The Fight for Fair (and Safe) Trade

A critique of international trade agreements' impact on health and the environment

By Michelle Swenarchuk

Editor's note: This article is a reprint of portions of a report that has contributed to the globalization debate and public understanding of the underlying issues: Civilizing Globalization: Trade and Environment, Thirteen Years On, *by Michelle Swenarchuk, Counsel, Director of International Programmes, Canadian Environmental Law Association, March 7, 2001. The full text of the report can be found at http://www.cela.ca/international/399global.pdf.*

A headline in the British newspaper, The Observer, *exclaimed, "The World Trade Organization [WTO] has plans to replace that outmoded political idea: democracy." Democracy is at the root of any discussion of globalization and international trade agreements. It is an abuse of the democratic process for elected governments to relinquish to an un-elected international body like the WTO their sovereign duty to protect health and the environment, over economic trade interests if necessary. To do so is especially repugnant when the decision making process of the WTO is heavily influenced by corporate interests and conducted under a veil of secrecy without public oversight. The public must engage on these issues as the protections and choices we are increasingly winning in our communities risk being threatened by current institutions of globalization. Understanding how and why is our reason for reprinting the globalization piece that follows. —JF*

The fundamental goal of the current internal 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 regulation 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 in establishing domestic standards. In both the World Trade Organization[1] (WTO) and the North American Free Trade Agreement[2] (NAFTA), standard-setting is limited by the provisions of two chapters: Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Standards (SPS).

Technical barriers to trade (TBT)

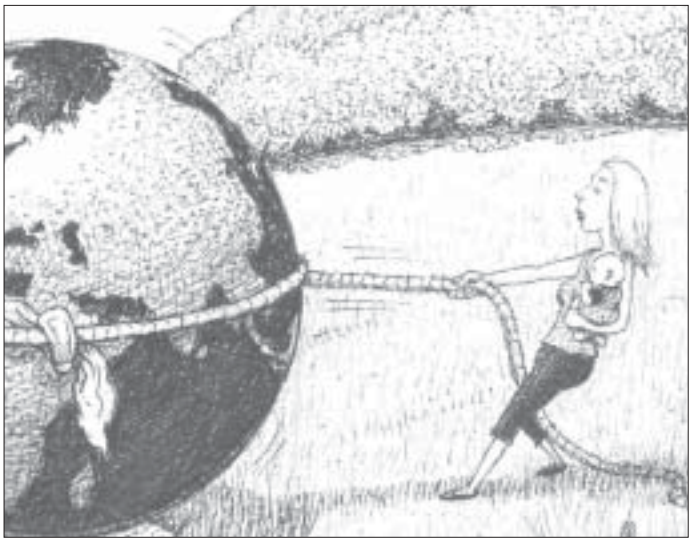
The TBT agreement provides an entire scheme for the setting of domestic regulations and standards. It requires that countries' regulations do not have the effect of creating unnecessary obstacles to international trade, although they are permitted in order to meet legitimate objectives including "protection of human health or safety, animal or plant life or health, or the environment." With an emphasis on international harmonization of measures, the TBT chapter requires that domestic regulations 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 the related Code of Good Practice. (TBT 4) The TBT recognizes the International Organization for Standardization (ISO) as an international standard-setter. This is an international organization of national standardization bodies that 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.

Sanitary and phytosanitary standards (SPS)

The SPS agreement establishes a comprehensive set of rules to govern countries' domestic setting of measures that 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 with heavy corporate involvement, 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 (ISO) 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 the fact that international standards will either be inappropriate to many specific ecosystems 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.



Trade related intellectual property rights (TRIPS)

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 U.S.-style intellectual property law be implemented globally, including strict enforcement mechanisms to ensure compliance. Environmental and health concerns are focused on the patent requirements in the Agreement 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 U.S. 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 U.S.-style patenting through the WTO Agreement, together with the aggressive marketing of drugs and genetically-modified crops by U.S. corporations, has spawned a global controversy regarding environmental, social, agricultural, and economic impacts. As the base of pharmaceutical giants, the U.S. also actively intervenes to protect its 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.[3]

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 General Agreement on Tariffs and Trade (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.

The Agreement on Technical Barriers to Trade provides 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 and 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 defense or justification by a country whose measure had been challenged. In every case except the 2000 *asbestos* case, the defense of necessity, (however defined) has been rejected.

Of eleven cases, ten held that the challenged measure could not be maintained. It appears to turn on the existence of international standards for asbestos, rather than affirming the right of France and the European Community (E.C.) 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

Case Studies: The Necessity Test

1996: UNITED STATES. 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."

2000: EUROPEAN COMMUNITY. In the only case to uphold a defense 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 that are less carcinogenic. The decision, appealed to the Appellate Body, was upheld.

are "legitimate objectives" in the TBT, SPS and in the "General Exception" (GATT XX). The existence of one panel decision in favor 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 defense for important standards for public protection.

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

In the 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."

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 favor 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 concept of regulations being burdensome conflicts with the 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.

NAFTA Chapter 11—investor-state cases

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 of local benefit to foreign investment. It prohibits governments from imposing "performance requirements"[4] such as conditions requiring 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.[5] 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 Corporation case against Canada, and its existence constituted a potent argument against the similarly-worded MAI.[6] As Jan Huner, secretary to the chair of the MAI negotiations, later reported:

> *[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.*
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> *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 U.S. 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.

Case Study
Environment vs. Trade

Methanex Corporation
In June 1999, this Vancouver-based company announced that it will sue the U.S. government for $970 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 U.S. states, including Maine, were 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 U.S. 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.[8]**

There are 12 investment cases, based on arguments that would not give rise to expropriation claims in Canadian domestic law,[7] 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 in *The Methanex* case at left (*See box*). Information on cases like theses remains sketchy since the rules of NAFTA preclude significant disclosure of the proceedings.

Textual analysis and access to negotiations

Both NAFTA and MAI were leaked late in the negotiation process. The "porous" quality of the U.S. 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.

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, full access to negotiating texts in six languages was provided, and NGO representatives could speak in plenary sessions.[9] No windows were broken, no security costs were incurred, and a treaty was successfully concluded.

Access to dispute settlement processes

NGOs 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, but then limited them to parties (the countries in which the trade dispute is occurring) and

additional countries which demonstrate a substantive trade interest in the dispute.

Restraining the trade regime through new international law

As the impacts of the Uruguay Round (GATT negotiations that originally set up WTO and effected a major expansion of GATT into new issues such as services, "intellectual property rights" and investment issues) 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 labor 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 a priority to free trade itself.[10]

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 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. In the POPs Convention, the trade language also appears only in the Preamble: "Mindful of the precautionary approach as set forth in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Convention is to protect human health and the environment from persistent organic pollutants."[11]

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 E.C. can be expected to do so. If decisions under these regimes are challenged at the WTO (a realistic possibility given continuing disputes between the E.C. and the U.S.), the E.C. 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.

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 Cooperation, 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 the best options for civilizing globalization.

Endnotes

1 The World Trade Organization (WTO) came into being in 1995. With 140 member nations and one of the youngest of the international organizations, the WTO is the successor to the General Agreement on Tariffs and Trade (GATT), established in the wake of the Second World War. Characterized as a multilateral trading system, it was developed through a series of trade negotiations, or rounds, held under GATT. The first rounds dealt mainly with tariff reductions, but later negotiations included other areas such as anti-dumping and non-tariff measures. The last round—the 1986-94 Uruguay Round—led to the WTO's creation.

2 The North American Free Trade Agreement (NAFTA) is a trade alliance, adopted by Congress in 1993, between the United States, Canada and Mexico.

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

4 NAFTA 1106.

5 NAFTA 1110.

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

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

8 Letter of January 31, 2001 to Mr. Robert Zoellick, U.S. Trade Representative, from California Speaker Fred Keeley (D) and others.

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

10 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.

11 Draft Stockholm Convention on Persistent Organic Pollutants, Clause B.