CIVILIZING GLOBALIZATION:
Trade and Environment, Thirteen Years On

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TABLE OF CONTENTS

Civilizing Globalization: Trade and Environment, Thirteen Years On

By Michelle Swenarchuk, March 7, 2001

1. Introduction

The environment and trade debate in Canada started in 1988, but for most countries, the establishment of the current international trade law regime, centered on the World Trade Organization agreements of 1994, initiated the debate on impacts on environment and labour. In capitals around the globe, the issues continue to demand attention. Unfortunately, little resolution of the questions has been achieved. Rather, ongoing dispute panels and trade negotiations magnify the negative environmental impacts flowing from the agreements.

Canada, a member together with the US, EU, and Japan of "the Quad", the group of leading members of the WTO, continues to demonstrate the ideological belief that "free trade raises all boats" and continues to pursue a one-dimensional trade policy oriented to maximum trade liberalization regardless of impacts on non-economic values.

This paper will review the origins of the problems in the wording of the agreements, the relevant dispute panel and arbitral panel cases, implications for domestic regulations and the strategies now being adopted by non-governmental organizations in response. Since the trade regime constitutes a powerful global constitution prescribing what governments are "permitted" to do, activists now speak not merely of "environment and trade" but of global governance.

2. Secrecy of WTO processes

One issue for which the trade regime has been consistently criticized is the secrecy of its negotiations and dispute resolution processes. Although there are various initiatives underway to increase transparency at the WTO through the release of some documentation, the current practice is to maintain confidentiality on ministerial deliberations, negotiations, and dispute panel processes. Citizens have no access so that though public protections are challenged in WTO dispute panels, they have no opportunity to participate, or even to observe the process.

Although the Canadian government has played a positive role in promoting greater transparency in the WTO, its initiatives do not extend to the negotiation process or to dispute panels. This is particularly unacceptable since the WTO trade rules actually constrain national governments from passing laws to protect the public. It is clear that the Department of Foreign Affairs and International Trade exchanges information with industry before and during negotiations and dispute settlement processes but not with other Canadians.

3. Impacts of trade agreements on environmental and health standards

The fundamental goal of the current international trade regime is to promote deregulated trade in goods, services, and investment through the removal of "barriers" to trade, both tariffs and "non-tariff barriers." Standards and regulations for all sectors of public protection, including environmental ones, (regarding pesticides, food and water safety, resource management) are frequently seen as non-tariff barriers to trade. Trade negotiators deliberately established "disciplines" on countries' scope to establish domestic standards. In both the WTO agreements and NAFTA, standard-setting is limited by the provisions of two chapters: Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Standards. (SPS).

The TBT provides an entire scheme for the setting of regulations and standards. It requires that they not have the effect of creating unnecessary obstacles to international trade, although they are permitted in order to meet legitimate objectives including "protection of human health or safety, animal or plant life or health, or the environment." With an emphasis on international harmonization of measures, the chapter requires that they should be based on science; and comply with international standards where such exist. Further, domestic standardizing bodies, both governmental and non-governmental, are to comply with the TBT and related Code of Good Practice. (TBT 4) The TBT recognizes the ISO, the International Organization for Standardization, as an international standard-setter. This is an international organization of national standardization bodies which has established standards for many goods, facilitating commerce through certifying goods. Its standards are voluntary, and participating countries obtain certification that their products comply with the standards established. The ISO does not monitor or accredit certification bodies.

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

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

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

4. Agreement on Intellectual Property Rights

This chapter of the WTO Agreements is an exception to the general liberalization tenets of the trade regime, since it imposes a positive duty on countries, requiring that a US-style intellectual property law be implemented globally, and including strict enforcement mechanisms to ensure compliance. Environmental and health concerns are focussed on the patent requirements in the Agreement[1] and their relation to the role of biotechnological products and the costs of patented pharmaceuticals. The current TRIPs Agreement permits countries to exempt animals and plants from patentability, but requires that they provide either patents or another property protection system for plant varieties.

The US is a world leader in allowing patents on living animals and plants, without even the slight possibility of ethical review of these decisions now possible under European law. The expansion of US-style patenting through the WTO Agreement, together with the aggressive marketing of drugs and genetically-modified crops by Northern corporations in the South, has spawned a global controversy regarding environmental, social, agricultural, and economic impacts. As the base of pharmaceutical giants, the US also actively intervenes to protect their dominance of world drug markets. This is causing growing conflicts regarding the costs of patented drugs as essential medicines remain unattainable in many developing countries.[2]

5. WTO cases on environment and health: the necessity test

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

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) provides in Article 2.1 that members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of the SPS. They may be applied only to the extent necessary (SPS 2.2) and SPS measures that conform to the agreement are presumed to comply with GATT 1994 Article XX(b) (SPS 2.4)

The Agreement on Technical Barriers to Trade provides in Article 2.2 that

technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, including national security requirements; the prevention of deceptive practices; protection of human health of safety, animal or plant life or health, or the environment.

GATT Article XX provides that countries may take measures necessary to protect public morals (XX a), human, animal or plant life or health (XX b), relating to conservation of exhaustible natural resources (if domestic restrictions are applied)(XX g) but they must be non-discriminatory, and not a disguised restriction on international trade.

These tests have been applied in numerous cases, both under the GATT (pre-1994) and the WTO, when "necessity" was raised as a defence or justification by a country whose measure had been challenged. In every case except the recently-decided *Asbestos* case, the defence of necessity, (however defined) was rejected.

Six Gatt cases are relevant[3]:

- 1982: a US import restriction on albacore tuna from Canada, imposed under the *Fishery Conservation and Management Act* was not justified under XX(g). The US had imposed the ban after Canada prevented US fishermen from fishing in waters it considered under Canadian jurisdiction.

- 1991: US prohibitions on imports from Mexico of tuna harvested with purse-seine nets causing dolphin deaths specified in the *Marine Mammals Protection Act* were not justified by GATT XX(b) (d) and (g). The *Act* provided that imports were banned from countries using fishing technologies resulting in a higher rate of dolphin deaths than occurred with US fishermen, and from countries importing tuna from those countries. ((primary nation and intermediary nation embargoes)

- 1994: The same US embargoes against imports from the EEC and the Netherlands were not justified by GATT XX (b) (g) or (d).

- 1988: *Canadian Fisheries Act* regulations prohibiting export of certain unprocessed salmon and herring could not be justified as a conservation tool under GATT XX (g) although Canada argued that they were part of a system of resource management designed to preserve fish stocks.

- 1990: Thailand's prohibitions on import of cigarettes were found not "necessary" within GATT XX (b) although chemicals and other additives in US cigarettes may have been more harmful than those in Thai cigarettes. (This case is particularly relevant now, since the major tobacco producers are targeting Southern countries to increase sales, and studies show that smoking increases in countries whose markets have been penetrated by the these corporations.[4] Import bans could be useful in slowing the increase in tobacco deaths in these countries.)

1994: the US CAFÉ regulation (Corporate Average Fuel Economy regulation) could not be justified under GATT XX(d). The regulation specified the permissible level of average fuel economy for passenger cars, both imported and domestic, but the trade panel ruled that elements of the accounting and averaging discriminated against foreign producers.

Five WTO cases (post-1994) are relevant:

- 1996: US Regulations under the *Clean Air Act* regarding composition of gasoline auto emissions designed to reduce air pollution were found contrary to GATT III by both the Panel and Appellate Body. The Panel found the regulations could not be justified under GATT XX (b), (d) or (g). The Appellate Body held that the regulations fell under XX (g) but did not satisfy the chapeau of the article (the introductory wording) prohibiting "disguised restriction(s) on trade.)

- 1998: EC measures to ban certain hormones in beef were challenged by both the US and Canada. The case was decided under the SPS chapter, and both the WTO Panel and Appellate Body found the EC's ban on certain hormone-treated beef was inconsistent with the EC's obligations under the SPS. Although the Panel and Appellate Body decisions differed in some respects, the Appellate Body upheld the Panel's ruling that the EC measure was unjustifiable as it was not "based on" a risk assessment. (Despite the decision, the EC has not revoked the ban, and is currently subject to trade sanctions from the US).

- 1998: US prohibitions under the *Endangered Species Act* on shrimp imports caught without turtle excluder devices could not be justified under GATT XX , either because it did not satisfy XX (g) (in the Panel's opinion) or because it did not satisfy the chapeau of GATT XX (the Appellate Body's decision). This is the case that provoked the "turtle" protestors in Seattle at the WTO Ministerial debacle of December 1999.

- 1998: Australian) Australia's quarantine restrictions on certain salmon imports were found inconsistent with the SPS on the basis of available scientific evidence.

- 2000: EC: In the only case to uphold a defence based on the necessity test, the panel found that a French directive banning chrysotile asbestos, challenged by Canada, is justifiable under GATT XX(b) and the chapeau of the article. However, the Panel also found that asbestos products are "like" products to those substitutes which are less carcinogenic. The decision has been appealed to the Appellate Body.

Of these eleven cases, ten held that the challenged measure could not be maintained. The last case, the Asbestos case, is not yet concluded, having been appealed by Canada to the Appellate Body. It appears to turn on the existence of international standards for asbestos, rather than affirming the right of France and the EC to legislate for public health. Further, in holding that products containing asbestos are "like products" to alternatives selected because they are less carcinogenic, the Panel has set back moves to

clean technologies and set the stage for further challenges against measures to phase out environmentally-damaging products.

This jurisprudence demonstrates that it is virtually impossible for a country to justify a challenged measure as "necessary", even one that concerns health or the environment, which are "legitimate objectives" in the TBT, SPS and in the "General Exception," GATT XX. The existence of one panel decision in favour of a challenged measure , a decision disputed by the Canadian government, does not detract from the necessary conclusion that "necessity" tests cannot be a reliable basis of defence for important standards for public protection.

6. General Agreement on Trade in Services: negotiations concerning domestic regulations under GATS Article VI(4)

In the current preparatory negotiations on services (part of the "built-in" agenda at the WTO) governments are developing positions regarding GATS Article VI(4) which requires the development of "disciplines" on countries' domestic regulations over services. Specifically, the article seeks to prevent "unnecessary barriers to trade" in regulations regarding "qualification requirements and procedures, technical standards and licensing requirements" and to ensure that regulations are "not more burdensome than necessary to ensure the quality of the service."

In public consultation meetings, Canadian negotiators have admitted that Canada intends to develop its position for these negotiations without conducting a full review of the regulatory framework in Canada (federal, provincial, and municipal) which may be affected by the results. Such a review would demonstrate that the regulatory framework provides essential protections which should not be subject to WTO interference.

In addition, Canada intends to rely on the "necessity" test, discussed above, to defend any domestic regulations which may be challenged in the future. However, the "necessity" test is a deficient and discredited defence, having been rejected by GATT and WTO decision panels in all but one case.

Furthermore, the GATS term "not more burdensome than necessary " is so vague and inappropriate, as a criterion of measurement of public protections, that it invites biased decision-making in favour of strictly economic interests. There is no articulated standard for measuring "burdensome." Does it include measures that add mere inconvenience to potential exporters, or must it entail significant costs or even serious disadvantage? The Canadian government has not indicated what meaning it considers applicable to these discussions, or whether there is an agreed definition amongst negotiators (not that such an agreement would bind future panels) and if so, what the agreed definition is.

The concept of regulations being burdensome conflicts with he increasing relevance of precaution in regulation-making for environment and human health. Application of a precautionary principle or approach involves taking steps to prevent or minimize harm when a risk has become apparent, even though scientific uncertainty exists regarding

some elements of the risk and the cause-effect relationships that produce it. Technical standards implemented on a precautionary basis are likely to be particularly vulnerable to a finding that they are unnecessarily burdensome.

A trade panel in Geneva can hardly be deemed competent to judge what "burdensome" means in any country in the world, and what is" necessary" in the myriad details of culture and ecosystem specific technical regulations which governments implement for public protection.

To illustrate the type of Canadian domestic environmental regulations may be at risk if GATS disciplines are expanded, we may consider Ontario regulations on water safety (pollution oriented) and forest management (resource extraction).

A representative example of Canadian health and environmental regulations pertaining to water exists in *Ontario Regulation* 459/00, *Regulation Made Under the Ontario Water Resources Act* entitled *Drinking Water Protection.* The regulation is considered necessary in the wake of the Walkerton tragedy, where seven people died and two thousand became ill due to contaminated water. The regulation prescribes the minimum acceptable level of treatment of water, whether from surface or ground water source, and provides standards (parameters) for sampling and analysis, (Sec.7 and Schedule 2)) and for experience, education and /or training of those service-providers who do the sampling (7c ii A and B).

Schedule 2, Sampling and Analysis Requirements includes extensive details regarding how samples are to be taken for testing for various factors (microbiological, turbidity, chlorine residual, flouride, volatile organics, inorganics, nitrates/nitrites, pesticides and PCBs. Schedule 6 includes "Indicators of Adverse Water Quality" together with required corrective actions and notifications to relevant authorities. Section 7 (8) prohibits the owner of water treatment or distribution system from using a laboratory outside Ontario unless it is accredited for the particular parameter tests, has a copy of the regulation and drinking water standards and agrees to comply with notification requirements in the Regulation. (7 (8). The Regulation requires immediate reporting of test results that exceed specific parameters to the Ministry of Health and Ministry of Environment verbally and in writing and prescribes corrective actions for excedences including re-sampling and warning notices. There are also requirements for public information, and quarterly reports to the Ministry of Environment. (Sections 11 and 12)

Section 13 refers to the professional accreditation of the writers of the reports; the writer: must be a professional engineer "as defined in the *Professional Engineers Act w*ho has experience in sanitary engineering related to drinking water supplies and who is not an employee of the owner." (Section 13 (2) There are differing and specific reporting requirements depending on the category of water treatment or distribution system.

In summary, Canada has detailed domestic technical regulations regarding services related to water that cover both the method of sampling and inspection, reporting to the government and the public, and who may perform certain functions (engineers with

accreditation and experience). These regulations fall within the GATS term "qualification requirements and procedures, technical standards and licensing requirements."

7. Forestry-related services

The production of forest products entails many services which are regulated by the provincial government owners of our public forests. Requirements of the *Crown Forest Sustainability Act of* Ontario (S.O.1994, Chapter 25) are representative of provincial regimes in the major forest-producing provinces of Canada.

The Act prescribes a series of activities for forest management, including; developing a management plan for a given area of forest land, to govern road building for access, areas to be logged, logging techniques, biodiversity (wildlife) protections, silviculture (re-forestation) and pesticide applications. To conduct the planning exercise (a service) requires numerous other services, including: collection and analysis of forest stand data; collection of relevant data for road placement; collection and analysis of data concerning geology, soils, and forest species; biodiversity identification and protection planning; public consultation processes, etc. (Sections 7 to 18)
The process is regulated through comprehensive detailed manuals mandated by the Act, including the Forest Management Planning Manual, (Section 8 and 68), the Forest Operations and Silviculture Manual (Section 43 and 68), the Forest Information Manual, (Section 68) and the Scaling Manual (Section 68. These manuals sometimes are supplemented by numerous additional ones, such as species-specific manuals for wildlife protection.

The manuals set standards (requirements) for how the services are to be carried out, for the accuracy of information to be collected, and in some cases, for the required results. For example, silviculture (planting) must result in specified levels of stocking.

The Act authorizes regulations regarding the manuals, and also for licensing forest lands and mills, record-keeping, auditing, etc. Both the Act and regulations specify that certain forest-related functions must be performed by accredited individuals, including certification of forest management plans by professional foresters. (Section 8(3)

In summary, the Act provides an extensive regulatory framework for the provision of services relating to forestry including specific standards for quality (stocking levels for silviculture) and professional accreditation requirements for various service-providers. Environmental protection involves both pollution controls and resource use and conservation. The forest-related services regulations are indicative of the importance of standard-setting regarding resource extraction. Regimes regulating other Canadian resource sectors also exist.

These few examples of regulation of services are meant to provide an illustration (only) of the extent to which such regulatory standards exist and are important components of public policy in Canada. Services negotiators need to review fully all sectors of governmental activity to have a comprehensive view of what is at stake.

Citizens have reason to be concerned at the apparent lack of such a comprehensive review by DFAIT and Industry Canada, and at their stated intention to rely on the "necessity" test as a potential future defence of Canadian domestic measures. Such a defence is clearly non-existent. Given the lessons to be learnt from decided trade cases, Canadian service negotiators should not support the development of any increased disciplines over domestic regulation under GATS VI(4) or in any other aspect of current negotiations. There should be no role for the WTO in over-seeing non-discriminatory domestic regulations (those which do not discriminate in standards and qualifications based on nationality.) This exercise represents a unwarranted intrusion of trade law into another area if important domestic public safety laws.

8. NAFTA Chapter 11 - Investor-state cases to date

The most notorious source of conflict between environmental laws and trade and investment agreements has resulted from NAFTA Chapter 11, the investment chapter, whose potential effects were not foreseen by environmentalists when NAFTA was implemented in 1994.

The chapter significantly reduces the authority of governments to attach conditions to foreign investment to provide local benefits. It prohibits governments from imposing "performance requirements[5]" such as that foreign investors include domestic content and purchasing, that levels of imports and exports and local sales relate to foreign exchange flows, and that investors transfer technology, production processes or other business knowledge to the receiving country.

The chapter also allows investors to sue national governments directly for virtually any action which decreases its expected profits, alleging expropriation or "measures tantamount" to expropriation.[6] Countries are permitted to take such measures for public purposes, on a non-discriminatory basis, after due process of law, but only if they pay compensation to the foreign investor.

At the time of the negotiations for the Multilateral Agreement on Investment (MAI), only one case had been commenced, the Ethyl case against Canada, and its existence constituted a potent argument against the similarly-worded MAI.[7] As I observed, it caused consternation amongst MAI negotiators at a meeting with NGOS at the Organization of Economic Co-operation and Development in Paris in October 1997. I was the NGO delegate tasked with the responsibility of arguing the expropriation issue with the diplomats present. As Jan Huner, secretary to the chair of the MAI negotiations later reported:

> Thus, a meeting with NGO's was called on 27 October 1997. This would prove to be a memorable and decisive event, for a variety of reasons. Memorable, because some 50 NGO participants took part, representing a wide range of interests and a wide range of intensity of opposition to the MAI. Memorable also because the NGO's in spite of their differences, managed to agree on a single moderator on

their behalf. This had in fact been requested by Frans Engering, because it seemed the only way to conduct an efficient and productive meeting. …

Decisive, because some of the points raised by environmental groups convinced many NG (Negotiating Group) members that a few draft provisions, particularly those on expropriation and on performance requirements, could be interpreted in unexpected ways. The dispute between the Ethyl Corporation of the US and the Canadian Government illustrated that the MAI negotiators should think twice before copying the expropriation provisions of the NAFTA. Ethyl considered that the Canadian ban on a certain additive for petrol amounted to an expropriation, mainly because it was the only producer of this additive. Canada eventually went for a settlement which reportedly involved the sum of $ 13 million. This surprised not a few observers, because Canada was expected to win the dispute. This settlement was invoked by NGOs to demonstrate the need for clarity in the MAI as to what expropriation really means. Above all, they insisted that the MAI should clearly state that the expropriation clause can never be interpreted to prevent governments from adopting rules and regulations on environmental protection.

Ignoring, for the moment, the patronizing attitude to NGOs, in Huner's statement, his report confirms that some governments could see the danger of even one such expropriation claim.

There are now 12 investment cases, based on arguments that would not give rise to expropriation claims in Canadian domestic law,[8] six of which concern environmental measures. Since they are conducted in confidential arbitral processes, inaccessible to public scrutiny and participation, (in contrast to proceedings in domestic courts which are open) information on ongoing cases is sketchy. However, the available information is summarized below.

9. Suits against Canada

Ethyl Corporation

In this first and best-known investor-state case, Ethyl Corporation of the US sued the Canadian government for US $250 million and obtained, in 1998, a settlement of US $13 million for the Canadian ban on the gasoline additive, MMT, a nerve toxin. The ban was reversed. The proceedings were conducted in secret, in accordance with the NAFTA Investment chapter provisions, were widely criticized in Canada, and provided a rude awakening to other governments regarding the impacts of the NAFTA expropriation provision. They also resulted in a direct reduction of Canadian health and environmental protections.

S.D. Myers

In October 1998, US-based S. D. Myers Inc., which treats transformers containing toxic PCBs, filed a claim for US $30 million for losses it claims to have incurred during a one and one half year ban (1995 to 1997) on the export of PCB wastes from Canada.[9] The Canadian federal government states that Canada is bound by international conventions that stipulate that PCBs must be destroyed in an environmentally sound manner, and that US standards for PCB disposal are not as high as Canada's. The wastes were destroyed in a Canadian facility in Alberta, and the export ban was revoked in 1997. The US government also controls cross-border movement of PCBs. In November of 2000, the arbitral tribunal found that the ban did contravene the investment chapter regarding national treatment and minimum standards of treatment of foreign investors, and it is now determining whether S.D. Myers suffered damages. In the meantime, the Canadian government has applied to the (domestic) Federal Court to have the tribunal's partial award set aside[10]arguing that the case concerned cross-border trade, not a Canadian investment, and that the award conflicts with a well-established Canadian policy requiring disposal of PCBs and PCB wastes in Canada to comply with the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*

Sun Belt Water Inc.

This California-based company is suing Canada[11] for the decision of the provincial government of British Columbia to refuse consent for the company to export bulk water from B.C. The government subsequently enacted the Water Protection Act which bans bulk water exports and inter-basin diversions by domestic and foreign investors alike. In a "colourful" claim which alleges a decade of "smelly" actions by successive BC governments, Sun Belt Water expounds on the growing world-wide demand for water, assumes that water export must be a positive benefit (ignoring environmental and conservation requirements) and makes extravagant claims of improprieties by the BC government and BC courts. In a BC court action, Sun Belt did not achieve its desired result. It is therefore using NAFTA Chapter 11 to seek damages of "between 1 and 10.5 billion" US dollars. Besides using the investment chapter for very dubious business practices, the case raises the fundamental issues of the uses of the investment chapter to evade the result of an action in a domestic court, and to challenge a non-discriminatory policy and legislation by a subnational (provincial) government. The BC government is deeply concerned about this threat to its resource management and conservation laws.

Pope and Talbot

This US based lumber company has sued Canada, claiming approximately US $510 million for alleged breaches of the NAFTA investment chapter related to changes in the profitability of its timber export business in Canada. [12] Softwood lumber exports from Canada to the US have been a source of contention and repeated trade disputes for decades. Forest products are amongst the most important exports from Canada,

representing billions of dollars in export earnings, and over 90% of these products are exported to the US. In 1996, in yet another attempt to resolve the ongoing timber wars, the Canadian and US federal governments signed the Canada-US *Softwood Lumber Agreement*, governing exports of softwood lumber from four Canadian provinces, British Columbia, Alberta, Ontario and Quebec. The agreement, which will expire at the end of March, 2001, establishes quotas for exports for each province, and requires producers to provide certain information regarding exports and pay an export levy if their exports exceed their particular quota. In arriving at such export agreements, the Canadian government consults extensively with industry.

Pope and Talbot claimed that Canada has breached the NAFTA investment requirements regarding national treatment, most-favoured nation treatment, minimum standard of treatment, and performance requirements. The company's lawyers are critical of the Canadian government for its public release of the Notice of Intent to Submit a Claim, calling the release " serious breach of international procedure."

Pope and Talbot's operations are located in British Columbia. During the period of the softwood memorandum, BC's share of total softwood exports has declined relative to total Canadian softwood exports; Pope and Talbot argue that this decline is related to the agreement, and amounts to a breach of the NAFTA chapter. (Others point to the loss of BC's traditional markets in Asia, related to the Asian economic crisis.)
In an interim award[13], the tribunal rejected the claim that expropriation had occurred, but decided to continue hearings on claims relating to national treatment and minimum standards of treatment.

The importance of this case for Canadian forests and government regulation of them cannot be over-estimated. Given the economic value of forest products to Canada, and the volatility of the US market due to US domestic forest producers' lobbies, this case touches on one of the cornerstones of the Canadian economy, and on a decision made by six governments: two federal ones and four provincial ones. It is an important indication of how far-reaching the impacts of the NAFTA investment chapter are and of how broadly multiple governmental powers and decisions may be challenged by an individual corporation for a huge compensatory claim.

United Parcel Service

UPS has filed a notice of intent to sue Canada for $100 million, alleging that Canada favours the public postal service, Canada Post, regarding provision of courier services. Specifically, UPS alleges that Canada Post has used its "letter mail monopoly infrastructure" to cross-subsidize its non-monopoly courier businesses in violation of NAFTA 1502(3)(d) and 1502(3)(a); and that UPS has been denied national treatment and the required minimum standard of treatment. The Canadian Union of Postal Workers and Council of Canadians attempted to intervene in the proceedings but have received no response to their request.[14] Their public policy arguments centre on the right of a national government to organize postal services with integrated mail, courier and package

delivery services in order to ensure that all areas of the country, including rural areas, retain access to affordable mail, parcel and courier services.

10. Suits Against the US

Loewen

In this case filed against the US government, B.C. based Loewen Group is suing for compensation arising from alleged discrimination, denial of minimum standard of treatment and expropriation, claiming that a $500 million Mississippi state court verdict against it amounts to a breach of NAFTA. [15] The case involved competition between Loewen and a Mississippi company, O'Keefe, including allegations of fraudulent practices made against Loewen, and was eventually settled for $175 million. Loewen was denied an appeal of the court decision due to a state law which requires an appellant to post 125 percent of the damage award ($625 million in this case) which Loewen could not post. It seeks to recover $775 million in damages, interest and legal expenses through this investor-state claim and alleges that the Mississippi decision against it was based on anti-Canadian bias. A tribunal has agreed to hear the case.[16]
This case demonstrates, as does Sun Belt, the use by a corporation of the NAFTA Investment chapter essentially to reverse the results of domestic court proceedings, and to circumvent the course of normal commercial civil litigation. Having lost to a competitor in the courts, it claims compensation from the US federal government.

Methanex Corp.

In June 1999, this Vancouver-based company announced that it will sue the US government for $US970 million due to a California order to phase out use of the chemical MTBE (methyl tertiary butyl) a methanol-based gas additive, by late 2002. The California governor called MTBE "a significant risk to California's environment" due to concerns that it is polluting water. Other US states, including Maine, are apparently considering phasing it out. Methanex claims its share price and potential revenues have been drastically affected by the controversy, amounting to an expropriation of its future profits due to lower sales, lower product prices and higher costs.

MTBE was introduced in fuel in the mid-1990s to increase the efficiency of fuel burning and decrease pollution, but there were concerns that leaking underground storage tanks would contaminate groundwater. Studies have shown that it is leaking into as many as 10,000 groundwater sites, costing as much as $1 million per site to clean up.

In a letter of January 31, 2001, to US Trade Representative Robert Zoellick, fourteen California assembly members and senators expressed concern regarding the Methanex case, noting that both houses had passed resolutions in which:

> California legislators of both parties communicated their misgivings about this challenge. We find it disconcerting that our democratic decision-making regarding this important public health issue is being second-guessed in a distant

> forum by un-elected officials….Secondly, we as California legislators, find it problematic to be told by remote and un-elected trade officials what paradigms or standards we must apply in writing environmental and public health laws for the people of our state. We further believe that since decisions about the level of risk to which a populace shall be exposed are ultimately a matter of values, such decisions are best made by elected officials in accessible and democratic fora.[17]

Mondev

In September 1999, Mondev International Ltd, a Montreal-based real estate development firm, filed a claim against the US government for $US 16 million. The case arises from the refusal of the city of Boston to permit it to expand a mall into a vacant lot in the 1980s although Mondev had a contract with the city. Mondev successfully sued the city and its redevelopment authority for $16 million, but the court decision was reversed on appeal due to state law protecting the redevelopment authority from liability. Mondev seeks to recover the damages through the NAFTA Chapter 11 investor-state route. Like Loewen and Sun Belt, the company is using the investment agreement to circumvent a decision of the domestic legal system.

11. Suits Against Mexico

Metalclad

This case involves a claim by US-based Metalclad, a waste-disposal company, that the Mexican state of San Luis Potosi breached Chapter 11 of NAFTA in refusing permission for a waste disposal facility. According to Preamble Center for Public Policy[18] the Governor deemed the plant an environmental hazard to surrounding communities, and ordered it closed down on the basis of a geological audit performed by environmental impact analysts at the University of San Luis Potosi, The study had found that the facility is located on an alluvial stream and therefore would contaminate the local water supply. Eventually, the Governor declared the site part of a 600,000 acre ecological zone. Metalclad sought compensation of some $90 million for expropriation and for violations of national treatment, most favored nation treatment and prohibitions on performance requirements. This figure is larger than the combined annual income of every family in the county where Metalclad's facility is located.

In August 2000, a tribunal found that Mexico had breached the Investment chapter and awarded Metalclad $US 16.7 million, the amount it had spent in the matter. In this case, Metalclad proceeded to begin construction of the facility without having local approvals, claiming that it had assurances from the Mexican federal government. The case raises important questions about whether governments retain the authority to enact environmental controls on foreign investors and about the powers of local governments.

As counsel involved frequently in environmental assessment hearings regarding the siting of waste management facilities in Ontario, we are aware that the hydrogeology of a site is

usually the most important single condition to be considered in environmental assessment of potential waste sites.

The Mexican government has appealed the award to the Supreme Court of British Columbia, since hearings of the case were held in British Columbia, and the Canadian government and government of Quebec have intervened.[19] An application to intervene from the Canadian Union of Public Employees was refused. The appeal is ongoing.

Waste Management Inc.

This case involves a claim filed in 1998 against the Mexican government for $US 60 million by Waste Management Inc.[20] (successor to USA Waste Services). It concerns an exclusive 15-year concession to its subsidiary to provide solid waste management to Acapulco. The company claims that it was guaranteed payment by the state of Guerrero and the Mexican federal development bank, Banobras, and that the obligations have not been met, constituting actions tantamount to expropriation.

Desona/Azinian

This was a claim for over $US 14 million and costs filed in 1997 against the Government of Mexico by US-based DESONA and its individual investors, Robert Azinian et al, resulting from a waste management business in Mexico. Desona claimed that a long series of unfair and conflicting decisions and actions by local authorities contributed to its losses, and culminated in the forcible removal of its managers from its waste collection and landfill business in Naucalpan, a suburb of Mexico City on four days notice. The case was dismissed by the arbitral panel in November, 1999, in a scathing decision, critical of the company's actions and record of dishonesty. However, since the case turned on the finding of invalidity of the contract on which the claim was based, it does not assist governments and citizens regarding the problem of the impact of Chapter 11 claims on legitimate legislative actions. [21]

Censa/Feldman

This is the first NAFTA investor-state suit involving a tax issue. US investor Feldman, sole owner of the corporation CEMSA, filed a claim against the Mexican government in May 1999 for $US 50 million, alleging that his company was wrongly denied excise tax rebates and export rights for its cigarette exporting business. Again, allegations of numerous irregular actions by Mexican authorities are made, including that CEMSA was required to provide invoices from its vendors which stated the amount of tax included in the purchase price. However, CEMSA claims that the tax authorities did not require that manufacturers provide this information, so that CEMSA could not comply with the requirement.

12. Investor-state implications

Information on these cases remains sketchy, since the rules of NAFTA preclude significant disclosure of the proceedings, Of the twelve cases, eight deal with businesses with environmental implications, specifically: toxics and waste management:(Ethyl, S.D. Myers, Methanex, Metalclad, Waste Management, and Desona); and resource management (Sun Belt, Pope and Talbot) Three cases involve attempts to circumvent domestic court decisions: Loewen, Sun Belt, and Mondev.

Due to the number of cases against Canada and the political pressure of NGO criticisms of the investment chapter, the Canadian government attempted to negotiate with the US and Mexican governments in 1999 to amend the investor-state expropriation wording or limit the scope of its impact. Specifically, Canada attempted to limit the chapter to ensure that normal regulatory measures by government would not be compensable. At this time, the international jurisprudence has no established limits on the types of actions that may give rise to claims. However, these attempts were not successful. Canada is now attempting to use court interventions and has resumed efforts to convince the NAFTA partners to act jointly, at least to issue an agreed interpretation of the investment chapter wording to limit the types and breadth of claims.

13. NGO Strategies for Civilizing Globalization

Although media attention to "civil society" on questions of globalization is dominated by coverage of demonstrations and conflict, NGOs around the globe are pursuing a range of strategies to constrain and contain global trade and investment agreements.

14. Textual analysis and access to negotiations

The basis of dissent, from Canada in 1988 to the globe in this era, is informed analysis and understanding of the terms of the agreements, and this work continues. Accompanying this work, increasingly, are critiques of the secrecy of negotiations and dispute settlement, coupled with demands for citizens' access to both. Both the NAFTA and MAI were leaked, late in the negotiation process. The "porous" quality of US government provided many unique sources of trade policy information in the 1990s, and now, the number and variety of negotiations occurring globally make "leakage" almost inevitable. Groups around the world now demand release of negotiating texts earlier, as a matter of democratic participation and accountability, to enable citizens' interventions in individual countries and internationally before governments make key decisions. For example, demands for release of the negotiating texts for the Free Trade Area of the Americas are being co-ordinated by groups operating across the Western hemisphere. Preparations for services negotiations at the WTO are accompanied by citizens' close scrutiny of their governments' positions and pressure for access to official texts.

The impact of informed citizens' critiques was demonstrated and acknowledged by European diplomats during the MAI process, when French officials even recommended

to the French government that it engage more lawyers and analysts to deepen its own understanding .[22]

Citizens also want a presence at negotiation sessions. The system of negotiations for United Nations conventions offers an alternative approach to international treaty-making, which makes the secrecy of trade negotiations appear less and less credible. Typical of the UN approach was the development of the *Cartagena Protocol on Biosafety*, concluded in Montreal in January 2000 under the *Convention on Biological Diversity*. The Protocol is explicitly both a trade and environmental treaty, being concerned with the use and transboundary movements of living genetically-modified organisms. Trade interests played a prominent role in the negotiations. Nevertheless, in keeping with UN processes, the negotiations were conducted in open sessions, which NGOs could attend. They had full access to negotiating texts, in six languages, and could speak in plenary sessions. Though in many negotiation meetings, only government officials spoke, NGOs could also attend the sessions, and access to the public was limited only by the size of the rooms, not by policies of secrecy. NGOs were also free to meet with government officials outside of the negotiation sessions to lobby them, and could conduct press briefings and demonstrations outside the buildings (in the minus 40 degree temperatures.) They provided many scientific and technical briefings in the UN building and valuable material and technical support to delegates, particularly from developing countries.[23] No windows were broken; no security costs were incurred; and a treaty was successfully concluded.

15. Access to dispute settlement processes

As noted above, Canadian organizations have attempted to intervene in NAFTA investment dispute processes, both at the tribunal and domestic court levels, without success. Similarly, NGOs have filed *amicus* ("friend of the court) briefs in WTO dispute panels since the WTO Appellate Body decided in 1998 that dispute panels could consider such submissions. However, in late 2000, after the Appellate Body decided that it could also accept *amicus* briefs and issued procedural guidelines for groups wishing to be heard on the appeal of the Asbestos case, Egypt and other developing countries called for a special session of the WTO General Council to oppose the decisions. [24] The Appellate Body's instructions provided strict limits on the form and content of briefs, but WTO member countries considered that extending intervention rights to NGOs conflicts with the government-to-government structure of the WTO, and gives NGOs rights exceeding those of WTO member governments. The dispute panels will only hear submissions from parties (the countries in which the trade dispute is occurring) and additional countries which demonstrate a substantive trade interest in the dispute. Countries may not join the Appellate Body hearings unless they were parties before the panel whose decision is being appealed. Thus, countries object to NGOs gaining the right to provide submissions directly to the Appellate Body. The General Council meeting was highly acrimonious, and members blasted the Appellate Body for its actions. It appears that all NGO requests to be heard on the Asbestos case were subsequently refused, and thus, the foreseeable future for this NGO strategy appears dim.

16. Restraining the trade regime through new international law

As the impacts of the Uruguay Round of trade negotiations filter down to countries and communities, both some governments and citizens' organizations recognize a need to restrain their effects on numerous sectors of human values, broadly grouped as issues of environmental protection, human rights, health, and labour policy. Given the near impossibility of amending the WTO agreements, which would require the consensus of 140 countries, initiatives to build other international law multiply together with attempts to achieve primacy over WTO agreements by existing laws. Regarding the relationship of trade law and human rights law, it has been argued that:

In the event of a conflict between a universally recognized human right and a commitment ensuing from international treaty law such as a trade agreement, the latter must be interpreted to be consistent with the former. When properly interpreted and applied, the trade regime recognizes that human rights are fundamental and prior to free trade itself.[25]

In negotiating both the *Cartagena Protocol Biosafety* and the *Convention on Persistent Organic Pollutants* (POPs) in 2000, officials were faced with positions from leading WTO trading countries, including Canada, that in the event of disputes under the agreements, WTO primacy would be preserved through wording specifying that the rights and obligations of parties, under any other international agreements to which they were parties, would not be affected by these treaties. In both cases, this extreme position was rejected.

The final *Biosafety Protocol* does not include any trade language in the body of the convention; in the final midnight hours of negotiation, it was moved into the Preamble, where it has less enforceable effect, and was much qualified to read:

> Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,
> Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a party under any existing international agreements,
> Understanding that the above recital is not intended to subordinate this Protocol to other international agreements…

Further, the Protocol continued the important move to a standard of precaution in environmental decision-making, specifying:

> Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that party from taking a decision, as appropriate, with regard to the import of the living modified organism in question …in order to avoid or minimize such potential adverse effects.[26]

In the POPs Convention, the trade language also appears only in the Preamble, in a shorter form:

> Recognizing that this Convention and other international agreements in the field of trade and the environment are mutually supportive…

Reference to precaution appears in the Objective of the Convention:

> Mindful of the precautionary approach as set forth in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Convention if to protect human health and the environment from persistent organic pollutants.[27]

The *Biosafety Protocol* also includes a possible strategy for protection of domestic decision-making from trade challenges, since the regime it envisages for regulation of genetically-modified organisms is complex, and will permit countries to continue to regulate this trade under current domestic regimes. Both Canada and the EU can be expected to do so. If decisions under these regimes are challenged at the WTO (a realistic possibility given continuing disputes between the EU and the US) the EU may invoke the *Biosafety Protocol* as a "safety blanket" or shield in international law, supporting its decisions vis a vis the WTO. In short, the multiple approaches of the Protocol offer ideas for constraining the \WTO's incursions into national laws, passed in the normal democratic process.

17. Conclusion

Although discussions of trade and environment issues grind on in the Committee on Trade and Environment at the WTO and at the NAFTA Commission on Environmental Co-operation, these institutions have delivered no concrete solutions to the accelerating global environmental decline. Few citizens now expect to see solutions to these issues in high-level policy discussions mandated by trade organizations. Rather, they have turned instead to strategies of intervention in the fora and venues where there is scope for creativity not constrained by the rigidities and non-democratic values of the trade regime, in particular, through building UN law and institutions. With all their faults, they continue to offer many of our best options for civilizing globalization.

ENDNOTES

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

[2] See, for example, the Statement from Medecins Sans Frontieres, Campaign for Access to Essential Medicines at the Health Issues Group Director General Trade, Brussels, 26 June 2000, file://A:\msfdrugprices.htm

[3] The cases to March 1999 are summarized in *Background Document to the WTO High Level Symposium on Trade and Environment,* www.wto.org/english/tratop_e?envir_e?tr_envbadoc2.doc

[4] Allyn Taylor, Fank Chaloupka, Emmanuel Guindon and Michaelyn Corbett, "The Impact of trade liberalization on tobacco consumption," in Prabhat Jha and Frank Chaloupka (eds) *Tobacco Control in Developing Countries*. Oxford University Press, 2000, 343-364.

[5] NAFTA 1106.

[6] NAFTA 1110.

[7] Jan Huner, "Trade, Investment and the Environment," Royal Institute for Internal Affairs, Chatham House, 27-30 October, 1998.

[8] Richard Lindgren and Karen Clark, "Property Rights vs. Land Use Regulation: Debunking the Myth of "Expropriation Without Compensation," Canadian Environmental Law Association, February, 1994

[9] "Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter 11 of the North American Free Trade Agreement" Americas Trade, September 3, 1998; Toronto Globe and Mail, 'US Firm hits Ottawa with NAFTA lawsuit' August 21, 1998; and Canadian Press, "US company files suit under NAFTA," by Nahlah Ayed, October 30, l998.

[10]Canada, Department of Foreign Affairs and International Trade "Canada Seeks Review of NAFTA Award in S.D. Myers Case, February 8, 2001, Document No. iwp2001_0714, and Inside US Trade, "Canada looks to its Courts to Limit NAFTA Investor-State Disputes" February 23, 2001.

[11]"Notice of Intent to Submit a Claim to Arbitration between Sun Belt Water, Inc. and Her Majesty the Queen in Right of Canada" November 27, l998.

[12]Pope and Talbot Inc. Investor v. Government of Canada "Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement", in Americas Trade, March 25, l999, pp. 7-8.

[13]"Between Pope & Talbot Inc. and The Government of Canada, Interim Award for Arbitral Tribunal", June 26, 2000.

[14]United parcel Service of America Inc. and the Government of Canada, Petition to the Arbitral Tribunal, Submission of the Canadian Union of Postal Workers and the Council of Canadians, November 8, 2000.

[15]Americas Trade, "In NAFTA first, Canadian Firm Challenges US on Investment Loss," November 26, l998, pp.1, 20-21.

[16]Toronto Globe and Mail, "Loewen files for damages under NAFTA," March 1, 2001.

[17]Letter of January 31, 2001 to MR. Robert Zoellick, US Trade Representative, from California Speaker Fred Keeley (D) and others.

[18]Michelle Sforza and Scott Nova, "The MAI and the Environment," October 1997, Washington, D.C.; Preamble Center for Public Policy.

[19]Supreme Court of British Columbia, No. L002904, In the Matter of an Arbitration Pursuant to Chapter 11 of the North American Free Trade Agreement, Between Metalclad Corporation and the United Mexican States, ICSID Additional Facility Case No. Arb.(Af)/97/1. The appeal is based on NAFTA 1136.

[20]Americas Trade, "Trade Lawyers Clash on Changes to NAFTA Investor-State Clause," March 25, l999, pp.5-6.

[21]Robert Azinian, Kenneth Davitan, Ellen Baca (Owners of Desona) Claimants and The United States of Mexico, (Respondent); Award of Arbitral Tribunal issued at Toronto, November 1, 1999 dismissing the claim.

[22]Catherine Lalumiere, Jean-Pierre Landau and Emmanuel Glimet, The Multilateral Agreement on Investment: Report on the Multilateral Agreement on Investment (MAI) Interim Report, September 1998. Published by the Ministry of the Economy, Finance and Industry, Republic of France, paris, 1998. Available at http://www.finances.gouv.fr/pole_ecofin/international/ami0998/ami0998/htm
Even I, with long experience of the predominant public view of lawyers, never venture to recommend hiring more.

[23]Tewolde Berhan G. Egziabher, Civil Society and the Cartagena Protocol on Biosafety, prepared for Forum 2000, (Oct.1-3,2000) Montreal.

[24]Bridges, "Amicus Brief Storm Highlights WTO's Unease with External Transparancy," Year 4,No.9, November-December, 2000, p.1,4 and Appellate Body document WT/DS135/9.

[25]Robert Howse and Makau Mutua, Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization, International Centre for Human Rights and Democratic Development, Montreal, 2000, p.5.

[26]Cartagena Protocol on Biosafety, Article 6.

[27]Draft Stockholm Convention on Persistent Organic Pollutants, Clause B.