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Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

517 College Street, Suite 401, Toronto, Ontario M6G 4A2
Telephone (416) 960-2284
Fax (416) 960-9392

CANADA-U.S. FREE TRADE AGREEMENT:

THE CANADIAN PERSPECTIVE

by Michelle Swenarchuk

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INTRODUCTION

On December 1, 1987, the Prime Minister of Canada and all provincial premiers endorsed the recommendations of the Report of the National Taskforce on Environment and the Economy. (National Taskforce on Environment and Economy: 1987) The report included proposals that

> Canada should explore and promote mechanisms to ensure that environmentally sound economic development is an important component in international discussions and negotiations dealing with development and trade.

Nevertheless, when asked in 1987 what studies had been conducted on potential impacts on the environment from free trade negotiations, the government replied:

> The Free Trade Agreement is a commercial accord between the world's two largest trading partners. It is not an environmental agreement. The environment was not, therefore, a subject for negotiations nor are environmental matters included in the text of the Agreement. (Tester: 1988)

Environmentalists disagreed and became involved in the national debate which preceded the 1988 federal election. Since that time, the impacts on the environment of the provisions of the Agreement and decisions of dispute panels have become more clear.

The Agreement relates in a fundamental way to the two broad categories of environmental protection: resource conservation and management strategies, and environmental standard setting. This paper will examine its impacts from a Canadian perspective.

RESOURCE MANAGEMENT AND CONSERVATION

a. Fundamental free trade provisions

Articles 408 and 409 of the Agreement deal, respectively, with export taxes and other export measures on "any good" subject to export. Article 408 precludes the use by either party of any tax, duty, or charge on exports unless it is also applied to such goods when destined for domestic consumption.

Article 409 goes further and restricts the rights of the US and Canada under GATT (Articles XI(a) and XX(g), (i), (j) by further limiting any restrictions on exports permitted by those articles. Specifically, the Agreement precludes restrictions which reduce the proportion of total domestic production of any good available to the other Agreement party beneath the proportion exported in the three years prior to imposition of the restriction.

This "proportionality clause" effectively gives the U.S. perpetual access to Canadian resources, once any amount has been exported, and has been a source of great concern to environmentalists with regard to energy (discussed below), water, and all other natural resources.

The effect of the clauses in eliminating many means of regulation of natural resource extraction and export is particularly clear given the definition of "restriction" in the Agreement, namely:

> ... **any** limitation, whether made effective through quotas, licenses, permits, minimum price requirements or **any other means** (Emphasis added)

b. Energy provisions

An entire chapter of the Agreement pertains to energy (Agreement, Chapter 9), and is described as "the great energy sellout" by Canadian nationalists. The Agreement covers almost every kind of energy product, including oil, natural gas, coal, and their derivatives, as well as electricity and uranium. The terms of Articles 407 and 408 eliminating regulatory mechanisms for resource export controls are explicitly repeated with regard to energy exports (Articles 903 and 904) as is the "proportionality clause", so that even in the event of domestic energy shortages, Canada must continue to supply this key resource to the US, the world's largest energy consumer.

Despite the controversies fundamental to free trade debates, about the allegedly undesirable role played in trading relationships by national subsidies for production of commodities, the Agreement allows for present and future incentives for energy exploration and development. Since the Agreement also provides for "national treatment with respect to investment and trade in goods and services" (Articles 105 and 1602) and reduced scrutiny of foreign investment (Annex 1607.3), Canadians predicted a run on Canadian energy resources by American companies, subsidized by Canadian government incentives.

The Agreement has led to significant changes in the regulatory powers of the National Energy Board in Canada. Annex 905.2 required that the "least cost alternative" test previously used by the Board in assessing export applications be eliminated. This test required that energy exports be sold at a price no lower than that which the customer would pay if required to buy from an alternate supplier. The "surplus test," which had precluded a natural gas producer from exporting to the US unless it could show a fifteen year surplus of supplies in Canada, was also eliminated (Swenarchuk: 1988).

Finally, in March, 1990, the Board decided to drop the cost-benefit test it had used on export applications to judge whether revenue from exports would cover the costs to Canadians of future increases in Canadian gas prices. The Board had rejected four applications for gas exports in the previous year, resulting in the US companies' applying

in Federal Court in Canada and threatening to require adjudication by a dispute resolution panel under the Agreement (Action Canada Dossier No. 26).

Bowing to the pressure, the Board approved the export applications on April 26, 1990.

Environmentalists expressed concern prior to the conclusion of the Agreement that the energy provisions would lead to accelerated and unsustainable development of Canadian energy resources, and would effectively preclude pursuit of soft energy alternatives in Canada. The Brundtland Commission found that countries like Canada need to reduce energy consumption by about forty percent in order to achieve sustainability of the resource. Given the energy needs of Canadians related to climate and transportation across a vast geography, a long term stable energy supply and immediate action to reduce consumption are essential. In fact, Canada does not possess abundant petroleum for export; reserves are decreasing and additions to reserves have been less than production in each year since 1985. Conventional crude reserves at the end of 1988 were equivalent to only about seven years consumption at current rates (Action Canada Dossier No. 29). Natural gas production in Canada is also disproportionately high; in 1988, Canada was the third highest producer of natural gas in the world despite having only 2.5% of known reserves (Shrybman: 1990). However, the Canadian government has surrendered sovereign control of energy resources and has produced no significant initiatives on energy conservation.

As predicted by environmentalists, energy megaprojects have proliferated subsequent to the Agreement. Two huge developments are planned for the North of Canada, with predicted massive environmental effects on delicate Northern ecosystems. Approval has been granted by the National Energy Board for a ten billion dollar project for the development and export to the US of 87% of the natural gas reserves of the Mackenzie River Delta. This development will include the construction of a 1200-mile pipeline across Arctic permafrost and affect a huge area of fish spawning beds and a migratory bird corridor. The socio-economic effects on the local aboriginal population will also be considerable.

In Eastern Canada, the government of Quebec is determined to proceed with "James Bay II," a massive hydro-electric development which will reshape an area as large as France and produce a "staggering" (Shrybman: 1990) 26,000 megawatts of power for export to the North-eastern US states. Its massive projected negative environmental effects have led to a concerted campaign in opposition to its construction, led by aboriginal peoples and US and Canadian environmentalists.

Given the evisceration of Canadian regulatory powers described above, Canadians will now be left to pay the huge environmental costs of these developments, and to face possible energy shortages in the future, while the influx of cheap Canadian energy serves to retard a move to conservation within the US itself. However, the Agreement met a key priority in US trade policy, articulated by Clayton Yeutter, US Trade Representative at the

time of its signing, to "secure supplies of energy at stable and reasonable prices" by proscribing future "government interference" in energy trade (Shrybman: 1990).

c. Fisheries

The Canadian fishing industry is the backbone of the economies of four Atlantic provinces and parts of British Columbia, and Canada is one the world's leading fish exporting nations. However, there is continuing and deepening concern about the declining fish stocks in Canadian waters, and about the reliance of Canadians on extraction of the primary resource for employment. Historically, Canada has utilized methods such as requirements for local processing, to increase employment in resource producing regions. From the environmental perspective, such requirements are important alternatives to accelerated extraction of the primary resource. Such requirements are now apparently prohibited by Chapter 4 of the Agreement, except for controls on unprocessed fish from the Atlantic provinces and Quebec, maintained under Article 1203. However, no new programs for local processing can be introduced, and the B.C. fishery, excluded from protection, has sustained significant job loss in processing since the implementation of the Agreement.

The first decision of a Dispute Resolution Panel under the Agreement considered whether the Agreement was breached by certain Canadian Fisheries Act regulations. The regulations required that certain species of herring and salmon caught on the West Coast of Canada be landed in Canada for on-site examination and biological sampling by Canadian fisheries officers. The panel had to consider whether GATT articles XI and XX, being incorporated into the Agreement, had also been breached.

The evidence established that the catch and landing requirements imposed on the fishing industry were used by regulators in managing the resource, including levels of harvest. Herring were found to be particularly vulnerable to overharvesting.

The US argued that the effect of the Regulations was to restrict exports, by placing additional burdens on US buyers to comply. Canada contested these claims, and described the evidence as speculative. The US argued that the landing program served no useful conservation purpose, and so was not "primarily" aimed at conservation as required by GATT Article XX (g). Canada rejected that view and provided evidence of the necessity of the particular approach, and the difficulties of other approaches advocated by the US.

The Panel found that the principal effect of the Regulations was to make exports more amenable to data collection, but that a measure may be considered a restriction within the terms of GATT Article XI:1 if it imposes a "materially greater commercial burden on exports than on domestic sales." Furthermore, the Panel did not consider that evidence of actual trade effects need be shown, but merely, that "the measure has altered the competitive relationship between foreign and domestic buyers."

The Panel then considered the important question of whether the Regulations were saved by Article XX(g) of GATT. It defined the dispute in terms of whether they constituted a measure "relating to the conservation of" the exhaustible resources in question, or a "disguised restriction on international trade". It found that

> It was not the intention of Article XX(g) to allow the trade interests of one state to override the legitimate environmental concerns of another.

However, the only conservation measures that will be protected are those

> that are part of a conservation programme. The "primarily aimed at" test is meant to determine whether this condition has been met.

Specifically, the Panel concluded that the test to be applied in assessing whether a conservation measure satisfies GATT Article XX(g) is whether "the measure would have been adopted for conservation reasons alone." To assess the measure, it looked at the conservation benefits of the measure, **"and whether there is a genuine conservation reason for choosing the actual measure in question as opposed to others that might accomplish the same objective"**, as well as its costs. Its point of departure was whether the Canadian government would have adopted the measure if it had caused an inconvenience to the Canadian industry equivalent to that caused to US industry and it specifically insisted on its right under GATT to "make its own independent evaluation of the conservation justification in question."

The Panel then proceeded to venture on a highly speculative assessment of the necessity of the particular conservation measure adopted, and the motivations of Canadian regulators in imposing it. It concluded that exempting part of the catch from the requirement would still permit the conservation goal to be achieved, and that therefore, the adoption of the measure applicable to the entire US and Canadian industries must have been for reasons not compatible with GATT Article XX(g).

The decision is striking for the willingness of the Panel to decide on the relative merits of a conservation measure and the likelihood of particular economic effects resulting from it for US companies, despite the admittedly inconclusive evidence on many questions, and complete lack of evidence on some. That a panel of members with no particular expertise in conservation matters is mandated to examine such matters is also of concern, particularly when the members decide to evaluate the measure against any other possible approaches to the problem. In fifteen years of reading judicial decisions, this lawyer has never seen a court ruling which ventured into such unsupported assessments of the legislative intent of a government.

The test to be applied, whether there is a genuine conservation reason for choosing the actual measure in question as opposed to others that might accomplish the same objective suggests that virtually no conservation measure will be upheld under GATT

Article XX and the Agreement. Various approaches to most problems can be considered, and the likelihood of having a particular one struck down, with all the administrative and legal costs involved, is likely to have a chilling effect on new initiatives.

Most important, the decision is an interpretation of Article 407 and therefore sets the standard for evaluation of conservation programs **for all resources**, not only for fisheries. It also illustrates well why Canadian environmentalists are calling for amendments to all international trade agreements to provide for a return to national sovereignty over environmental and conservation standards.

A second trade dispute decision under the Agreement which has affected the Canadian fishery is the **Lobsters from Canada** decision, in which the Canadian government challenged the provisions of an American statute prohibiting the import into the US of lobsters beneath a certain size. **(National Oceanic and Atmospheric Administration Ocean Coastal Programs Authorization Act, Pub.L.No. 101-224, Section 8, 103 Stat. 1905, 1907 (1989).** Canada argued that the restriction was contrary to Article 407 of the Agreement. In this case, the conservation rationale advanced by the US as the grounds for the import restriction was never discussed as the majority of the Panel decided that the issue was governed by GATT Article III, which has no provision for exceptions for reasons of conservation, rather than by GATT Article XX, which has. The minority of the Panel found that GATT Article XX did apply, and would have entered into an examination of the conservation rationale advanced, particularly since the published history of its passage in the US indicated a mix of conservation and trade-restrictive purposes.

Unlike the panel which examined the Canadian Fisheries Act regulations, this Panel did not consider whether the Act was necessary for conservation purposes or whether its breadth, involving trade restrictive effects, was too wide.

These two decisions, different as they are in results and analysis, indicate the breadth of the effect of Chapter 4 of the Agreement, as it affects a primary resource. The Atlantic fishermen have lost approximately thirty million dollars because of the **Lobster** decision, despite no examination of its alleged conservation rationale. The **Salmon and Herring** decision carries serious implications for all resource conservation programs, and therefore, for all sectors of the Canadian environment.

d. Agriculture

Canadians have identified significant negative environmental problems associated with agricultural practices. These include degradation of soils from loss of organic matter, creation of monocultures, use of energy-intensive heavy machinery, and widespread use of pesticides. Insecticides and herbicides have caused contamination of ground and surface waters and the Great Lakes system. Although some government initiatives address these problems, they are relatively short-lived, and environmentalists are aware that the crisis of farm incomes in Canada is a barrier to widespread changes in

agricultural practices. The costs associated with changes to more ecologically beneficial farming practices will not be assumed by farmers when the survival of many farms is as tenuous as it is at this time. Environmentalists also favour food self-sufficiency within each nation, partly to reduce the enormous energy requirements involved in the global transportation of agricultural products. The loss of a viable agricultural sector endangers food self sufficiency in Canada.

The primary measure used in Canada to promote farm income stabilization is a complex system of marketing boards which regulate the production and sale of agricultural products. Given the competitive disadvantages of Canadian farmers, related to climate, Canadians did not promote free trade in agricultural products. Nevertheless, Chapter Seven of the Agreement includes provision for free trade of these products, and eliminates rail transportation subsidies on certain western grain shipments. While no direct attack on the marketing board system was negotiated in the Agreement, the parties retained their rights to mount such attacks under GATT. The US then successfully challenged Canadian import restrictions on ice cream and yoghurt, administered by a marketing board, before a GATT panel.

Chapter 7 of the Agreement sets out a complex and comprehensive approach to freer trade in agricultural commodities and the harmonization of many standards related to these products.

As a result of the provisions, the Canadian licensing requirements which regulated the amount of American durum wheat imported into Canada, have been eliminated. The Agreement requires that the licences be dropped if the level of subsidy provided to Canadian growers equals the subsidies paid by the US government to US growers, even if the equivalence is temporary. According to the National Farmers Union of Canada, the subsidy equivalence occurred because of the 1988 drought in Canada, an exceptional event, and is not likely to be repeated (Action Canada Dossier No. 31). Nevertheless, with the permanent elimination of licensing requirements, the flow of durum wheat into Canada has increased, and is expected to result in mill closures in Canada.

Wheat and vegetable pricing has also been affected since the Agreement, to the detriment of the agricultural sector in Canada.
While both the US and Canadian agricultural subsidy systems are under discussion in the current GATT negotiations, the Canadian agricultural sector remains particularly vulnerable to inroads by US products, and environmentalists are concerned about its increasing instability and concomitant perpetuation of ecologically damaging practices. Furthermore, the globalization of agricultural production and transportation, promoted by international free traders, contributes to continuing carbon dioxide emissions and the probable devastating effects of global warming.

Chapter 7 also contains provisions for the harmonization of many standards related to agricultural production, including animal quarantine restrictions, accreditation procedures

for inspections, approval requirements for new goods and processes, veterinary drugs, and food additives,to specify only a small number of those included.

In addition, Annex 708.1 to Chapter 7 provides for the harmonization of standards and regulations regarding pesticides, and requires the use of risk/benefit analysis in the approval process for pesticides. This provision has caused great concern to environmentalists, since it means a distinct weakening of the Canadian standard for pesticide registration, which is based on whether the use of the pesticide "would lead to an unacceptable risk of harm to ... public health, plants, animals or the environment" (Pest Control Products Act, Regulation Section 18(d)). Although it contemplates an evaluation of risk, it does not require a risk/benefit analysis as commonly used in the US, where the health and environmental risks are evaluated against the economic loss which could be caused by the prohibition of use of the pesticide in question. (Federal Insecticides, Fungicide and Rodenticide Act). Many commentators and the US Congress have criticized the process of risk benefit analysis, concluding that the quantification of benefits is not well advanced, and the resulting studies frequently misleading. Nor do the analyses deal fairly with questions of equity since costs, risks, and benefits are often borne by different groups within society. As hundreds of environmental groups in Canada are engaged in work pertaining to pesticide use and regulation, they were particularly opposed to this regulatory change, achieved by the government in secretive trade negotiations, without public notice.

Further health concerns ensued when, in February of 1990, the Deputy Prime Minister of Canada, Don Mazankowski, announced that the Canadian and American governments had terminated border inspections of meat and poultry "in the spirit of cooperation embodied in the Canada-US Free Trade Agreement" (Action Canada Dossier No. 29).

Canadian unionists noted that this action meant that meat inspected in Canadian or American plants would then be transported long distances and delivered without a check on its condition at the border. In 1988 and 1989, 1.4% of the over 144 million kilograms of meat imported for the US to Canada had been turned back at the border. Under the current regime, approximately 40% of meat imported from the US will go directly to restaurants and fast-food outlets without being inspected in Canada.

Since the conclusion of the Agreement, Canadians have attempted to monitor the committees established to continue the harmonization process. Although it appears that the process is not being pursued with great dispatch, the secrecy involved leaves unresolved questions in Canada about the status of many of the standards related to agricultural products enumerated in Chapter 7.

e. Water

Considerable debate occurred in Canada during the 1988 election campaign regarding "whether water is covered by the Deal", with the federal government maintaining that it is

not. However, since it is not explicitly excluded, and some trade in water occurs, it seems clear that Articles 408 and 409 also pertain to water. Particular concern has been raised by the deepening crisis of water shortages in the American south-western states, and the existence of business-backed schemes for massive diversion of Canadian rivers to the US. For example, the "Grand Canal" proposal, backed by Quebec Premier Bourassa, would reverse the flow of rivers into James Bay in Northern Quebec using a series of nuclear pumping stations, and deliver this fresh water through the Great Lakes system to California, thousands of miles away. With ecological effects of staggering dimension across North America and as far East as the Atlantic coast, this project is considered to be in the realm of lunacy by most environmentalists. Nevertheless, the Canadian government has contributed a small amount of money to feasibility studies, and its Crown corporation, the Atomic Energy of Canada Ltd. is represented on the Board of Directors of the project supporters.

The Saskatchewan government signed an agreement with the US Corps of Engineers on October 26, 1989, requiring that water from the Souris River in Saskatchewan be delivered to the state of North Dakota in accordance with US needs for the next one hundred years. The river is now controlled by two dams which have been the subject of controversy and litigation, led by Canadian environmentalists, since reviews of their environmental effects were not conducted prior to construction. It now appears that they will be used to provide water to the US and that diversion of other waters into the Souris system may be demanded, since it does not contain enough water in dry periods to provide the amount North Dakota is entitled to demand. The US paid one third the cost of construction of the dams, but will pay nothing for operation and maintenance costs for the next one hundred years (Action Canada Dossier No. 30).

Although Canada is blessed with a wealth of fresh water, the supplies are not close to population centres, and much of the most accessible water has been seriously polluted. As the need for conservation measures for water becomes more clear, Canadians are growing more concerned about "the proportionality clause" of the Agreement, which entitles the US to perpetual supply of Canadian water, regardless of shortages in Canada. Each diversion or export project increases the amount of water which Canada is committed to supply in perpetuity.

FREE TRADE IMPACTS ON ENVIRONMENTAL STANDARD-SETTING

There is a growing international jurisprudence related to conflicts between environmental standards and international trade agreements, particularly GATT and the Canada-US Free Trade Agreement. In addition to the effects of the Agreement on Canadian Fisheries Act regulations and pesticide standards, Canadians have seen the federal government rely on it to challenge the American Environmental Protection Agency's planned phase-out of the production, import and use of asbestos. The defeat of this environmental advance was confirmed on appeal in October, 1991. (Corrosion Proof Fittings, et al v. EPA). The

US non-ferrous metals industry has challenged Canadian pollution control programs, including loans and investment credits, in programs intended to reduce emissions and improve worker health and safety in several Canadian lead and zinc smelters. In Europe, Danish requirements for the use of returnable beer and soft drink containers was struck down by the Court of Justice of the European Communities (Shrybman: 1990), and in the recent "Tuna/Dolphin"case, parts of the American Marine Mammals Protection Act (Inside US Trade) were found to be incompatible with GATT.

The secretive and undemocratic nature of trade negotiations, resulting in the defeat of legislative reforms achieved through the public process essential to environmental reform, is particularly unacceptable to growing numbers of activists.

To reverse these setbacks to planetary protection, some Canadian environmentalists have called for a reversal of the primacy of free trade provisions over environmental initiatives (Ferretti, Makuch, Traynor: 1991). They have proposed:

1. the environmental assessment of trade deals, beginning with initial negotiations, and with meaningful and timely public review.
2. the inclusion of environmental protection and resource conservation measures in trade agreements, including national control over resource exports and import flows. The import controls might pertain to movement of hazardous waste and other environmentally damaging products, and tariffs on substances produced subject to lax environmental standards in the producing country.
3. the enhancement of environmental standards, including the right of each government to enact standards higher than any "harmonized" ones, and open and accessible processes for the negotiation of harmonized standards.
4. international commitments to enforcement mechanisms.
5. public participation in the negotiating processes, trade related institutions, and trade-dispute resolution processes, supported by intervenor funding.

Such measures would ensure that the negative environmental impacts of the Canada-US Agreement will not be duplicated elsewhere.

NOTES

Action Canada Dossier, (various volumes, 1989, 1990, 1991) Ottawa, Public Service Alliance of Canada.

The Canada - US Free Trade Agreement, 1988, Minister of Supply and Services Canada, Ottawa.

Canada-US Trade Commission Panel, In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring. 1989.

Canada-US Trade Commission Panel, Lobsters from Canada, 1990.

Corrosion Proof Fittings et al v. The Environmental Protection Agency and William K. Reilly, Administrator, U.S. Court of Appeals for the Fifth Circuit, No. 89-4596, October 1991.

Ferretti, Makuch, Traynor, 1991, Issue Paper: International Trade and the Environment, Toronto. Pollution Probe, Canadian Environmental Law Association, Common Frontiers.

General Agreement on Tariffs and Trade Panel, Canada: Import Restrictions on Ice Cream and Yoghurt, L/6568, 1989.

Inside US Trade: Special Report, "GATT Tuna Ruling Spawns Environmentalist, Congressional Backlash", September 6, 1991.

National Taskforce on Environment and Economy, Report, 1987, Ottawa.

Redisposable Beer Cans; E.C. Commission v. Denmark; the European Court of Justice, l988, reported [1989]1 CMLR 619.

Shrybman, Steven, 1990, Selling the Environment Short: an Environmental Assessment of the first two years of free trade between Canada and the United States, Toronto, Canadian Environmental Law Association.

Swenarchuk, Michelle, l988, Environmental Impacts of the Canada-US Free Trade Deal, Toronto, Canadian Environmental Law Association.

Tester, Frank. 1988, The Free Trade Deal. Toronto: Lorimer.

NAFTA THREATENS THE ENVIRONMENT

International trade agreements cause environmental problems because our governments don't act in accordance with their rhetoric. Specifically, they don't treat the environment and economy as inextricably linked when they get down to the serious work of making economic deals. They don't negotiate economic relationships with other countries based on environmental principles including the need to conserve resources, and to maintain high environmental standards and the freedom to constantly improve them. Neither do they allow for public participation in the negotiations, or public access to information.

The Canadian government continues to deny that trade agreements, which so fundamentally structure our economies, also structure how we treat the environment, both here and in other countries. An emerging business argument, favoured at the OECD and GATT and in Ottawa, says that trade is good for the environment because it increases GNP and therefore provides better resources for environmental protection. However, we do a deplorable job of environmental protection in the developed world, constantly running behind the damage we cause with ineffectual cleanup efforts. Nor have we begun to reduce our rapacious and unsustainable use of natural resources. Trade agreements premised on the desirability of continual growth cause environmental problems.

The North American Free Trade Agreement (NAFTA) continues these damaging trends. With regard to environmental standard setting, it turns the clock back.

OBSTACLES TO ENVIRONMENTAL STANDARD SETTING IN NAFTA

A draft text of the NAFTA was leaked to the public in March. It indicates that various trade rules, originating in the GATT and jurisprudence under GATT, have been codified and strengthened. These rules reduce the authority of elected governments (federal, provincial, and state) to enact measures that differ from the terms of the NAFTA in an enormous range of subject areas.

No measure of a country may constitute a disguised restriction on trade or "otherwise nullify or impair any benefit reasonably expected to accrue to one or more of the other Parties, directly or indirectly, under this Agreement." (Article 106) Subject to these sweeping restrictions, countries may adopt measures including those for protection of the environment, and human, animal, or plant life or health, or to enforce "generally agreed international environmental or conservation rules or standards", provided that they are "the least trade-restrictive necessary for securing the protection required."(Article 111)

It is difficult to imagine an environmental standard that could not be challenged by the industrial sector it affects for its "impairment" of unfettered economic activity. Various environmental standards have been found to contravene international trade rules for not being "the least trade-restrictive necessary". Most important for Canadians, regulations under the Canadian Fisheries Act that required landing of West Coast salmon and herring in Canada for biological sampling were found to contravene the Canada-US Free Trade Agreement (FTA) based on this standard, and the conservation program involved was down-graded.

This wording definitely has a "chilling" effect on new government initiatives: why take a chance with a program that may be struck down if challenged?

Having made any possible environmental standards subject to these reservations, the NAFTA then goes further and establishes an extensive process of harmonization of technical and sanitary and phytosanitary (plant-related) standards. (Chapter 12) In essence, the parties are to comply with international standards through processes involving committees under the agreement, GATT, and international environmental and conservation agreements. The bodies that will set a wide range of standards include Codex Alimentarius, the International Office of Epizootics, and the Tripartite Animal Health Commission. These closed industry-dominated organizations will now have the power to replace public, accountable governmental processes for environmental protection.

The right to set different, higher national standards was not agreed to, although Canada and Mexico had a proposal to that effect. If accepted, it would still be subject to the standards above (no nullification of benefits; least restrictive to trade) and could not be maintained "against available scientific evidence". Given that scientific certainty never exists in environmental standard setting but is always a matter of debate, and given that the least trade restrictive standard may not be the environmentally-preferred one, these proposals are further limitations on our ability to set necessary environmental standards.

The US proposed the use of risk assessment, in which health and environmental benefits of a measure are "balanced" against its possible economic effects. This is another pressure to lower environmental standards. Canada has also proposed risk assessment regarding sanitary and phytosanitary standards, using risk assessment techniques developed internationally or by the Parties, with consideration of economic factors in setting the standard and with the objective of "minimizing negative trade effects". They will also take into account "the exceptional character of human health risks to which people voluntarily expose themselves."

These are all code words for a range of arguments used by industry to deny responsibility for environmental health effects, and to block strengthened environmental standards. These excuses, based

on economic self-interest and a refusal to take responsibility for environmental degradation, will now provide the basis of standard setting for a large and crucial range of health-related measures including pests and pesticides, and food additives, contaminants, and toxins.

There are no proposals in the NAFTA for any form of public involvement, access to information, or accountability in environmental standard setting. The right of the public to "leap-frogging", when one country's superior standard becomes adopted in other countries due to public pressure, will be cut off in favour of stagnant or lowered standard setting by business groups.

OBSTACLES TO RESOURCE CONSERVATION

The NAFTA repeats the problems caused by the GATT, and US-Canada FTA which effectively preclude export and import restrictions, even for purposes of resource conservation. Canada and the US also go further and propose, in the NAFTA, the further restriction to GATT rights that Canada accepted in the FTA: namely, that a country cannot reduce exports of any good (ie. resource) to another party beneath the proportion of total production of the good which that party obtained in the previous three year period.

These import-export control prohibitions are the "guts" of free trade agreements. They are also totally antithetical to sustainable resource management by democratic, accountable governments.

A particular concern in the agreement refers to the inclusion of non-energy pipeline operations in the Services chapter, indicating that water exports are again on the table.

AGRICULTURE

At this time, the approach to agriculture in the NAFTA is in doubt, but Canadians should know that our government proposed, in the NAFTA, the same approach to agriculture that it allegedly opposed in the Uruguay Round negotiations at the GATT. This approach would see Canada's supply management scheme for agro products replaced by protective tariffs, to be gradually phased out.

Environmentalists support national self-sufficiency in food, both to satisfy a fundamental human need, and to reduce the environmental effects of increased energy use related to long-distance transport of food. We therefore support a healthy national farming sector. We know that significant environmental problems exist in the agricultural sector in Canada: high energy inputs, waste management problems, heavy pesticide use, and soil degradation. Realism suggests that these problems won't by dealt with unless farmers have a measure of income security, and in this era of farm income crisis, supply management provides some of that security.

Our government's temporary "tariffication" scheme for farm products in the NAFTA is therefore disturbing.

INTELLECTUAL PROPERTY

Intellectual property rights are not a part of the US-Canada Agreement but were a major goal for American negotiators in NAFTA. The resulting provisions are of concern because they implicitly include rights to patent life forms. Mexico has proposed various exclusions from patentability: biological processes for the reproduction of life forms, plant and animal species, genetic material, and inventions concerning living matter of the human body. However, these exclusions had not been accepted when the document was leaked.

The chapter also has provisions for patent protection for producers of agricultural and pharmaceutical chemicals, raising all the issues associated with higher prices to consumers that we've seen in Canada.

Expanded intellectual property rights for the gifts of nature represent an appropriation for corporate profit of our fellow earth creatures. Given the richness of biodiversity in our ecosystems, and particularly in Mexico's environment, humanity as a whole is made poorer by the right of business to exclusive use of our natural heritage.

THE "WEB" OF THE AGREEMENT

Various sections of the NAFTA mention issues that involve environmental concerns: packaging standards, auto emissions, occupational health and safety costs, transport of hazardous goods, energy subsidies, the role of multilateral environmental agreements. The list goes on.

The Canadian government argues that the NAFTA is not of great concern to Canada because only about 1% of our trade is with Mexico. However, it significantly erodes our sovereign rights to conserve resources and set environmental standards, and potentially affects **all** our environmental protection strategies.

Michelle Swenarchuk
May 7, 1992