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May 14, 2002

CIELAP Shelf:
Canadian Institute for Environmental Law and Policy; Elwell, Christine; May, Elizabeth
Comments on Strategic Environmental Assessment of the FTAA

RN 27344

Dear Madame or Sir,

**RE: Strategic Environmental Assessment of the FTAA**

Please accept these comments on behalf of CIEALP as well as Sierra Club of Canada. Our comments are in two parts. First, we make certain observations on the process – both on the lack of direct notice of this consultation and well as the adequacy of the Framework for Environmental Assessment (EA) used to analyze the draft FTAA. The second part relates directly to the content of the anticipated agreement.

Part 1 – The Process, Adequacy of the Framework for Environmental Assessment. Part 2 – The Content, Recalling Forgotten Promises, Removing Controls to Protect Natural Resources, Human Health and Biodiversity, MEA's are unenforceable, Investor Rights – Pay the Polluter, and Removing Public Participation and Democracy.

We understand from the Notice published in the Canada Gazette that the next step is for the Department to prepare an initial EA. We assume there will be another opportunity to comment on the scope and tone of that document and we thank you in advance for direct notice of this and other related developments. Our general recommendation is that the Canadian government immediately proceed with an independent Canadian civil society Sustainability Impact Assessment of the current draft text.

Part 1 – EA of FTAA – The Process

The first observation is that despite both organizations having actively participated in the People's Summit at Quebec City last spring as well as at other trade-related government consultations, neither organization received direct notice of the EA of the FTAA. Nor did the major civil society networks such as the Canadian Alliance on Trade and

Environment or Common Frontiers received notice of such an important process and undertaking. It was only by chance that a friendly business associate alerted us to this development. Surely consulting with civil society entails more than a posting of notice of an EA in the Canada Gazette.

EA of FTAA – The Adequacy of the Framework.

According to the Canada Gazette, the EA of the FTAA is being conducted pursuant to a 1999 Cabinet Directive. We note that when the Draft Environmental Assessment Framework for Trade Negotiations was released many environmental groups and well as academics were highly critical of the Framework and provided constructive comments on how to improve it. Unfortunately the current EA Framework for the FTAA still suffers from lack of rigor and scope.

According to many observers, the Framework does not make obvious who will be conducting the environmental assessment or which government departments will be responsible for conducting an environmental assessment other than DFAIT. This raises fundamental questions about transparency, fairness and credibility. Quite simply there is not the expertise within the Department, or the public perception of impartiality to carry out environmental assessments to either identify environmental impacts or to assess their significance, with any degree of confidence or credibility by the Canadian public. It is like asking the fox to look after the chicken house. The virtual lack of analysis by Environment Canada on the environmental impacts of international trade does little to assure Canadians that a rigorous or balanced approach will be forthcoming.[1]

The purpose of the assessment should be expanded to allow a realistically integrated approach centered on achieving sustainability. This entails adoption of a broader definition of "environment" than in the current EA, that includes social, economic and ecological factors. It also requires an extension of scope so the assessment considers not only adverse effects and how to mitigate or avoid them, but also positive steps towards greater sustainability (ecological rehabilitation, community building, fairer distribution of perils and gains, etc.) and how to enhance them. Currently the only scope for the EA is to suggest how to mitigate or enhance environmental effects, not how to avoid negative effects by, for example, alternative trade deals.

The EAF should ensure consideration of alternatives. This should include not just alternative immediate responses to identified problems and opportunities, but also alternative trade arrangements that might have been and be more beneficial and less damaging in the cases assessed.

[1] The only analysis posted by Environment Canada is a short piece on the energy use related to the export of manufactured goods that concludes " Establishing a direct link between international trade and environmental effects is difficult because of the problem of distinguishing between domestic and foreign consumption". See State of Canada's Environment, Part 111, Chapter 11, www.ec.gc.ca/1996 Report/Doc/1-7-4-10-3-4-1.cfm.

Effective public participation is widely recognized as the best way of ensuring rigor and impartiality in environmental assessment work. The process should be more open and participative. Local knowledge and contributions from a variety of stakeholders should be valued and included throughout the process. Public consultation should be sought out at key decision-making steps and the relevant communities should play an integral role in deciding the end uses of the findings. Mere posting to the Canada Gazette is not enough.

A good EAF accepts the precautionary implications of uncertainty. It should anticipate that, in many cases, environmental assessments will not identify a clear cause-effect relationship between trade and environmental impacts. It should set a standard of "proof" that is suitable for conditions of inevitable uncertainties, and should be realistic and fair in determining where the burden of providing such proof should lie. Usually the burden is with the proponent, in this case the DFAIT.

Priorities for assessment should assign greater concern to those trade effects that are difficult or impossible to reverse, that reduce the diversity of future options, and otherwise weaken abilities to adapt in the face of unexpected changes. Impacts on exhaustible natural resources should be a priority for precautionary measures such as avoiding accelerated tariff removal from forest, fish and non-renewable energy products.

The process must recognize not just direct and immediate individual effects but also long term, additive, synergistic and cumulative effects, both positive and negative. There should be an evaluation of whether environmental impacts would have been different without current or purposed trade agreements, or would be different with modified trade arrangements. There is no need to assume that trade agreements as currently designed and applied are permanent.

The scope of the EA should not be limited to likely environmental impacts related to Canada alone but include likely impacts to the Americas as well as the global commons.

The process should also ensure public access to information; identify the factors that are to be taken into account in decision-making; and acknowledge limitations and difficulties. True partnership also often require resources to allow citizen groups and NGOs to be involved at the same level as advocates of the private sector. Otherwise, the process deserves little public acceptance.

Environmental assessment findings should be followed by long-term and sector-wide monitoring to ensure that results are being used in an appropriate manner and that concerns are being addressed and clearly marked for further application.

We suggest that the Department allocate resources to a Canadian civil society organization involved in the Americas, with a focus on trade, environment and sustainability to independently conduct a rigorous assessment of the proposed FTAA and invite Canadians to review the major findings as soon as possible.

Part 2 – EA of the FATT – The Content

Despite the narrow scope of the EA Framework, with respect to the content of the FTAA and the likely environmental impacts, we raise seven main issues.

1. Recalling Forgotten Promises

At the first Miami Summit in 1994 the 34 member states of the Organization of American States (Cuba was suspended in 1962) agreed to work towards creating a Free Trade Area of the Americas ("FTAA"). The meeting produced a Declaration of Principles that seeks to expand prosperity through economic integration and free trade; to eradicate poverty and discrimination in the Hemisphere; *and to guarantee sustainable development while protecting the environment.*

Another outcome of the Miami Summit was the inclusion of a proposal from the President of Bolivia to call a specialized Summit on Sustainable Development to be held in 1996. The objectives were to establish a common vision for the future according to the concepts of sustainable development and to ratify the principles subscribed to at the 1992 Earth Summit held in Rio de Janeiro, Brazil.

The Unit for Sustainable Development and Environment was to be the principle arm of the OAS to follow up on Rio 92 mandates and the mandates given to the OAS from the Bolivia Summit. A new political body the OAS Inter-American Committee on Sustainable Development would exchange the relevant information and co-ordinate activities. But instead of the Unit engaging in a thoughtful Environmental Impact Assessment of the various trade negotiating committees of the FTAA, the main function appears to be preparing projects for loan consideration by bilateral and multilateral agencies such and the Inter-American Development Bank and the World Bank.

The OAS was left with no resources and no momentum to monitor the 65 initiatives that came out of the Bolivia Summit and the so-called Santa Cruz Action Plan. Instead of consolidating environmental protection into a coherent whole, the decision was taken to separate out into two tracks the FTAA trade agenda from everything else around sustainable development.

The Santiago Summit of 1998 saw the complete removal of sustainable development from the goals and agenda of the FTAA project. It is no surprise, therefore, that all of the political energy goes to trade liberalization and environmental protection is hardly on the map, except to be further undermined by the trade rules emerging from the various FTAA working groups. As in the case of the WTO, the hope is to see a number of so-called business facilitation measures and early harvest agreements in particular sectors on forestry, on energy, on fisheries before the hard trade-offs need to be made, if at all. But instead of a coherent plan to avoid or mitigate the negative impacts, governments give vague assurances that environmental issues will be dealt with on a case by case basis…so much for Rio!

Environment is not a Non-Trade issue

The FTAA project continues to deny the connections between trade liberalization and environmental stress. All nations in the hemisphere face common environmental problems. One thing is certain, however, the environmental degradation induced or at least aggravated by free trade is not a "non-trade" issue to be separated out from trade negotiations into discussions later on, if at all. Where will the independent environmental impact assessment of the FTAA project be conducted, at the remote OAS Unit for Sustainable Development? Where will the evidence be found whether FTAA nations are fulfilling their Miami pledge to guarantee environmental protection?

There is no indication anywhere how the proponents intend to address the significant environmental costs likely to occur due to increased forestry, mining, shipping transport, fossil fuel extraction, fishing and other environmentally harmful activities following the enactment of the FTAA.

Ministers of Trade of the Americas agreed to implement 20 "business facilitation measures" to speed up customs integration. Draft language being development by the FTAA negotiators since 1998 would create a stream lined electronic tracking system for customs officials throughout the Americas to use. The system would apply to so-called low value commodities that are less than $2000 in value. This language could cover most shipments of hazardous and infectious waste; the value of such is often low or even negative in value. These fast track approval systems being put in place risk large quantities of waste being imported into Canada or other countries in the hemisphere without adequate treatment facilities or even the knowledge of environment officials, let alone the general public. USEPA has asked for exemptions from expedited customs rules for wastes but so far Commerce has overruled US EPA.

Fast-Track customs clearance is sure to lead to mass increases in hazardous waste and other illegal trade yet where are the measures to protect the environment? What is the relationship between the FTAA and Multilateral Environmental Agreement such as the Basel Convention or Stockholm? Despite repeated requests to address these specific concerns, no answers are provided.

Notwithstanding the overwhelming public concerns with globalization and the role that trade and investment agreements play in the corportization of the planet, the Canadian government is determined to forge ahead. Instead of providing the obviously necessary political leadership the FTAA project integrate environmental protection and conservation into its trade and investment agenda, as promised at Rio, the government's response is that each of the nine FTAA Trade Negotiating Group "should consider relevant trade and environment issues as they arise". Canadian Trade Minister Pettigrew explains that environmental negotiations in the context of the FTAA would only "bog down" the process and discourage Central and South American developing countries.

Indeed there is a myth that the concerns for environmental protection are only shared by northern NGOs and other protectionists forces within these economies. Exposing the

environmental consequences of undisciplined free trade is seen at best as naïve and at worst as disregard for the aspirations of developing countries and their people. But as our shared experience in the north and in the south with trade agreements and other international financial institutions grows, the evidence is clear that all peoples want clean water to drink and clean air to breathe.

To conclude this part, there has been no progress in implementing the 1996 Bolivia Action Plan to protect the environment and there is no independent institutional capacity to assess and avoid the environmental impacts of the FTAA. Consequently any assurance given by the DFAIT as describe in the Canada Gazette that the FTAA will achieve sustainable development is more or less unhelpful.

2. The FTAA would remove controls to protect Natural Resources.

Basic trade rules around national treatment (investors/corporations from all FTAA countries must be treated the same as domestic and local service providers) and non-discrimination act as a barrier to natural resource conservation. Trade rules provide foreign corporations precisely the same access to crown resources as is available to Canadian citizens, companies and First Nations. This result offends the strong environmental ethic to "discriminate" in favour of local allocation of public natural resources and resource management to avoid the "Tragedy of the commons" and to achieve sustainable development. As has been observed, while trade and investment agreements foster access to resources and markets, they engender no obligation of stewardship. Those that must live with the consequences of destructive resource practices will often have the greatest stake in ensuring long-term sustainable management. They should be given a central role in determining local management issues and priorities.

Without any meaningful controls on the scale and cumulative impacts of resource exploitation, the rapacious rates of consumption soon exhaust non-renewable resources or overwhelm the capacity of renewable resources to regenerate. Natural resources that were once subject to national priorities and controls, now become the common property of all non-domestic and domestic investors. At the same time, the capacity of government to impose conservation constraints is weakened. Under NAFTA the Canadian government gave up important tools for conservation, including the use of price differentials to reflect higher rates for non-domestic assess to resources and other traded goods.

Trade agreements also prohibit quantitative restrictions such as outright trade bans that deny market access all together or even more limited quotas. Traders prefer agreed tariffs to provide any support to domestic producers so that negotiations can eventually eliminate them to zero. Disguised quotas or so called "non-tariff barriers to trade" such as export and import license requirements, state trading enterprises and environmental standards are also strictly disciplined.

There are a number of general exceptions in trade agreements that purport to recognize the objective of free trade is somehow moderated to accommodate other competing

policy objectives. These exceptions include: the protection of public morals, human and animal life, and environmental protection for exhaustible natural resources and goods relating to national security. While the exceptions appear to reverse the presumption in favour of national and most favoured treatment, or the presumption in favour of minimum international standards, the disputes at the WTO and NAFTA[2] indicate their continuing ineffectiveness. The FTAA tips the balance in favour of trade even more.

Without a sea change in trade rules, any further or accelerated tariff reductions and market access agreements should be avoided in environmentally sensitive sectors such as forests, fish, water and non-renewable energy. A 1999 Clinton administration study by the USTR and the Council on Environmental Quality found that tariff reductions in wood products, for example, would increase the clearcutting of forest as well as the conversion of primary forests into tree plantations, especially in the south.

The removal of non-tariff barriers to trade or competition includes the removal of important environmental policy tools. These tools include ecolabelling, raw log and unprocessed natural resource export bans as well as government green procurement programs. If the leaders of the hemisphere were to adopt the proposed text on Market Access Article 10, on Standards and Technical Barriers to Trade Article 33, on Competition Article 1 and on Government Procurement Article 26, the scope for government policy to protect exhaustible natural resources would be unsustainably reduced or altogether eliminated.

To conclude this part, the largest FTAA negotiating group is on market access, that includes the elimination of industrial tariffs, including non-agricultural tariffs relating to forest, fish and energy, as well as non-tariff barriers to trade. This group will begin negotiations as early as May 15, 2002 and are expected to produce a new version of their text by August 2002. Given the likely and significant impacts these negotiations will have on natural resources and human health, it is unwise to proceed without the fulfillment of the 1996 Bolivia Action Plans as well as the completion of national and regional environmental impact assessment, complete with alternatives proposals.

3. The FTAA Removes Controls to Protect Human Health and Biodiversity

Trade agreements tend to cause nations to keep their environmental and public health standards to the lowest common denominator and their markets for imports and exports open. This is the result despite the need for caution especially respecting the import of

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[2] When Canada objected in 1988 to the US exporting UNPROCESSED HERRING AND SALMON from Canadian pacific coast waters, a trade dispute panel was able to rule against Canadian landing requirements as an unacceptable export control and thus a trade barrier. The panel also ruled that the requirement was unrelated to a limited and ineffective GENERAL EXCEPTION to WTO trade disciplines that purports to save government regulations for resource conservation purposes. The trade panel believed that the real purpose of the landing requirement was to protect in-shore employment when the fish resource could be processed more economically offshore. Traders do not understand that local stewardship and value adding to resources is fundamental to sustainable development.
*In the Matter of Canada's Landing of Pacific Coast Salmon and Herring, 1989, FTA.*

mad cow disease and biological agents and the export of exhaustible natural resources. Under both NAFTA and the WTO agreements, and as anticipated in the FTAA, countries are required to meet certain scientific burdens of proof in setting their standards and to show that laws and regulations are "necessary." Trade rules do not provide a clear right to use the precautionary principle in setting standards or to insist upon the process and production methods used to produce goods or services for market entry. Given the history, the burdens in trade agreements a willing national government must bear to go beyond the minimum standards issued by industry led organizations such as **Codex Almentarius** or the **International standards Organization** are obviously too great.

For example, the TBT covering national standard setting for widgets as well as environmental, consumer and health and safety protection, only permit governments to set higher national standards, if the standard is deemed necessary, the least trade restrictive and not applied in an arbitrary or discriminatory manner where the same conditions prevail or as a disguised restriction on international trade.

Importantly as well, the TBT Agreement does not permit technical standards to make distinctions between products based on how the product was produced. For traders a can of tuna is a can of tuna no matter how many dolphins were killed in the process. This gap offends yet another environmental, animal welfare and social policy ethic to care about the process and production methods associated with the product or service, including child labour.

The requirements on national governments are even more burdensome to successfully restrict imports because of food safety, animal welfare and plant concerns. Sanitary and Photosanitary Measures Agreements (SPS) require that in addition to all of the above burdens, national standards must also be based on scientific evidence and a risk assessment. While the WTO SPS Agreement permits temporary precautionary restrictions while a nation seeks further scientific information for setting national standards, the emphasis on quantifiable scientific risk management overlooks the political process to determine what is an acceptable risk to society. In effect trade rules set limits on the level of safety a country can choose.

While countries can set their own levels of risk tolerance, there is a presumption in favour of minimum international standards, were they exist. It has been noted that the absence of international scientific opinion has become the necessary precondition for environmental regulation. The absence of such a consensus can then be asserted as prima facie proof that economic protection motives must underlie a purported concern for the environment and food safety. Furthermore, by assigning the task of standard setting to international technical bodies, such as Codex Alimentarius, the prerogatives of elected and accountable institutions are greatly diminished.

Trade rules completely ignore the heated scientific as well as ethical issues associated with biotechnology and genetically engineered (GE) foods. The ineffectiveness of the current exceptions for national standard setting and the presumptions in favour of low international standards will continue to matters of great concern. Not only are these trade

rules fundamentally at odds with the precautionary principle, in fact the most accurate "science–based" approach, but also they attempt to exclude ethical, social and economic considerations from the equation. The precautionary principle essentially says that protective measures should be taken in the absence of scientific certainty. The most important practical feature of incorporating the precautionary principle in trade agreements is that it would reverse the burden of proof in dispute settlements.

That there is an immediate need to reverse the burden of proof to ensure environmental protection and public health, is most evident from the results of trade disputes out of the WTO[3] and NAFTA[4].

We can expect no improvement in standard setting within the draft FTAA. The draft text states: "Consistent with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), said measures will only be applied to achieve the appropriate level of protection for human, animal or plant life or health, will be based on scientific principles, and will not be maintained without sufficient scientific evidence". The WTO regime would become the sole arbiter of legitimate prohibition, restriction, or licensing requirement on imported agricultural products. By using such a standard, the FTAA would effectively limit the grounds under which member countries can impose trade-restrictive SPS measures to protect the environment, biodiversity or health and safety. The WTO standard is stricter even than that in NAFTA, requiring that an importing country bears the burden of proof in showing that an SPS measure is scientifically justified. The FTAA/WTO model shows no support for the use of the precautionary principle in making such determinations.

The threat of the spread of invasive species is real and aggravated by increased trade-related transportation and the movement of persons and products. Precautionary measures aimed at preventing the spread of ecologically and economically destructive invasive plants and animals would be further impeded if the proposed FTAA TBT and SPS agreements were adopted. Undisciplined liberation of agricultural products, as

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[3] Given on-going food security fears in Europe, the EU ban the importation of animals and meat from animals which had been administered with certain hormones for purposes of promoting the growth of the animals. Canada and the US successfully brought a WTO trade complaint to force open an unwilling European market to hormone treated beef. The EU's directive relied upon risk assessment that considered hormonal limits based on measures of adult daily intake (ADI) whereas the less rigorous Codex international standard found no toxic risk to humans based upon the measure of low residue levels found in treated animals. The WTO upheld the complaint because in its view the EU did not conduct a proper risk assessment and therefore could not justify the import ban based upon a measurement of risk that went beyond the minimum international standards. The EU has maintained its right to conduct on-going assessment of hormone treated beef and has paid penalties instead of importing treated beef. SeeEU-Measures Concerning Meat and Meat Products ( Hormones) WTO, 1998

[4] To deal with PUPPY MILLS, Canada enacted legislation with the intention of protecting consumers from purchasing US bred puppies with congenital defects. The US puppy mill industry challenged the legislation under NAFTA, which led to a compromise on Canada's part, whereby shipments of puppies into Canada would be checked for signs of health problems at the border. If any animals showed signs of illness the entire load would be denied entry. Unfortunately the compromise kneecapped the original intent of the legislation as most congenital defects only manifest themselves at later stages in the animal's life, and will not be picked up by a cursory border inspection.

contemplated in the FTAA Chapter on Agriculture, Article 17, especially in GE foods and seeds, will further spread the contamination of invasive species. If the draft Chapter on Intellectual Property Rights, Section 10 were adopted, FTAA members would be required to allow the patenting of GE organisms, including GE vascular plant and tree species capable of disrupting native ecosystems.

To conclude this part, given the history of trade disputes over standard setting to protect the environment and human health, together with new threats of invasive species to biodiversity and ecological integrity, the negotiations to liberate agriculture and intellectual property rights ought to clearly ensure the sovereign right of nations to set high environmental and public health standards and engage in agrarian land reform.[5] Reversing the burden of proof in trade disputes and ensuring food security as well as the predominance of multilateral environmental agreements such as the Biosafety Protocol over trade obligations would be a good place to start in order to achieve sustainable development.

4. FTAA trade rules are Enforceable, MEA's are not

Consider the stark imbalance in the political energy to negotiate and implement regional and multilateral environmental agreements (MEA), compared to that of trade and investment agreements. Trade agreements have all the tools of enforcement, international agreements to protect human rights, labour standards and the environment do not. Trade rules not only tend to undermine the enforcement of MEAs but also to undercut their underlying goals and objectives. The leading case in point is the Kyoto Protocol to address climate change compared to the free trade in fossil fuels expected under the NAFTA, WTO and FTAA regimes.

It is generally agreed that the relationship between international trade rules and MEAs ought to be mutually supportive. In practice, however, the two regimes often contain incompatible provisions and avoiding clashes remains a controversial ad hoc task. Often regarded as emblematic of the trade-environment debate, the 1991 GATT Tuna-Dolphin Dispute was the first to test the legitimacy of using environmentally-unfavourable process and production methods (PPMs) as justification for trade restrictions in order to protect the global commons. The case revolved around a US embargo on Mexican tuna caught using purse-seine nets that incidentally trapped a high number of dolphins [6]

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[5] Export production is highly profitable for the handful of agribusiness of the North but it runs counter to the aspirations of the millions of small farmers and indigenous peoples of the Americas. Trade liberalization under the FTAA will undermine their struggles for agrarian reform and efforts to pursue sustainable agricultural practices and local food security strategies. Export production is dangerous for poorer, agrarian economies as reliance on a few export-earning crops increases their vulnerability to market fluctuations as well as crop devastation through disease or pests. Most, if not all of these measures will lead to the destruction of independent farms, the rise of agri-business conglomerates, using the original farmers as indentured labour, leading to an exodus to urban centres and increasing poverty and the labour pool with deflating wages.

[6] More recently, the WTO ruled against the legitimacy of a partial U.S. import ban under the US Endangered Species Act on shrimp caught in the wild in countries with-out sea turtle conservation measures. The Act required the U.S. government to certify that all shrimp imported to the country were

In addition to undermining MEA enforcement tools, undisciplined free trade also undercuts MEA goals and objectives. For example, current trade rules do not address the issue of traditional/indigenous knowledge. Civil society organizations from the south and north have demanded the primacy of the Convention on Biological Diversity (CBD) over other Intellectual Property Regimes. The CBD gives national states sovereign rights over their biological resources and allows the protection of indigenous knowledge and rights. Intellectual property rights give global corporations with a patent in one country the monopoly marketing rights to the item throughout the region. Moreover, companies are encouraged to "bioprospect" and lock down patents for traditional medicines that are considered "traditional knowledge," effectively robbing indigenous people of their cultural heritage to fatten corporate wallets.

To conclude this part, there are no provisions to deal with the relationship between an FTAA and regional or multilateral environmental agreements. The trade rules around market access, the process and production methods of products as well as the current design of intellectual property rights continue to represent fundamentally good green reasons to oppose the current direction of the FTAA. The concern for MEAs is a priority area for improvement in all trade deals.

5. FTAA Investor Rights Pay the Polluter

Current NAFTA investor protection rights undermine the sovereign right of nations to take proactive measures to ensure that investment serves national development and environmental sustainability goals. The thrust of these policies is to elevate the rights of investors above other interests, with the ultimate goal of facilitating capital movement. The U.S. position within the FTAA Investment group is to promote obligating FTAA countries to "strive to ensure that environmental and labour laws are not relaxed to attract an investment." This position expands the scope of a similar provision in NAFTA

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caught with methods that protected marine turtles from incidental drowning in shrimp trawling nets. Under the Act, shrimp-importing countries with sea turtles in their waters must demonstrate that mechanically harvested marine shrimp are caught by means that allow sea turtles to escape as efficiently as the turtle excluder devices (TEDs) mandatory on all U.S. shrimp nets. According to the National Marine Fisheries Service of the U.S. Department of Commerce, proper use of TEDs reduces the number of turtles caught in shrimp nets by some 90%. Farm-harvested shrimp or shrimp caught by annually hauled nets may be imported without restrictions. While the law applied to all countries, its enforcement was first (in 1993) limited to the Atlantic coasts of 14 Caribbean and Western Atlantic countries. Also in 1996 some 40 nations concluded an agreement on the Inter-American Convention for the Protection and Conservation of Sea Turtles (twenty-four countries participated in at least some of the negotiations). The United States signed the treaty, which prohibited the use of WTO-inconsistent trade measures but according to the U.S. State Department; the agreement required the use of TEDs on virtually all shrimp trawling vessels operating in the Western Hemisphere. Despite the regional environmental agreement, non-parties mostly Asian brought a successful trade complaint at the WTO centering on the US application of a unilateral trade measure, involving the extension of domestic laws and standards beyond national borders (extra-territoriality) to the global commons. In addition, WTO rules again did not allow discrimination on the basis of the methods of production. According to the traders, shrimp caught that kills sea turtles is the same product as shrimp that does not! *United States Import prohibition of certain shrimp and shrimp products, WTO, 1999*

Chapter 11, which purports to covers environmental and domestic health laws, but not labour laws. But it appears that the USTR is not proposing that there be any type of enforcement mechanism for this provision and is not even asking FTAA countries to ensure that these laws will not be relaxed but only to "strive to ensure." Moreover, this type of provision would be virtually meaningless in countries where environmental and labour laws are already weak. It also does nothing to strengthen enforcement of existing labour and environmental standards or to promote a lifting of these standards across the Americas. The United States has not adopted a clear position in favour of deference to environmental and public health laws similar to the weak general exceptions listed in the GATT. While GATT Article XX itself is inadequate, the lack of any such exceptions for environmental protection in the investment proposal is extremely troubling.

The investment Chapter of NAFTA includes enforcement procedures that are in many ways more powerful than any enforcement mechanism ever built into the framework on an international trade agreement. Because foreign investors, i.e. corporations, have the right to invoke these procedures directly – NAFTA investor-state suits have emerged as a powerful new tool to attack environmental and conservation measures that stand in the way of greater corporate profits.

Under these rules foreign corporations can sue NAFTA governments for damages to enforce the exclusive rights the treaty accords them. As has been observed, in most cases these broad investor "rights" have no domestic analogue, and could not be enforced before national courts. By allowing countless foreign investors to invoke international binding arbitration to enforce expansive investment rights, NAFTA and other investment treaties represent a dramatic departure from the norms of international law in two important ways. First, by giving corporations the right to directly enforce an international treaty to which they are neither party nor under which they have any obligations - i.e. rights, but no responsibility.

Second, foreign investors may invoke private and secretive international commercial arbitration processes to determine claims that involve important issues of public policy and law - i.e. to use private procedures to resolve public disputes. The result has placed a coercive international enforcement regime at the disposal of countless foreign investors who may use it freely to challenge public policies and laws they oppose. Not surprisingly a growing number of foreign corporations are taking advantage of this opportunity to claim substantial damages from governments that have allegedly failed to respect the constraints imposed on their authority by NAFTA rules. The targets of these claims have included water export controls, fuel additive regulations, hazardous waste export controls[7], and most recently public services. Often, just the threat of litigation is sufficient

[7] In the SD Myers case, Canada has been found in breach of its obligations under NAFTA by refusing to allow PCB exports to the US for a brief period in the mid 1990s, even though importing PCBs was illegal under US environmental law and notwithstanding Canada's obligations under the Basel Convention to minimize the export of such wastes. The company is claiming more than $US 10 million US in damages, which have yet to be assessed. Canadian courts have now been asked to set aside both of these awards. In a testament to just how oblivious these tribunals are to any non-commercial reality, in both SD Myers and Metalclad, the tribunals concluded the issues before them weren't really environmental after all. This refusal to acknowledge even hazardous waste management as an environmental issue is reminiscent of

to warn governments off regulatory initiatives such as requiring plain packaging of cigarettes, or sustaining a ban on the use of a neurotoxic fuel additive.

To conclude this part, if the FTAA members were to accept the framework outlined in the draft Investment Chapter, Articles 10 and 15, significant public policy tools will be lost forever. In the area of forest protection, for example, foreign companies will be empowered to sue governments when they feel that their ability to earn a profit is inhibited by forest management and protection standards or by the return of land to indigenous communities. Most fundamentally it will be distant international trade tribunals that will decide if the measure is "tantamount to expropriation", operating entirely outside the framework of domestic law, courts, or constitutional guarantees of fairness, freedom of the press, due process, fundamental justice, and equality.

6. Free Trade in Services

The mandate of the FTAA Negotiating Group on Services is meant to be compatible with the General Agreement on Trade in Services (GATS) - the WTO services negotiations now in progress, that has eliminated the general goods exception for government measures that protect exhaustible natural resources. The most fundamental purpose of these negotiations is to constrain all levels of government in their delivery of services and to facilitate access to government contracts by global corporations in a multitude of areas, including energy, water services, and as yet undefined environmental services. While some developing countries see potential in providing environmental services such as carbon sinks, eco-tourism and biodiversity conservation to address the ecological debt owed by the north, the FTAA services agreement could be more sweeping than the GATS.

As well as incorporating "comprehensive rights and obligations," it will apply to "all measures [defined by Canada as 'laws, rules, and other official regulatory acts'] affecting trade in services taken by governmental authorities at all levels of government." As well, it is intended to apply to "all measures affecting trade in services taken by non-governmental institutions at all levels of government when acting under powers conferred to them by government authorities." This scope purports to cover eco-labelling by NGOs.

While the USTR position pays lip service to not having the FTAA negotiations promote privatization of social services—including education and health care services—it does not propose to carve out these services. Instead it relies on the deeply flawed exemption for government services in GATS. This exemption only applies when a service "is supplied neither on a commercial basis, nor in competition with one or more service suppliers." But many government services include fees, such as park entry fees, which could fall under the "commercial basis" prohibition. Also almost no government service is provided as an exclusive monopoly so there is competition with other service suppliers. Combined with proposed local coverage, this provision would leave all local, provincial

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Canadian and US denials during the free trade debate of the 1980's that the environment had even come up during the negotiations.

and federal laws pertaining to public and private services vulnerable to corporate challenges by the service providers as well as their investors.

The GATS/FTAA model focuses on discipling the process and substance of government regulation, including second-guessing whether it is necessary, that is "not more burdensome (on trade) than necessary to ensure the quality of the service". "Quality of service" should be understood relatively narrowly, i.e., the reliability, accuracy and safety (to the consumer) with which the service product performs its intended function. It seems unlikely that a dispute panel would interpret the term broadly to include upstream, downstream or other quality considerations such as protection of environmental quality. To do so would likely be seen as reintroducing the very kind of broader social policy considerations traders intend to exclude.

As in the case of goods, free trade in services would presume the necessity of regulation if in conformity with international standards and provided other member's "equivalent" standards are accepted. Absent provision otherwise, the ***necessity*** for the governmental measure, the ***adequacy*** of whatever due notice and process was afforded, and the ***rationale*** for deviations from international standards or for determinations of non-equivalency would all be "disputable", i.e., arbitrable by trade panels.

Consider the case of hazardous wste. A hazardous waste shipper could successfully challenge regulations aimed at: • illicit shipments of dangerous substances e.g. ozone depleting substances, hazardous and radioactive; • the extent of liability for damage from transport and disposal of hazardous waste that exceed international standards; and • the denial of access to a port upon the determination that the pollution reception and/or treatment facilities are inadequate.

Most of these examples are already regulated by established and ratified multilateral environmental agreements. But as has demonstrated, MEAs are vulnerable to being undermined by panels convened by the dispute settlement mechanisms in trade agreements. Any of these examples could be deemed by trade tribunals to be more burdensome than necessary, thus "nullifying or impairing" the benefit of the services national treatment obligation.

Moreover, domestic regulations that effectively limit the number of hazardous waste sites or treatment providers in a market or community would be inconsistent with service market access obligations. Rules limiting cross-border provision of services that: • require disposal of domestic generated hazardous waste in the domestic jurisdiction rather than exported abroad; • allow only domestic-based providers to export or import hazardous waste or garbage; and • require domicile or residence for operation of a waste disposal or storage site are all open to trade and investment disputes.

To conclude this part, if the FTAA members were to accept the draft Chapter on Services local, provincal and federal law makers will lose the ability to set specific measures to govern the provision of services as well as limits on the number of service providers or facilities, likely resulting in the mass exploitation of exhaustible resources, including

water, forests, coral reefs and wetlands, harm to wildlife and intensive local and regional pollution. The entire free trade in services agenda has not addressed sustainability issues.

7. FTAA removes public participation and democracy

At the 1996 Bolivia Summit on Sustainable Development governments "strongly supported the full integration of civil society into the design and implementation of sustainable development policies and programs at the hemispheric and national levels". Governments conferred responsibility on the OAS Unit for Sustainable Development to formulate a strategy but left it with no resources and no momentum. Instead the traders offered a FTAA Committee of Government Representatives on Civil Society that turned out to be little more than an electronic mail box.

We know that the NAFTA is as much an investment agreement as it is a trade liberalization agreement. We have the experience under NAFTA Chapter 11 with investor-state dispute settlement behind closed doors that undermine environmental and public health laws. And despite the unified voice of Canadians opposed to these investment protection rules in the absence of investor responsibility, the Canadian government continues to seek strong investor protection provisions in an FTAA.

The mandate of the FTAA Dispute Settlement Group is: "to establish a fair, transparent and effective mechanism for dispute settlement among FTAA countries" and "to design ways to facilitate and promote the use of arbitration and other alternative dispute settlement mechanisms, to solve private trade controversies in the framework of the FTAA". But in an effort to achieve sustainable development, why not make provision to allow public complaints to be brought against private parties who are responsible for substantive rights violation? Given the growing evidence that the current design of undisciplined trade agreements is contrary to notions of conservation, ecological protection and **environmental justice,** it is time to ensure a sustainable future for the planet, to attain social justice and human rights at home and in the Americas.

To conclude this part as well as these comments, while the FTAA ministers' decision to release the draft FTAA text is welcomed and the promise to direct civil society comments to the appropriate negotiating group is a start, these measures are likely not enough to sustain and improve communications with civil society. In the Canadian context, it is advised that the Department allocate resources to a recognized civil society organization to independently conduct a rigorous sustainability impact assessment of the proposed FTAA and invite Canadians to review the major findings as soon as possible.

Yours truly,

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