

**SUBMISSION TO
THE DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE
ON THE FREE TRADE AREA OF THE AMERICAS
BY THE CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY
(CIELAP)**

**Prepared by Anne Mitchell, Executive Director
with the assistance of Michelle Gibo, Masters Student,
Department of Environmental Studies, York University**

APRIL 1999

CIELAP Shelf:
Canadian Institute for Environmental Law and Policy;
Mitchell, Anne; Gibo, Michelle
Submission To The Department Of Foreign Affairs And
International Trade On The Free Trade Area Of The

RN 27182

TABLE OF CONTENTS

- I Background on the Canadian Institute for Environmental Law and Policy
- II Why CIELAP is Interested in This Issue
- III Background on the FTAA
- IV Lessons Learned from NAFTA
- V The Future with an FTAA
- VI Next Steps
- V Conclusion

I Background on CIELAP

The Canadian Institute for Environmental Law and Policy (CIELAP) was established in 1970 in response to the continuing need for objective analysis of environmental law and policy issues. Independent of both government and industry, CIELAP is a national, charitable, not for profit research and education institute committed to reforming environmental law and public policy in Canada and the world.

The Institute's mission, which has remained focussed for nearly 30 years, is to provide leadership in the research and development of environmental law and policy that promotes the public interest and the principles of sustainability.

II Why CIELAP is Interested in this Issue

CIELAP became involved in trade issues when the organization prepared a submission to the Ontario government on the North American Free Trade Agreement in 1994. The Institute's Executive Director has a longstanding interest in trade and development issues and their links to the environment and quality of life of communities. She is a member of Canada's National Advisory Committee to the Governmental Committee on the North American Commission for Environmental Cooperation, and has participated in several international fora on international, trade and environment issues including at the United Nations. The Institute is currently working with the Commission on Environmental Cooperation on three projects. The Institute's staff participate in consultations from time to time on international, environment and trade related issues.

The Institute works in partnership with law centres in several Latin American countries. In particular, the Institute is working with an environmental law and policy organization in Costa Rica, Fundacion Ambio on issues related to trade, development and environment. CIELAP's Executive Director participated, along with the Executive Director of Fundacion Ambio, in the March 98 preliminary discussions on FTAA in Costa Rica.

If the FTAA is to be successfully integrated, environment, labour, human rights and trade issues have to be negotiated together.

III Background on FTAA

The Free Trade Area of the Americas (FTAA) is an agreement currently being negotiated between Heads of State and Governments from 34 countries throughout the Hemisphere of the Americas. Stretching from the southern tip of Argentina to the Arctic Circle, this will be the largest Free Trade agreement in existence. Since negotiations began at the Summit of the Americas in December of 1994 in Miami, hemispheric trade ministers and business leaders have met a total of five times, Denver in 1995, Cartagena, Colombia in 1996, Belo Horizonte, Brazil in 1997, San Jose, Costa Rica in 1998, and Santiago, Chile in April of 1998. The next scheduled Ministerial meeting is to be held in Toronto in Canada in October of 1999.

The general principals and objectives of the negotiation process are outlined in the San Jose Declaration of March 19, 1998. The completion of this Declaration has served to push forward the negotiation process considerably as demonstrated by the launch of the hemispheric trade negotiations in Santiago, Chile in April of the same year.

General objectives outlined in the Declaration include the promotion of prosperity, improvement of working conditions of people of the Americas, and better protection of the environment through increased economic integration and free trade among the participating countries. The Declaration states that by providing opportunities to facilitate the integration of smaller economies in the FTAA process, those countries will be able to realize their opportunities and increase their level of development. Furthermore, commitments to internationally recognized core labour standards is supported through the observance of promoting worker rights and the acknowledgement of the International Labour Organization as the administrative body dealing with such standards.

In attempting to establish this immense trade agreement and incorporate all objectives and guiding principles, the FTAA negotiations will examine the key areas of trade and the interrelationships between them by establishing negotiating groups on market access, investment, services, government procurement, dispute settlement, agriculture, intellectual property rights, subsidies, antidumping and countervailing duties, and competition policy. All trade negotiating groups will take into account the needs and economic conditions of smaller economies, as well as the concerns related to countries with different levels of development. Furthermore, the negotiations are to be made transparent and built on consensus decision-making.

As evidence of their commitment towards the principle of transparency of the negotiating process, a committee of government representatives has been established who will act as liaison between civil society and the negotiators. The FTAA negotiators have recognized the interests and concerns expressed by different sectors of society and have responded by encouraging the participation of civil society to present views on trade matters in a constructive manner. Upon receipt, the committee will analyze the submissions and present the range of views to the negotiators for consideration.

IV Lessons Learned from NAFTA

As we enter into the negotiations of the FTAA, there are some lessons we can learn from NAFTA on free trade agreements.

1 Workers rights and environmental protection must be placed within the body of the text rather than in side agreements. This may be controversial and a difficult issue as many feel that environmental protection is a limiting factor to trade and economic growth, rather than a fundamental, virtually inseparable, aspect of it. The economic powerhouse of the United States may play a key role in preventing these issues being incorporated in the text body as the Republicans, who hold a majority of votes in Congress, argue that the environment and worker rights rate less consideration than protecting intellectual property and therefore belong in side agreements. Furthermore, experience with the NAFTA thus far has demonstrated that those side

agreements are virtually meaningless.

Recommendation: Incorporate worker rights and environmental protection within the body of the text.

2 Profits from trade will not 'trickle down' to everyone unless adequate provisions are adopted. Despite the fact that the NAFTA accorded more open trade, benefits of this increase have not been realized by the middle class and poorer members of society. As trade expands, the developing world, and sectors within the industrialized world, experience a widening gap between the rich and the poor. This is illustrated by the fact that after the NAFTA, the income gap in Mexico increased rather than decreased. Addressing worker rights and environmental protection will help to ensure that trade benefits all people, not just the rich.

Recommendation: Ensure that all people receive benefits of increased trade

3 Trade policy must embrace long term economic and sustainable development goals and not just focus on short term profits. Any trade agreement must address human rights, democracy, food safety, narcotics flows, financial flows, and transitional assistance. Trade agreements should help to protect these basic standards and not undermine them.

Recommendation: Embrace the concept of sustainable development through the protection of basic standards

4 The pace of trade liberalisation must be consistent with societies ability to respond. The NAFTA negotiations were conducted at a quick pace under fast-track authority. Consequently, the pace of trade liberalization seen in Mexico surpassed the ability of communities to keep up. The federal government was unable to develop the transportation infrastructure required to spread the economic impact of increased trade throughout the country. As a result, Mexico City is faced with massive unemployment while Tijuana is at less than 2%. The fast paced rate of trade liberalisation observed in the NAFTA proceedings did not let change happen gradually thereby preventing government and civil society the ability to deal with its impacts. Incorporating a more gradual process into the FTAA negotiations will lessen the impact of sudden change.

Recommendation: Incorporate a gradual process of change so as to adequately allow civil society to deal with impacts.

5 NAFTA became the first trade agreement to attempt to incorporate environmental considerations by declaring in the preamble the commitment of all three countries to the concept of sustainable development. Although the focus of the NAFTA is primarily trade, the environment does enter the picture insofar as the acknowledgement of Multilateral Environmental Agreements (MEAs) and protection of such from trade challenge. NAFTA protects MEAs from challenges by asserting that they supersede NAFTA should conflicts between them arise.

Recommendation: Continue to protect Multilateral Environmental Agreements from trade challenge.

6 NAFTA prohibits reducing environmental standards to attract investment (NAFTA, 1992, art 104, 906(2) and 1114). The goals of the NAFTA are contradictory in that they are a result of political pressure to create trade liberalisation on the one hand, and greater international environmental protection on the other. The result, however, was the creation of a treaty that addressed environmental concerns in part by prohibiting the weakening of, or the failure to enforce, existing environmental standards in an effort to attract foreign investment. While this was a worthy endeavour, the problem stems from the fact that the NAFTA failed to provide for enforcement of these provisions as well as not dealing with the existing differing laws that may have given one jurisdiction an advantage over another.

Recommendation: Include and ensure enforcement of prohibitions against reducing environmental standards to attract investment.

7 NAFTA allows for the protection of human, animal, plant life and health through the adoption of Multilateral Rules on Sanitary and Phytosanitary Measures (SPSs) and other Standards-Related Measures (SRMs) (NAFTA, 1992, art. 712). According to the Agreement, these SPSs must be non-discriminatory and based on scientific principles, however, the degree of risk to which each country is willing to endure when creating SPSs is a social value to be determined within that country.

Recommendation: Continue to allow for the protection of the health of humans, animals and plant life through the adoption of SPSs.

8 NAFTA preserves the right of countries to apply appropriate standards at the level needed to achieve the desired protection (NAFTA, 1992, art. 712). In keeping with the commitment of sustainable development, the precautionary principle has been applied in that under NAFTA it is acceptable to adopt environmental measures to avoid risk even if sufficient evidence outlining the risk is not yet determined. Furthermore, under NAFTA, the 'best method' to achieve the desired protection is called for, rather than the 'least trade restrictive' as was the case under GATT.

Recommendation: Continue to embrace the precautionary principle and allow appropriate standards to be applied to achieve desired protection and avoid risk.

9 NAFTA promotes the upward harmonisation of environmental policies and standards (NAFTA, 1992, art 713, 714, 905 and 906). As previously discussed, the lowering of environmental standards in order to attract investment is prohibited under the NAFTA. However, in order to create an even playing field with respect to trade, the harmonisation of environmental laws across participating countries is desired. This will allow for manufacturers to sell their products in all participating countries without having to struggle with differing environmental standards. Unfortunately, under NAFTA, there were no financial resources allotted to accomplish this upward harmonisation. The lack of compensation for environmental measures in the global interest is an important factor limiting upward harmonisation.

Recommendation: Incorporate compensation to enable parties to raise environmental standards

thereby continuing to promote the upward harmonisation of environmental policies and standards.

10 NAFTA incorporates improved consideration of environmental issues during dispute resolution procedures. Contrary to GATT, where the burden of proof rests on the challenged party to demonstrate that its law is not restrictive of trade, under the NAFTA, the burden is on the party challenging the environmental law (NAFTA, 1992, art 723 and 914). Furthermore, should a law with which there is a scientific or technical aspect be challenged, the NAFTA dispute resolution panel is able to consult with the experts that were relied on when the law was drafted (NAFTA, 1992, art 2014-2015). Despite the improved dispute resolution procedures, the NAFTA trade dispute procedures remain closed to public participation and lack transparency.

Recommendation: Incorporate transparency and public participation in the dispute resolution process

11 NAFTA, under chapter 11, decisions made by local or national governments are subject to challenge by corporate plaintiffs before NAFTA tribunals. This provision, which came into effect in 1996, has resulted in major lawsuits against the Canadian government: Ethyl Corporation and S D Myers Inc. These cases illustrate the problem that as long as an investor or corporation in one country has a potential business interest in another country, it can challenge the laws and policies of that country. As the FTAA is negotiated, this loophole needs to be fixed.

Recommendation: Corporations should not be able to challenge the laws and policies of a country with which they wish to do business.

V The Future with an FTAA

Instituting the FTAA will have immense repercussions in the global market. It can be argued that, if done properly, such changes are beneficial to the Americas. Central America, for example, will be given the opportunity to enjoy benefits of free trade with North America, which will increase its market from 32 million consumers to upwards of 774 million people. With the implementation of NAFTA, Central America saw Mexico drawing investment away. Therefore, it is argued that the FTAA will improve Central America's position by providing new markets and increased investment. Furthermore, the North American market could also benefit with a fairer free trade agreement embodied within the FTAA San Jose Declaration. Improving worker rights, wages and living standards grants Central America with adequate purchasing power to access the North American market, thereby creating tremendous demand for North American products.

On the other hand, there are major concerns regarding the implementation of the FTAA. These concerns surround the disparities in economic infrastructure of participating countries. For example, in Central America due to the extreme influence of internal security and political stability on investor confidence, investment rates vary. As a result, Costa Rica has a higher investment rate than the rest of the region. The FTAA will have to address these issues in order for all countries to benefit from the agreement. Jaime Botran, the chairman of Guatemala's Chamber of Industry, states that the only way this agreement will be successful is through the recognition that small economies will require special treatment so as not to be left behind. Nicaraguan Foreign

Minister Emilio Alvarez feels that a concrete plan of action granting preferential treatment to weak economies is required for the successful implementation of the FTAA.

Civil Society organizations also have major concerns. These include the assumption that economies can continue to grow and the wisdom of continuing to export the North American way of life which we know is unsustainable. Other concerns include how to ensure adequate protection for environmental, labour and human rights.

VI Next Steps

Sergio Marchi, Minister of External Trade, committed, at a breakfast meeting with interested Canadians in San Jose during the March 1998 meetings between trade ministers and business leaders, that civil society in Canada would be consulted as the FTAA negotiations proceed. As well, civil society has been invited to present their views on trade matters to a committee of government representatives, which has been established to act as a liaison between civil society and the negotiators. To date, it is unclear what the process is to engage civil society in either of these proposals. As well, once that process has been established and widely communicated to civil society groups, resources have to be made available, otherwise, the only sector of civil society which will be able to participate will be the industrial or rich sector. Efforts have to be made to level the playing field.

Recommendations:

- 1 A consultative process needs to be established immediately in Canada. This could include The Standing Committees of Environment and Sustainable Development, International Trade and Human Rights holding joint hearings on the FTAA.
- 2 A discussion document should be prepared and widely distributed. This discussion document should lay out the advantages and disadvantages of the FTAA for various sectors of society in Canada and also in Latin America.
- 3 Resources should be made available to community and non government groups so that they can carry out their own research and prepare their own submissions.
- 4 Opportunities should be created for representatives of civil society to meet with the liaison committee appointed for the purpose at the ministerial committee meeting in Toronto in October.
- 5 An ongoing process needs to be established to engage civil society beyond the October 1999 Ministerial meeting in Toronto.

VII Conclusion

If an effective FTAA is going to be successfully negotiated several factors need to be considered:
i) civil society needs to be engaged in the negotiation process; ii) environmental protection issues

have to be linked to trade issues; and iv) workers rights, environmental standards and human rights need to be addressed.

An effective FTAA must focus on trade as a means and not an end in itself. The end is fairer trade, a reduction in pollution and environmental destruction, a better quality of life for the majority and a more just society. The end is not higher profits for a few multinational corporations or the support of an economy based on the over exploitation of natural resources and the destruction of the environment. An effective FTAA must respect human rights, worker rights and the environment so as to ensure that trade benefits all people and not just the fortunate few. These obligations must be established in the body of the trade agreement.

The North American economy - the fossil-fuel-based, automobile-centred, throw-away economy is in trouble. An effective FTAA cannot promote this model but has to promote a sustainable economic system that protects workers rights, the environment and promotes a more just society. This requires wide ranging, radical change and enormous political will and commitment.

We have a responsibility to future generations to ensure that an effective FTAA is negotiated along the lines of a sustainable economic system. We have an obligation to aspire to take the lead in moving toward a sustainable society. The FTAA gives us an opportunity to show that leadership.