. With this safeguard removed, Canadian utilities will be free to make prospective U.S. purchasers a deal they simply cannot refuse. As we have noted however, once an export contract has been negotiated, Article 904 appears to entitle the U.S. to that proportion of Canadian supplies, **even after the contract expires**, for as long as the U.S. is willing to pay.

Finally, within the context of the continental energy package represented by the deal, the nuclear industry may find Canada a more "hospitable" environment for new nuclear projects. In the U.S. soaring insurance costs have undermined the viability of nuclear power. In Canada liability is limited to a modest \$75 million dollars under the *Nuclear Liability Act*. More importantly, U.S. facilities must be sound business ventures capable of paying a return to investors — nuclear power generation stations are not. In Canada the debt of public utilities is underwritten by government, and crown corporations do not pay a return on equity.

Taken together, the effects of the deal should help the nuclear industry negotiate some of the hurdles that have threatened its ability to proceed with additional nuclear projects. It is overwhelmingly likely that if additional nuclear stations are built, they will supply U.S. markets to a greater extent than ever before.

The U.S. would thus acquire secure access to Canadian electricity at a price that may be cheaper than any alternative available to them. **For its part Canada will get the environmental impacts of nuclear power — and the risks.**

NATURAL GAS

Natural gas is one of Canada's most abundant and important energy resources. While conservation has to be the first priority of a sustainable energy resource policy, natural gas offers several environmental benefits when compared with other fossil fuels.

As with other energy and natural resources the Canada-U.S. trade agreement gives away forever Canadian rights to control the rate and price at which this resource leaves our country — guaranteeing the U.S. proportionate and perpetual access. Not surprisingly many Americans are ecstatic about the arrangement. The Natural Gas Association of America described the deal this way:

"If the Canadian government ratifies the Agreement, it will be making an important commitment to the free movement of natural gas by assuring us that Canada will erect no artificial barriers to future incremental demands the United States may have for its gas. This commitment is binding even if Canadian supplies should tighten. In such a situation the Agreement prevents any Canadian government trade measures which may be enacted from constraining trade below proportionate levels". (emphasis added)

Because natural gas is such a clean-burning fuel, it offers a significant opportunity to reduce ozone and carbon monoxide pollution. Natural gas combustion also results in less of other pollutants including sulphur dioxide and NOx, ash and solid waste.

Abundant Canadian supplies might also offer Canadian industry a cost-effective way to meet increasingly tough air pollution standards. Natural gas co-generation systems, that co-produce electricity and steam, also contribute significantly to energy efficiency and conservation objectives.

Not only will Canada be giving away important environmental and economic benefits that it might have derived from its natural gas reserves but exports will actually help U.S. industry to undermine Canada's competitive position. This particular benefit is not lost to the U.S. Natural Gas Association which has claimed that:

"Total deregulation of natural gas at the wellhead would enhance domestic producers' long-term ability to compete with Canadians."

In 1986, 25% of Canadian natural gas production was exported to the United States. In 1987 exports rose by 33%. The U.S. gas industry expect that rate to double over the next 20 years. Under the Canada-U.S. trade agreement, the U.S. will be guaranteed that proportion of Canadian natural gas supplies, in spite of domestic shortages, until Canadian reserves are finally and completely exhausted.

ENERGY CONSERVATION AND EFFICIENCY

Because Canada is a northern nation and the world's most energy-intensive industrial society, it is particularly dependent upon available and affordable energy resources and more vulnerable to supply disruptions. Effective conservation strategies are absolutely vital to Canada's continued prosperity. Not surprisingly, the National Task Force on the Environment and Economy describes conservation as "imperative to ensure that our renewable resource base is sustained for future utilization". Energy efficiency and conservation objectives are also absolutely essential to sustainable resource management.

Environment Canada describes softened oil markets as having created the illusion in many minds that the crisis of the 70's was a temporary phenomenon. It explains that at present "many factors combine to indicate a condition which may deteriorate rapidly and which could well catch the world unprepared". Apparently indifferent to this advice, the Conservative government claims that our "biggest (energy) problem is not shortage, but abundance". The facts are that commercially available supplies of gas and oil are limited, and our frontier wealth remains largely hypothetical.

The preceding analysis makes it very clear that the trade agreement will dramatically increase Canada's vulnerability to disruptions of the world energy market. In order to ensure U.S. energy security, the agreement also denies Canada the use of differential domestic prices to cushion, as it did during the 1970's, the shock to Canadian consumers and industries of sharply escalating energy prices.

Article 906 further undermines the principles of sustainable resource management by specifically recognizing the value of Canadian subsidies and incentives for oil and gas exploration while completely ignoring the need to encourage research and development in the areas of energy efficiency and conservation technology. Because Canada will no longer be able to buffer energy-intensive Canadian industry from future energy shocks, it is absolutely essential that progress be made to improve our energy-to-productivity equation.

The trade agreement assures that Canadian priorities will lie elsewhere and that we will continue to lose ground in relation to countries like

Japan and Sweden who have taken energy conservation and efficiency seriously and developed economic and industrial policies to match.

FORESTS

Canadian forests are in serious trouble because of over-cutting and inadequate reforestation. Since 1950, Canadian annual wood harvests have increased by 50%, and Environment Canada has confirmed that present harvests are often in excess of allowable maximum cuts. Shortages are already apparent in some regions and the viability of the logging industry is threatened as loggers must go further to harvest less desirable species.

The implications for Canada's largest industry are very disturbing. So is the fact that the viability of the forest industry will suffer even further as the legacy of bad management practices catches up to it. For example, according to Environment Canada, between 1975 and 1980 only 1/5th of the area harvested was seeded or replanted, and "natural" regeneration has failed to renew large portions of Canadian forests with trees of any commercial value.

The Canada-U.S. trade agreement will exacerbate the pressures that led us to our present predicament and undermine our prospects of actually implementing sustainable forest management practices in the future.

Reforestation

What little reforestation is carried out in Canada is heavily subsidized by Canadian government. The U.S. lumber industry regards reforestation grants as unfair trade practices and subsidies to Canadian lumber exports. It has been effective in prompting the U.S. government to take up its cause by retaliating against Canadian imports. The culmination of the recent softwood lumber dispute with the United States was an agreement that requires a Canadian province that wishes to have the 15% export tariff removed from its exports to increase stumpage rates and obtain Washington's approval for the change.

However, the softwood lumber deal also targets Canadian reforestation subsidies. In accordance with the deal, the B.C. government recently revised its forest management scheme, ending replanting subsidies to the forest industry. B.C. decided to do so only after sending a delegation to Washington to get U.S. government approval.

The Canadian forest industries' environmental track record is dismal, and the will of Canadian governments to enforce better management practices has never been strong. The Canada-U.S. trade deal does nothing to lessen the likelihood of further challenges to Canadian government activities in the area of forest management and reforestation. In fact the Softwood Lumber Agreement is specifically incorporated by Article 2009 of the trade deal.

Parks and Wilderness Areas

Another casualty of the Canada-U.S. trade deal is the prospect of adding to Canada's inventory of parkland or wilderness areas. Indeed as the competitiveness of the Canadian forest industry is undermined by dwindling and unregenerated forest resources, it will become increasingly vigorous in its efforts to gain access to those lands that are presently preserved.

Beginning with Banff in 1885, Canada has fully protected only 3% of this country as wilderness areas within parks and protected areas. Prior to the signing of the trade deal, a Federal Task Force on Park Establishment warned the Federal Environment Minister that the potential for dedicating wilderness lands to conservation will have all but vanished by the year 2000 because "future land use options were being foreclosed on a massive scale in this generation". The deal will accelerate foreclosure of land-use options as we tie ourselves economically to a country that has traditionally supported its own conservation programs by using the resources of other countries.

The Canadian forest industry is responsible for 1 in 10 Canadian jobs and is one of Canada's largest earners of foreign exchange. The lumber industry's lobby will be very difficult for any future Canadian government to resist. While native people, tourist outfitters and naturalists may be those most severely affected in the short term, all Canadians will suffer as we fundamentally undermine the viability of this vital Canadian resource.

Finally, national parks and wilderness reserves play a strong role in the protection of aboriginal hunting grounds and areas that support traditional lifestyles. By promoting the development of wilderness

areas that they depend upon, the Canada-U.S. Trade Agreement will aggravate the erosion of traditional life styles of aboriginal peoples.

In the words of Canada's first Ministers, "government holds resources in trust for both present and future generations": the Canada-U.S. trade deal is a fundamental betrayal of that trust.

AGRICULTURE

Productive agricultural land is a vital Canadian natural resource. Without it we lose our ability, as a nation, to feed ourselves. While most Canadians are aware of the successive economic crises to confront our farming communities, few are aware of the enormous ecological problems associated with our current agricultural policies and practices

The tools with which we have transformed the Canadian farming industry — heavy machinery, monocultures, hybrid crop strains and chemicals — have precipitated a number of adverse consequences for soil fertility, water quality, public health and a viable rural economy. In the last 40 years we have lost much of the sub-soil structure of our most valuable farmland and have seriously threatened its sustaining potential as a “renewable” resource. Soil acidification, salinization and erosion seriously compound the problem.

The productivity of our farmland has become, year by year, more dependent upon massive chemical infusions of energy largely in the form of petrochemical-based fertilizers and pesticides. We are also losing productive agricultural lands at an enormous rate to urban development.

If an ecological recovery of Canadian agricultural lands is to be brought about two basic objectives must be met. First, the economic viability of Canada's farm communities must be revitalized. There is no better paradigm for the notion of one generation holding resources in trust for the next than the family farm. Secondly, agricultural policies and practices have to be re-oriented in favour of sustainable management approaches that must include much greater commitments to recycling organic wastes, using renewable sources of energy, applying ecologically derived cropping patterns and integrative pest control programs.

The Canada-U.S. trade deal will directly undermine both objectives because it will significantly increase economic pressures on agricultural industries to increase production at the expense of long-term sustainability. There is a very substantial consensus that the deal is not good for Canadian farmers. Agriculture and food industries have been identified as “major losers” by the *Financial Times* of Canada, and major Canadian farm organizations oppose the deal.

Losses to the agricultural and food sectors in Ontario alone have been estimated to be in the order of \$95 million per year by the Ontario Ministry of Agriculture and Food. As summed up by the National Farmers Union:

“...integration of the Canadian agricultural industry with that of the United States will drown our producers in the backwash of U.S. production.”

Canadian farmers are simply at a considerable competitive disadvantage because of shorter growing seasons, smaller markets, and greater transportation and energy costs. Under the deal the effectiveness of marketing boards will be reduced, certain transportation subsidies under the Western Grain Transportation Act will be removed, and tariffs necessary for the existence of certain sectors of our agricultural industry will be abandoned.

If left entirely to the mercy of market forces, economic farm crises will significantly worsen, and Canadian horticultural and grape growing industries may disappear. A collapse of Canada's horticultural industry would be a disaster, one consequence of which would be an even more rapid conversion of precious agricultural lands to real estate development.

The deal will also weaken Canadian regulatory controls intended to protect the environment and public health. The area of pesticide registration is one of particular concern because we have agreed in Annex 708.1, Schedule 7, of the agreement to “work toward equivalence” with a weaker U.S. licensing model (see the note on pesticides which follows). Another example is our agreement under Schedule 4: “Animal Health” to lower our health standards with respect to certain swine and cattle diseases in order to facilitate larger imports of U.S. cattle and hogs.

The impacts of the deal should also be considered in the context of other federal initiatives. If recently proposed plant-breeder's rights legislation is passed, we will be relinquishing control over agricultural production in another way by providing patent protection to large corporations that develop their own hybrid plant varieties — the same corporations that are also major producers of agricultural chemicals. Genetic manipulation for

seed survival will be geared to developing uniform crop varieties that can be sold to the largest possible markets. The seeds are “adapted” to differences in environmental location by the use of fertilizers and pesticides rather than the development of genetic strains suited to these different conditions. The result is greater chemical dependence and a loss of genetic diversity.

The trade deal will significantly increase economic pressures on an already reeling Canadian farm economy and threatens to permanently undermine our relative self-sufficiency in agricultural production. We will in the bargain aggravate soil degradation and air and water pollution problems, and accelerate the pace at which agricultural land, one of Canada's most important resources, is lost forever.

PESTICIDES

Pesticide use in Canada has increased dramatically over the last two decades, in one ten year period (1971 to 1981) alone, sales increased four-fold. Pesticides are, of course, designed to be toxic. Many are persistent and bio-accumulative, and their impact upon our eco-system can be devastating as our experience with DDT, dioxins (a by-product of pesticide manufacture) and other pesticides has made very clear.

We have learned that pesticides present substantial environmental and health impacts. We are also coming to recognize that they are an integral part of an approach to farming that is destroying the productive capacity of Canadian agricultural lands.

Just as we are recognizing an urgent need to develop policies that will move us away from an ever increasing dependence upon these toxic substances, the Canada-U.S. trade agreement commits Canada to a U.S. regulatory approach that has actually made it easier for certain pesticides to be licensed.

Schedule 7 to Chapter 7 of the deal specifically concerns pesticides. It provides that the U.S. and Canada must "work toward equivalent guidelines, technical regulations, standards and test methods" for pesticide regulation. In particular, under the deal, Canada undertakes to work toward equivalency in "the process of risk/benefit assessment".

In Canada pesticides are licensed pursuant to the provisions of the *Pest Control Products Act* which does not mandate risk/benefit analysis but rather places emphasis squarely upon demonstrating the *safety* of the pesticide in issue.

In contrast, U.S. pesticide legislation requires a balancing of risks and benefits. It is an approach that environmentalists have argued against for years, because there are several serious problems with risk/benefit analysis, including:

- the uncertainties of quantifying risks, particularly given the delayed effects of pesticide toxins and the lack of epidemiological data;
- the difficulty of balancing risks and benefits that are not equitably distributed and that favour some to the detriment of others;

- the inherent impossibility of placing a monetary value on clean water, air, or good health.

If implemented, the trade agreement will simply foreclose the possibility of any debate in Canada as to whether risk/benefit assessment *should* be incorporated into our law.

The differences between the U.S. and Canadian approaches are quite real. In the U.S. there are 20% more active pesticide ingredients registered for use and over 7 times as many pesticide products.

One good example is the herbicide alachlor (Lasso), a probable human carcinogen, which the U.S. continues to license, but is banned in Canada. Alachlor, which has been demonstrated to cause tumours in test animals has been found in both ground and surface waters across Canada. According to Health and Welfare officials, the evidence of carcinogenicity was the most convincing they had ever seen for a pesticide. Yet the U.S. found that the benefits outweighed the risks of alachlor and continues to register it. Not surprisingly, the manufacturer has argued that Canada's licensing criteria should also be founded upon a risk/benefit assessment.

Moving towards equivalency of regulatory policies concerning tumour-causing pesticides is also a problem. While the U.S. does have a cancer policy, Canada presently does not. Again the trade agreement would seem to dictate that we adopt the made-in-U.S. policy. In 1982, a congressional committee argued that U.S. EPA had changed the scientific principles underlying its risk assessment of carcinogenic pesticides, resulting in an approach that permitted greater exposure to cancer-causing agents. The committee noted, "more significant, however, is that the agency's use of (certain) approaches to decision-making appears systematically slanted towards less stringent regulation of suspected carcinogens."

For these reasons, the Canada-U.S. trade deal will weaken Canadian pesticide regulation. The effect will be to 'trade' adverse environmental and public health impact in Canada for greater profits to the trans-national chemical industry.

WASTE

We already have free trade with the United States in waste thanks to a bi-lateral agreement entered into with the U.S. in October 1986. Under that agreement Canada has agreed to facilitate trans-boundary shipments of hazardous wastes. The bi-lateral agreement actually weakens the effect of the prior notification and consent provisions of the U.S. *Resources Conservation and Recovery Act*.

Because U.S. waste disposal standards are tougher than our own, there is considerable incentive for American firms to look to Canada for disposal or processing options. Since 1980, this has resulted in a tenfold increase in the number of applications by U.S. companies to dispose of waste in Canada. The U.S. Department of Energy has also invested \$30,000,000 in AECL's high-level radioactive waste disposal research efforts in the Canadian shield.

However, the Canada-U.S. trade deal is not neutral in its effect upon Canadian waste disposal issues because it will create new obstacles to achieving the waste reduction, reuse and recycling objectives that must now become a priority.

If we are to effectively confront our ever-growing waste management problems, regulatory initiatives devised to reduce waste at the source must be implemented. One of the first targets will have to be packaging which accounts for approximately 30% of our waste stream. Canadian laws will have to be developed to mandate recyclable packaging, refillable containers and absolute bans on such things as mercury batteries and polystyrene made with CFCs.

The result will inevitably create obstacles to the import of U.S. products that fail to meet Canadian packaging standards. In consequence U.S. business interests may challenge such packaging laws as being non-tariff trade barriers. While Canada may be entitled to rely on the "legitimate domestic objective" exception of Article 603 to sustain its initiative, it may now have to win the argument under the dispute resolution provisions of the Agreement.

The most likely result will be that U.S. approval will be sought *before* such legislative initiatives are implemented (as B.C. and Quebec have recently done with respect to their reforestation subsidies). The U.S. packaging industry will of course have its own agenda, quite apart from any interest that it may have in the Canadian market, and would be

loath to have Canada establish a precedent in the area of packaging reduction. We will now be inviting them to join us at the table to determine what if any measures we may take to reduce Canadian waste in order to protect our environment.

An important tool that Canada is currently using to encourage 3R initiatives is that of providing financial incentives or subsidies to encourage recycling and the recycling industry. This type of financial support is vulnerable to challenge under U.S. trade remedy law either as an unfair subsidy to recycled goods that we may want to export, or as a non-tariff barrier to U.S. goods entering Canadian markets and having to compete with products that have had the benefit of a recycling subsidy.

In addition, the Agreement prohibits Canada from placing a surtax on hazardous materials being imported into Canada that may then partake, once in Canada, of recycling subsidies that may be available in this country. The result may well be Canadian subsidies to U.S. companies (operating in Canada) to support recycling of U.S. wastes.

Another potential casualty of the trade deal may be provincial crown corporations such as the Ontario Waste Management Corporation. The "national treatment" provisions of the Agreement may make it difficult to discriminate in favour of public as opposed to U.S. owned enterprises.

For example, a province might want to subsidize hazardous waste disposal costs in order to control unlawful dumping, while providing state of the art disposal technology. If it refused to make similar subsidies available to a private U.S. waste treatment company operating in Canada, its decision might well be considered an unjustified discrimination under Article 1609. In such a case Canada would then be obligated to either have the subsidy removed or to have it extended to the private U.S. company. This would be true even where the U.S. company was primarily constituted to treat U.S. wastes. Ironically the same "guarantee" would not be available to a competing Canadian corporation.

The effects of the trade deal upon Canada's waste management agenda are largely indirect. However, it is clear that our waste management problems — which if trends continue, will include ever increasing quantities of U.S. waste — will be even harder to

address if the deal goes through. New Canadian initiatives and programs to encourage waste reduction or recycling may now have to run the gauntlet of U.S. as well as Canadian business interests or pass the test of bi-lateral dispute resolution. The effect will certainly be chilling for those who may wish to address the root causes of the ever worsening waste management crisis confronting us.

Standards/Incentives

Part I Standards

Standards and incentives represent two sides of the same coin—both may be used to achieve environmental quality and resource management objectives. The Canada-U.S. trade agreement will have a considerable impact upon these sticks and carrots of environmental regulation.

In one important area, price and export controls, Canada has agreed to abandon important regulatory tools that have been used to accomplish public policy and environmental objectives. In other areas, the effects of the deal are more uncertain, but if recent experience is a guide, Canada may have to struggle just to maintain the status quo.

Harmonizing Standards Will Create New Pressures To Move To The Lowest Common Denominator Of Environmental Regulation.

Several provisions of the trade agreement are intended to promote the harmonization of standards, testing procedures and regulations. Chapter 6, which provides for the harmonization of technical standards, will not apply to the provinces and relatively little environmental regulation exists at the federal level. In this area then, the effects of the deal on air pollution or waste management standards is likely to come indirectly and as a result of the new economic pressures that will be brought to bear as a result of the deal.

At the federal level however, disparities between U.S. and Canadian environmental standards do exist. In some areas Canadian standards are higher, in others the U.S. is tougher. Where the deal does apply, will it operate to encourage adoption of more rigorous controls or will it militate in favour of the lowest common denominator of environmental protection? Recent experience suggests the latter, and the agreement includes two concrete examples.

For years CMHC has insisted upon a standard specification for plywood relating to harsh Canadian weather conditions. It is tougher than the U.S. standard, and the U.S. plywood industry doesn't like it because the plywood it produces can't pass the test. The Americans pressed the point during negotiations and argued that the Canadians standard was only a pretence for keep-

ing the U.S. plywood out of our markets. Canada relented and agreed to include Article 2008 which specifically contemplates a downgrading of our standard. To sustain its position, CMHC must now conduct a re-evaluation and persuade a "panel" that its judgement is justified.

Chapter 6 of the agreement 'allows' Canada to maintain different standard requirements, as in the case of plywood, if it has a "legitimate domestic objective." However, if Canada's experience with its plywood standard is a guide, a decision to impose higher standard requirements will be put to the acid test.

Another specific challenge to higher Canadian standards concerns pesticide licencing and obligates Canada to "work toward" the risk-benefit analysis of the U.S. model, which will make it easier for the pesticide industry to have its products registered for use in Canada (see preceding discussion).

The reach of the agreement's standards provisions will be considerable and will also include Canadian packaging requirements. In a recent communique from Consumer and Corporate Affairs Canada with respect to the labelling of irradiated foods, specific reference is made to the need to co-ordinate labelling requirements in order to avoid potential non-tariff trade barriers. The U.S. has proposed to sunset the requirement that irradiated foods carry the label "treated by irradiation" after two years. The trade deal will create considerable pressure for us to follow suit, whatever the views of Canadians on the matter.

The other threat to tough Canadian standards will come from Canadian business that will now have a new impetus to argue for environmental controls of no greater economic consequence than those facing its U.S. competitors. In a deregulated environment, in which energy-intensive Canadian industry must compete with U.S. industry guaranteed equal access to our relatively cheap energy resources, its arguments may be difficult to deny.

For those Canadian standards that are weaker than in the U.S. there is, of course, the hope that we will achieve some improvement. Unfortunately, what little evidence does exist suggests that the major struggle may be to persuade the U.S. to hold the

line in response to calls like that made recently by the National Coal Association in response to the deal, to downgrade U.S. regulation.

The other casualty of the harmonization provisions of the agreement will be public participation in the regulatory process. If Canadian and U.S. standards are to be harmonized in many areas, the regulation-making agenda, timetable and venue will probably be set by the U.S.

American standard setting processes are often more formal than our own and substantially greater resources are available to U.S. interest groups than in Canada. The results of U.S. proceedings will likely now, de facto, set the standard for Canada as well. It is very unlikely that Canadian groups would influence the U.S. approvals process even if they could find resources to open offices in Washington. Again, the deal's effect is to undermine Canada's ability to regulate our environment.

Part II Incentives

The Trade Agreement Provides New Tools For Attacking Canadian Pollution Abatement Subsidies And Incentives.

It has become common in Canada for Government to subsidize programs that will achieve public policy objectives from medicare to acid rain abatement. In the environmental area, such activities include subsidies to encourage reforestation, grants to defray some of the costs of acid rain abatement and initiatives like the Ontario Waste Management Corporation or recycling programs.

Not infrequently, U.S. business interests have complained that these incentives are uncompetitive practices. On occasion the U.S. has employed its trade remedy law to retaliate. The recent softwood lumber dispute is a prime example and culminated in B.C. abandoning its reforestation subsidies.

U.S. countervail, anti-dump and other trade remedies are potent mechanisms with which to attack Canadian environmental incentives. Simon Reisman noted the importance of restricting the applications of the U.S. contingency protection measures:

"Any agreement which did not restrict the use of U.S. dumping and countervail statute... would not be worth the powder it would take to blow it to hell".

It is remarkable, then, that the trade agreement leaves these protectionist measures entirely intact (see Article 1902). Not only will Canada be subject to existing trade remedy law but the U.S. will be able to add to its arsenal of protectionist measures. In fact, to the extent that the agreement will increase Canadian exports of goods and resources that may hurt U.S. economic business interests, e.g. electricity or steel, there will be new incentives to challenge Canadian subsidies including those that may be intended to reduce pollution.

Indeed the agreement itself has set off a new round of complaints about Canadian policies and programs by U.S. industry. The U.S. mining industry has recently complained that Canadian producers have an unfair advantage because of subsidies for pollution control equipment. In a similar vein the U.S. National Coal Association, in submissions to the Energy and Natural Resources committee of the U.S. Senate, has assailed the status of provincial utilities as crown corporations as providing an unfair trading advantage.

Financial incentives programs, price and export restrictions have been used in Canada for decades to promote environmental and resource management policies. Price and export controls are being fundamentally abandoned in the deal, incentives and subsidies may well, if less immediately, go the same way.

References

A more detailed analysis of the the Trade Agreement is available from a variety of sources — here are several that we have found helpful with respect to environmental issues:

"Freer Trade And The Environment," Canadian Environmental Advisory Council, May, 1986.

"Free Trading The Environment", Frank James Tester, in *The Free Trade Deal* edited by Duncan Cameron, James Lorimer and Company, Toronto, 1988.

"The Impact Of The Canada/U.S. Trade Agreement: A Legal Analysis", the Attorney General for Ontario, May 1988.

"Environmental Impacts Of The Canada-U.S. Free Trade Agreement," Michelle Swenarchuk, The Canadian Environmental Law Association, Feb. 29, 1988.

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"Under The Label Of "Free Trade" Canada Is Being Asked To Support An Unprecedented Surrender Of Our Resources," Ian McDougall, in *If You Love This Country*, assembled by Laurier Lapierre, M & S, 1988.

"Implications Of The Free Trade Agreement For Canadian Electricity Exports," Ian Blue, a paper presented at the National Conference On The Free Trade Agreement, Osgoode Hall Law School, March, 1988. *Free Trade And The Provinces*, Andrew Petter, idem.

Report Of The National Task Force On Environment And Economy, Submitted to the Canadian Council of Resource and Environment Ministers, September, 1987.

The Canada-U.S. Free Trade Agreement, Canada, 1987 (with explanatory text and tariff schedules).

The Canada-United States Free Trade Agreement Implementation Act, Bill C-130.

This analysis was prepared by Steven Shrybman, Counsel to the Canadian Environmental Law Association, who thanks all those who assisted with the project.

The Canada-U.S. trade agreement represents Brian Mulroney's vision of Canada's future. We believe that it is fundamentally at odds with the principles of environmental protection and resource conservation.

As environmentalists, we believe that Canada must adopt and put into practice the concepts of sustainability and integrated economic and environmental planning so strongly endorsed by the Brundtland Commission. For the many reasons identified by this analysis, the trade agreement will substantially undermine our prospects of doing so.

Because the agreement, if implemented, will overwhelm the progress we are all working for, we urge your group to state your opposition to it. Please tear off and return the attached form and join us in an effort to stop the deal.

WE, _____, ARE OPPOSED TO THE IMPLEMENTATION OF THE CANADA-US TRADE DEAL BECAUSE OF ITS NEGATIVE ENVIRONMENTAL IMPLICATIONS.

Return to: Canadian Environmental Law Association, 243 Queen St. West, Toronto, Ontario M5V 1Z4

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