U.S. CITIZENS' ANALYSIS OF THE

NORTH AMERICAN FREE TRADE AGREEMENT

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PREFACE

This month, the Presidents of the United States and Mexico and the Prime Minister of Canada will sign the North American Free Trade Agreement (NAFTA), an accord designed to liberalize trade and deregulate investment among the three countries. President-elect Clinton may submit the implementing legislation to Congress within the next few months. If approved by the legislatures of the three nations and implemented in its current form, the NAFTA will have far-reaching consequences, including the areas of labor and the environment.

Despite the importance of the NAFTA to citizens' groups across the country, there is, as yet, very little public knowledge and understanding of its actual content. The NAFTA negotiations were very secretive, with little information provided to the U.S. Congress and even less to the general public. The completed agreement is over 2,000 pages long and is filled with ambiguous "legalese".

This citizens' analysis of the NAFTA is intended to contribute to an informed public debate on the agreement. It is a work in progress, with contributions from a variety of authors. Citizens' groups across the United States worked in 13 issues teams to complete this analysis. Similar teams were established in Canada and Mexico. Representatives from the three national teams plan to meet soon to formulate an integrated trinational analysis of the NAFTA. Readers are encouraged to contact the contributors listed at the end of this document for further information on particular sectors.

Many of the contributors to this document are members of one or more of the U.S. citizens' coalitions on the free-trade agreement -- the Alliance for Responsible Trade (ART, formerly MODTLE), Citizens Trade Campaign and the Fair Trade Campaign. The content of the analysis, however, is the responsibility of the contributors and the team coordinators.

While the contributors and the coalitions may have somewhat different interpretations of specific aspects of the NAFTA, we are united in our conviction that this agreement must either be rejected or fundamentally recast. We call for a more democratic process through which the people of the United States, Canada and Mexico can engage their governments in the search for equitable and sustainable solutions to the profound problems related to the economic integration that is currently underway. These include declines in wages and employment levels, a diminishing of labor rights and standards, environmental degradation, dislocations in rural communities, massive migration, and human rights violations.

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EXECUTIVE SUMMARY

ENVIRONMENT

The NAFTA lacks the funding mechanisms to ensure that a sufficient share of the wealth it may generate will go towards improvements in infrastructure and the strengthening of environmental cleanup and oversight. Funding for necessary NAFTA-related expenditures should be explicitly linked to the Agreement itself and sourced from those who benefit from it.

No provision is included in the NAFTA to ensure that hazardous wastes generated by NAFTA-induced investments will be managed properly. The NAFTA comes the closest to addressing enforcement problems in its investment chapter, which meekly encourages, rather than requires, countries not to lower their standards in order to attract investment. If a country believes that environmental standards have been lowered by another country to attract investment, its only recourse is to non-binding consultations.

The NAFTA leaves U.S. environmental and consumer protection open to challenges as unfair trade barriers. In contrast to earlier drafts, the NAFTA puts the burden of proof on the challenging nation rather than on the defendant. Yet a U.S law that is subject to a challenge must meet a series of highly subjective requirements, including that it be "consistent" in its level of protection and applied "only to the extent necessary" to achieve a NAFTA-approved policy goal. Under the NAFTA, a dispute panel, meeting in secret and heavily biased in favor of free trade to the exclusion of all other concerns, will judge whether or not the challenged regulation represents an unfair trade barrier.

Global treaties may run into problems with the NAFTA. While the NAFTA would appear to protect international environmental agreements (IEAs), it nevertheless opens up two possible complications. First, for the treaties listed under the NAFTA, the NAFTA itself becomes the arbiter of what is, and what is not, allowed under the treaty. Second, it requires all signatory nations to submit in writing their desire to include new IEAs under the NAFTA. The difficulty in getting all the parties to the NAFTA to agree to add other IEAs could be compounded if additional countries accede to the NAFTA.

ENERGY TRADE

The NAFTA directly conflicts the goal of energy conservation and the development of alternative energy technologies by promoting increased reliance on fossil and uranium fuels and on large-scale projects such as the James Bay hydroelectric dams in Quebec. The energy chapter of the NAFTA fails to include conservation and resource efficiency goals and timetables. Rather, its stated objective is to "strengthen the important role that trade in energy and basic

petrochemical goods play in the North American region...through sustained and gradual liberalization" (Article 601). The NAFTA would prevent the U.S. and Canadian governments from restricting the import or export of energy resources from other parties except under conditions of war. The NAFTA also sanctions continued direct subsidies to the oil and gas industries, while making no provision for incentives to promote energy efficiency projects or the development of renewable energy programs.

AGRICULTURE

The agriculture provisions of the NAFTA are contrary to the goal of economically and environmentally sustainable agriculture and rural development. It would provide many opportunities for increased corporate concentration in agriculture through the elimination of import restrictions, lowered food-safety standards, and lower world prices for farm products.

NAFTA, in concert with the Dunkel proposal for the renegotiation of the General Agreement on Tariffs and Trade, would eliminate the best farm programs in North America. U.S. farmers could lose the only programs that have established supply management and reasonable prices for farmers. Sugar, dairy, peanuts, cotton, beef, fruits and vegetables are the commodities that would be most negatively affected by NAFTA in the U.S. Mexican farmers would also suffer as NAFTA, coupled with changes in the Mexican land tenure system, places an unprecedented burden on family farmers to enter the competition in global commodities markets without the infrastructure, technology and resources currently available to their northern neighbors.

LABOR

Studies show that up to a half million high-wage U.S. jobs could be lost over the next ten years due to shifts in investment resulting from the NAFTA. The NAFTA dramatically alters the incentives and rules for investors, enhancing corporate mobility within the North American continent. If ratified in its current form, it would significantly increase the shift of productive investment from the United States to Mexico. While Mexico would likely gain some manufacturing jobs due to new investment, it will also experience significant labor surplus growth due to the large-scale displacement of small grain farmers and agricultural workers.

If ratified in its current form, the NAFTA could cost U.S. workers up to $320 billion over the next decade in lost jobs and lower wages. Liberalizing trade and facilitating the shift of investment from the United States and Canada to Mexico will put downward pressure on U.S. and Canadian wages without necessarily pulling Mexican wages up. Median wages for U.S. workers, especially those lacking a high school degree, have fallen dramatically in the last decade. This suggests that workers at the bottom of the wage scale have borne the brunt of the "globalization" of the U.S. economy, though all workers have felt its impact. Recent immigrants, women, and people of color are disproportionately concentrated in some of the labor-intensive industries that may be most vulnerable to wage erosion and job loss due to the NAFTA.

The NAFTA would, if implemented, undermine labor standards. Any trade agreement among the nations of North America should integrate basic labor rights and protections to prevent "social dumping", i.e., violating worker rights to gain an advantage in the international

marketplace. Several U.S. trade statutes set forth compliance with basic worker rights as a condition for receiving trade benefits under programs such as the Generalized System of Preferences. Since the NAFTA does not include an equivalent formulation of basic worker rights in trade, it would actually displace other U.S. trade statutes, leaving unguarded those worker rights now protected under U.S. law.

INVESTMENT AND CORPORATE RIGHTS

The NAFTA gives corporations extensive rights without attendant responsibilities. The investment section lays out the framework for the further liberalization of investment rules for corporations operating in the three nations. The basic principle is that a corporation should be able to operate freely and without discrimination in any of the three countries. This includes freedom from government-imposed performance requirements, freedom to repatriate profits and freedom to shift top management from country to country. At the same time, the NAFTA draft requires nothing from corporations in terms of advancing worker rights, community investment or environmental health. A NAFTA under these terms would benefit a few hundred large corporations at the expense of the vast majority of the people in all three countries.

AUTOMOBILE SECTOR

The NAFTA would encourage auto plant closures. The goal of the NAFTA negotiators was the integration of auto production in the three countries into a single "rationalized" production system. For the companies, this means closing inefficient plants, easing rule-of-origin requirements, taking advantage of the lowest cost production site and forcing workers, communities and suppliers to compete with one another to lower production costs. The NAFTA would accomplish these goals for the companies at the expense of auto workers.

Under the NAFTA, current Mexican requirements for each auto assembler to export as much as it imports into Mexico would be phased out over ten years. While the Mexican requirement that foreign investors purchase inputs from domestic parts companies would also be phased out over the ten-year period, the Mexican parts industry would still be assured of a large share (declining to 50 percent) of the growth in the Mexican market. The Canadian government retains the safeguards of the Auto Pact, but the U.S. has no comparable protection. The rule of origin for automotive vehicles and parts will be gradually raised to 62.5 percent, but this would allow too much non-North American value to be incorporated into products that qualify for NAFTA benefits. The rapid phase-out of tariffs on light-duty trucks and the negotiated rules for Corporate Average Fuel Economy (CAFE) would lead to increased production of trucks and small cars for the North American market in Mexico without compensating benefits for U.S. production and employment.

RULES OF ORIGIN

Loose rules of origin in the NAFTA would favor transnational corporations over local workers and producers. The conflict over rules of origin is essentially a clash between economic forces anchored geographically in this country or region -- such as labor, small businesses and resource-

based producers (e.g., agriculture and mining) – and transnational corporations producing outside North America and still claiming privileges under the NAFTA. Tight rules favor the former, loose rules the latter. In this agreement, the corporations appear to have won. Regardless of the social or environmental standards inside the region, the loose rules of origin in the NAFTA would allow producers to escape these regulations by conducting labor-repressive or environmentally damaging aspects of production elsewhere.

For most goods, "substantial transformation", meaning a change in tariff classification, is all that is required for materials originating outside of the region to be considered regional goods and have the full benefit of the free-trade regime. This makes it possible for all the raw materials for many goods to come from outside the region, while the finished product is given totally free treatment.

Where substantial transformation has not taken place, or where goods are made up of components from both inside and outside the region simply assembled into another good, a percentage of "regional content" was agreed upon for goods to qualify for regional treatment. The figure is 60 percent for most goods, 80 percent for most textiles and 62.5 percent for automotive products. When up to 40 percent of a product can be shipped into the region from outside and have the whole treated as a domestic product, as would be the case for most goods, a strong incentive is given to non-regional producers to suppress the value of the non-regional components and to use NAFTA rules as a Trojan horse to acquire free access to markets in the U.S. and Canada.

DISPUTE RESOLUTION

The NAFTA text establishes highly secretive dispute-resolution procedures that eliminate citizen oversight on vital concerns such as food safety, consumer-product standards and environmental regulations on hazardous substances. Provisions promoting, or even recognizing, worker rights as a factor in continental trade are completely absent from the Agreement. Provisions treating panel proceedings as secret must be changed to guarantee public access to the dispute resolution panel proceedings for private citizens, as well as governments.

The NAFTA dispute-resolution procedures permit, but do not require, advice from outside experts. Although the agreement specifies that lists from which consultative or arbitral panels will be drawn should be comprised of individuals with experience and expertise in trade law and commercial affairs, it sets no such requirement for familiarity with labor, environmental or human rights matters.

PRE-EMPTION OF STATE LAW

NAFTA clauses that speak to the role of state governments are cautiously drafted and contain less explicit pre-emptive language than did the earlier Dallas draft text. The NAFTA leaves intact current law and practice on pre-emption, whereby Congress can define the relative power of the states to act on trade-related issues. Thus, implementing legislation will effectively determine the degree of autonomy left to the states under the NAFTA and, correspondingly, the degree of pre-emption of states' rights by the federal government.

Both the Standards chapter and the subchapter on Sanitary and Phytosanitary Measures explicitly bind the states to extensive access, assessment, notification, publication, information, consultation and cooperation procedures. These requirements are procedural matters, not substantive constraints on state powers to enact environmental, consumer or public health provisions.

The Government Procurement chapter commits the parties to further negotiations commencing no later than December 31, 1998 "following consultations with state governments." NAFTA specifically exempts federal set-aside programs for small and minority businesses from the Government Procurement provisions and presumably also leaves state set-aside programs undisturbed.

INTELLECTUAL PROPERTY PROVISIONS

The main beneficiaries of the NAFTA provisions on intellectual property rights are pharmaceutical and biotechnology companies and the computer software industry. The potential losers are the consumer, the individual inventor or creator or performer, the indigenous, and the poor. They are the likely payers of the high costs implied by the intellectual property protections offered in the NAFTA. Clearly, the intellectual property rights proposed in the NAFTA were designed to support the continued technical and scientific advantage of transnational corporations.

In general, the NAFTA has granted corporations the privileges of intellectual property without recognizing corresponding obligations to the broader society. It is not so much that Chapter 17 creates new inequities; rather, it endorses and exacerbates existing inequities. The NAFTA does not recognize the intellectual property rights of indigenous peoples; it does not protect the intellectual property of large numbers of creators and performers in the entertainment and mass media industries; and, it does not protect the public's right-to-know. It does protect industry's right to keep trade secrets; it endorses the privatization, commodification, and ownership of life itself by compliance with the notion of life-form patenting; and it effectively shackles the use of compulsory licensing, one of the few existing means for ensuring the public access to new products at affordable prices.

FINANCIAL SERVICES

The NAFTA, unless recast, would allow U.S. banks to gain greater control of the Mexican financial system. Limits on foreign ownership of Mexican banks would be phased out by the year 2000. If, after that time, the total foreign ownership of the Mexican banking industry reaches a certain defined limit, Mexico would have the right to temporarily freeze further foreign investment in its banking sector once during the four years following the transition period. No individual foreign bank would be allowed to own more than 4 percent of the total commercial banking sector, although there are no limits on the percentage of the sector that U.S. banks as a whole may own. This effectively protects Mexico's large banks from being taken over directly by U.S. banks, but would allow the U.S. banking industry to gain control over many of the smaller banks and over a significant percentage of the larger banks.

ENTERPRISE FOR THE AMERICAS INITIATIVE

The NAFTA and subsequent free-trade agreements are intended to reinforce World Bank/IMF structural adjustment programs throughout the hemisphere and guard against any changes by future governments. The Enterprise for the Americas Initiative (EAI) is President Bush's plan to establish a free-trade zone stretching from "Anchorage to Tierra del Fuego", expand private investment and provide limited debt relief for countries in Latin America and the Caribbean. Each of these components is conditioned on or supports the implementation of a structural adjustment program, programs that have resulted in falling wages, increased poverty, environmental degradation, and the weakening of unions and other organizations representing the interests of working-class people.

The "accession clause", article 2205 of the NAFTA, specifies that other countries or groups of countries (not limited to countries in the Americas) may join the NAFTA, making it the model for any future trade agreements. Thus, future negotiations could proceed much more quickly than the NAFTA, leaving very little time for informed debate with or within these countries. The resulting agreements would severely limit future governments' abilities to implement industrial policies, sustainable development programs or other alternative economic programs.

ENVIRONMENT

Endorsed by:

American Cetacean Society
Animal Protection Institute
Arizona Toxics Information
Border Ecology Project
Center for International Environmental Law
Clean Water Action
Defenders of Wildlife
Earth Island Institute
Environmental Investigation Agency
Fair Trade Campaign
Friends of the Earth
Graduate Group on Industrial Heritage Policy (SUNY-Buffalo)
Humane Society of the United States
Institute for Agriculture and Trade Policy
Public Citizen
Rainforest Action Network
Sierra Club
Texans United

6 October, 1992

INTRODUCTION

The Administration has labelled the North American Free Trade Agreement (NAFTA) "the greenest ever" and, given that previous trade agreements almost entirely ignored environmental issues, such a claim is not hard to prove.[1] Although the NAFTA displays some sensitivity with respect to environmental issues (e.g. in the sections on Sanitary and Phytosanitary Standards and on Technical Barriers to Trade) the undersigned organizations still have grave concerns about the NAFTA as it is currently drafted, both for what is in the agreement and for what has been left out.

This document lays out six major problem areas and briefly sketches proposals to address these issues. It does not, however, seek to prescribe exactly how improvements should be made. Some believe issues can be addressed in the implementing legislation. Others suggest that sections might be quietly re-worked with the Mexicans and Canadians as occurred in the U.S.-Canada Agreement or that there should be protocols or side agreements to amend or clarify the text. Some think that flat out rejection is the only solution. Regardless of the vehicle, the endorsing organizations believe these issues must be addressed in a meaningful fashion.

A) SUSTAINABLE DEVELOPMENT: A RHETORICAL GAIN NOT REFLECTED IN NAFTA'S ACTUAL DEVELOPMENT MODEL

The NAFTA preamble states that its goal is to "promote sustainable development." Sustainable development, endorsed at the United Nations Conference on Environment and Development in Brazil earlier this year, is the idea that development must meet the needs of people today, without jeopardizing the ability of future generations to meet their needs.

The NAFTA's rhetorical exhortation for sustainable development is, unfortunately, not matched by measures within the agreement to promote the idea or by the development model endorsed by the Administration. The Administration's model, outlined by officials such as William Reilly, EPA Administrator, and Carla Hills, the U.S. Trade Representative, might well be called 'environmental deficit financing'. This concept posits that current wealth must be generated first, and that wealth will, in turn, allow future generations to pay for

clean-up. In effect, the NAFTA does not promote sustainable development, but rather hopes to meet the specific economic needs of people today while gambling with the ability of future generations to meet their needs.

Trade history has proven this model false, as the U.S.-Mexican border testifies. Properly constructed trade agreements should promote the elimination of pollution before, not after it is created.

Therefore, most environmental and social organizations strongly endorse a 'pay as you go' approach to the environment, rather than putting off clean-up to an unspecified time in the future. **Thus, one of our most basic concerns with the NAFTA is that it lacks any mechanisms to guarantee that an appropriate share of the wealth it may generate will go towards environmental and infrastructural improvement, nor does it commit the three governments to enforce similar environmental, health and safety rules.**

The issues raised in the following sections largely stem from and elaborate this concern.

B) FUNDING: NO MECHANISM EXISTS IN THE AGREEMENT FOR INFRASTRUCTURE DEVELOPMENT, ENVIRONMENTAL ENFORCEMENT, OR CLEAN-UP

A large environmental and developmental bill accompanies the NAFTA, especially in, but not limited to, the U.S.-Mexico border region. Funds must be earmarked to pay for:

A) The clean-up of the existing environmental problems caused by the Maquiladoras,

B) Basic sanitation and other infrastructure for the inhabitants of both sides of the U.S.-Mexico border, who have been drawn there by trade-related economic opportunities,

C) The further expansion of infrastructure into the interiors of the U.S., Canada and Mexico so that the greater trade caused by NAFTA can be accommodated in an environmentally sound fashion,

D) Expanded environmental inspection, testing, and enforcement throughout Mexico to help insure that environmental laws are implemented,

E) The creation and maintenance of the proposed North American Environmental Commission whose creation is now being negotiated following the meeting of Environmental Ministers on September 17, 1992.

The Administration relegates discussions of such funding to the so-called 'parallel track' on the environment, which has culminated in the February, 1992, Integrated Environmental Plan for the Mexican-U.S. Border Area. This plan has been sharply criticized by environmentalists from the border region for its lack of concrete policy recommendations, timetables, and firm funding commitments. In addition, attention must be paid not just to border regions but to the interiors of the NAFTA countries. The Administration's Feb. 1992 "Review of U.S.-Mexican Environmental Issues" largely sought to justify the NAFTA by arguing that the Agreement would spread investment and industry throughout Mexico rather than concentrating it in the border region as is now the case. If this new investment is to

be environmentally sound, much more than a border plan is required.

Even if the Border Plan were broadened in scope and more substantial, the fact remains that funds for these necessary expenditures would be subject to the vagaries of the appropriations process in the U.S. and to equally uncertain funding in Canada and Mexico. Under the parallel track, it seems highly improbable that appropriate funding levels will ever be realized, especially once the political spotlight drifts away from NAFTA.

Consequently, the endorsing organizations believe it is crucial that funding for these necessary NAFTA-related expenditures be explicitly linked to the Agreement itself.

This linkage could be achieved either by connecting trade liberalization phase-out schedules to the achievement of clean-up targets or through mechanisms such as including a cross-border tax as part of the agreement itself, as has been suggested by House Majority Leader Richard Gephardt.

C) ENFORCEMENT: WEAK IMPLEMENTATION OF ENVIRONMENTAL LAWS THREATENS TO CREATE 'POLLUTION HAVENS'

The environmental community is concerned that firms may relocate in Mexico to avoid stronger pollution control standards (particularly the enforcement of standards). In addition, and perhaps more common, firms may relocate in Mexico primarily for other reasons, especially cheap labor, and then find they can give profits an additional boost by violating environmental standards. A dramatic example of such behavior has been the failure of over two thirds of the Maquiladora firms to return their hazardous wastes from Mexico to the U.S. for proper treatment as is legally required. Similarly, independent testing outside Maquiladora facilities has revealed enormous toxic loads that indicate pervasive violations of environmental laws. An August, 1992 GAO Report disclosed that none of the six U.S. majority-owned Maquiladoras tested in 1990 and 1991 had complied with a 1988 law requiring such facilities to undergo an Environmental Impact Assessment. Environmentalists are concerned that these conditions would only worsen under a NAFTA unless aggressive steps are taken to curb these abuses.

The NAFTA takes no such steps. It is extremely disturbing that no provision is included to ensure that hazardous wastes generated by NAFTA-induced investments will be managed properly, despite the appalling track record of U.S. firms in Mexico under the Maquiladora program.

The NAFTA comes closest to addressing enforcement problems in its investment chapter, which meekly encourages, rather than requires, countries not to lower their standards in order to attract investment. Where standards seem to be lowered to attract investment, the agreement allows only for non-binding consultations (Section 1114.2). Formal dispute resolution is not available. The measure fails on two additional counts:

1) It misses the main current problem which is lax enforcement of existing laws, rather than the lowering of standards to attract investment,

2) It does not address the problem that regulatory disparities may widen if one country tightens its regulations, while the other partner countries leave their standards at current levels.

Environmentalists had hoped that the NAFTA would explicitly affirm that lax environmental regulations or enforcement constitute unfair trade practices. If polluters are not paying for their pollution the NAFTA will simply create a large distorted market. Several suggestions have been brought forward to avoid this problem:

- Countervailing duties could be imposed on specific sectors to even out the cost advantage enjoyed by firms that profit from lax regulatory environments. Funds from such duties could be channeled into the lax country to help firms bolster their environmental controls.

- A second proposal would be to set ambient standards in the border regions which, if exceeded, would trigger a cross-border tax to pay for clean-up until the region is brought back under the ambient targets.

- A third proposal would be to allow citizens access to the courts in the country of a facility's investor to seek redress for environmental transgressions.

Interestingly, the Agreement does provide enforcement mechanisms for companies whose intellectual property rights are violated and for investors who believe they have not received the full benefits and protection of the NAFTA's investment section. Thus, we see a serious disparity between the way the economic interests are to be treated, as compared to how the overall public interest is taken care of.

D) DISPUTE RESOLUTION: TIGHT SECRECY MAINTAINED

Environmentalists had hoped that the NAFTA would feature a more open dispute resolution mechanism than those found in other trade treaties. This demand is important for two reasons. First, giving citizens access to the documents and to the proceedings themselves is an important step towards democratic accountability and is a means of ensuring that governments vigorously defend challenged laws. Second, a further broadening to allow citizens and other interested parties to submit documents could allow for the inclusion of broader social concerns in the dispute resolution panel's judgement. Such broadening is crucial since a wide range of measures traditionally considered domestic and social legislation is coming under attack as trade barriers.

To our disappointment, NAFTA dispute resolution maintains the tight secrecy that was present in the negotiations. Confidentiality is the norm on all documents submitted in dispute resolution, during the dispute proceedings, and on panel reports until absolutely finalized. This procedure leaves the Executive branch as the sole protector of challenged environmental and consumer laws.

The dispute resolution process does allow for participation of scientific review boards, but only at the consent of both disputing parties. If the Parties agree to such input, the NAFTA requires the dispute panel to take it into

account, however, the scientific boards are limited to questions of fact. Thus, NAFTA allows for secret proceedings by five-person dispute panels, who are empowered to second guess core issues underlying an environmental or consumer standard.

Environmentalists believe that environmental and consumer issues should be resolved by environmental and consumer experts. The dispute resolution process should include mechanisms whereby environmental experts are brought into decisions on the legitimacy and effectiveness of disputed measures.

E) THE SANITARY AND PHYTOSANITARY STANDARDS (SPS) AND THE TECHNICAL BARRIERS TO TRADE (TBT) SECTIONS, ALTHOUGH IMPROVED COMPARED TO THE GATT DRAFT, STILL LEAVE U.S. LAWS OPEN TO CHALLENGES AS TRADE BARRIERS

The standards provisions of the NAFTA, the SPS and TBT sections, are improved over those in the GATT Uruguay Round. Despite this improvement, the TBT and particularly the SPS text still may leave legitimate U.S. consumer and environmental safety laws open to challenge by other NAFTA countries.

From the outset it must be understood that the real impact of the SPS and TBT sections is small since the General Agreement on Tariffs and Trade (GATT) is the principal forum where these disciplines are developed. At best, NAFTA could limit the likely success of Canadian and Mexican challenges to U.S. environmental and consumer safety laws. Unfortunately Mexico and Canada are just two of the over one hundred nations participating in GATT. Therefore, the true forum for reform of these clauses is the GATT and not NAFTA. Still, improvements in these sections could conceivably become the basis for revisions of the GATT codes in these areas.

Most encouragingly, these sections do set forth a shift in the burden of proof in the case of challenges. Unlike the GATT, under NAFTA the burden rests with the challenging nation rather than the defendant. Dispute settlement panels, however, are not courts, and there can be no certainty that this change will affect outcomes in particular cases.

Despite these improvements, the SPS text may still expose numerous U.S. national and state laws to challenge and could slow progress in environmental protection. In accordance with the idea of making standards equivalent or identical to those of other parties or international bodies, U.S. standards that are more protective than named international standards must meet a series of procedural requirements or they can be considered illegal barriers to trade. Unfortunately, the named international standards for food in the NAFTA are those of the Codex Alimentarius, many of which are lower than current U.S. law. A U.S. food safety standard that is higher than Codex that is subject to a challenge must meet a series of strict procedural requirements.

Specifically Sanitary and Phytosanitary standards must be shown to be:

A) Scientifically based,
B) Based on a risk assessment,
C) 'Consistent' in its level of protection with other national standards,

D) Applied 'only to the extent necessary' to achieve a NAFTA-approved policy aim.

Each of these requirements may open U.S. laws to challenge. Most disturbing are the last two -- the "consistency" and "necessity" tests. For example, the consistency clause could be used to attack standards such as the Delaney Clause, which simply forbids adding carcinogens to processed food -- a standard that is different from and higher than that which is applied to fresh foods. Similarly, determining whether a law is 'necessary' is a highly subjective task, which opens up the possibility of a challenging country suggesting a politically impossible but technically feasible means of achieving a policy goal. A challenged standard is judged by a pro-trade biased dispute panel, in secret, and in the context of an arrangement whose principal purpose is to eliminate governmental laws and regulation (see section above on dispute resolution).

Furthermore, the NAFTA text does nothing to address fundamental problems of the trading system which was highlighted by the August 1991 GATT panel ruling against the U.S.'s Marine Mammal Protection Act. In our view, the NAFTA should allow countries to regulate products based on their production method. Under the NAFTA, product prohibitions based on environmentally damaging production methods such as driftnet fishing remain exposed to challenge. Furthermore, the NAFTA only allows countries to set standards that apply to a product within that country's geographic borders.

Finally, the NAFTA requires the national governments to "ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement...by state and local governments." The NAFTA text may force the federal government to preempt state and local environmental laws. This could prove detrimental because states have traditionally played a key progressive role as an engine to pull forward federal standards, and a number of U.S. federal environmental laws expressly authorize our state to enact stricter legislation.

The NAFTA TBT text covers those standards-related measures not covered in the SPS text and contains some improvements on the GATT TBT text. This section is an improvement over the GATT Uruguay Round. Nevertheless, like the SPS text, the TBT text does not allow a country to regulate based on the process of production.

Still, the NAFTA TBT text would allow a country to maintain a wider range of standards than the SPS text. It does not require science or risk assessment in the setting of levels of protection and it considers a wider range of objectives for regulation to be legitimate. The TBT text also allows for different levels of protection across different regulatory circumstances.

The TBT text encourages countries to follow international standards. It does, however, allow higher standards if an international standard fails to meet a country's chosen level of protection. In all, the NAFTA TBT text seems the least likely to promote a downward harmonization of standards, as compared to the NAFTA SPS and the GATT Uruguay Round's SPS and TBT.

We are, however, deeply concerned by the provisions of Annex 2004, which holds out the possibility that the U.S. might have to pay "damages" even if U.S. standards meet those spelled out in NAFTA. Called "Nullification and Impairments," the section seems to allow countries to bring non-violation cases for national measures that do **not** violate the NAFTA rules but that cause another NAFTA country to miss an economic opportunity it could have expected.

F) INTERNATIONAL ENVIRONMENTAL AGREEMENTS: GLOBAL TREATIES MAY RUN INTO COMPLICATIONS WITH THE NAFTA

Article 104 of the NAFTA sets forth the relationship between the NAFTA and International Environmental Agreements (IEAs) whose provisions include specific trade obligations. While the language of Article 104 would appear to protect these international agreements, it nevertheless opens up two possible complications that could easily be addressed with relatively minor adjustments to the September 6 text.

The first concern is that, for the treaties listed under the NAFTA[2], the NAFTA itself becomes the arbiter of what is, and what is not, allowed under the treaty. The language states that the obligations in the IEAs shall prevail, "to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions," of NAFTA. The effect of this provision would be to throw disputes before a NAFTA panel, which would adjudicate the unfocused but potentially very restrictive requirements of "equally effective", "reasonably available" and "least inconsistent". As noted above, the trade dispute resolution process under NAFTA is extremely problematic and closed to public participation and monitoring. It is not the appropriate forum for judging the legitimacy of measures taken under IEAs.

We would therefore propose that, either through amendment to the text or through supplementary agreements, a greater standard of deference to a party's choice of what constitutes the proper means of implementing an IEA be created. The language could be modified to state that a Party's choice of implementing such obligations, "will be respected unless there is no rational basis for that choice." This definition should also make clear that administrative efficiency alone is enough to justify the choice of a particular implementation method.

The second concern with IEAs is that Article 104.2, which requires all signatory nations to submit in writing their desire to include new IEAs under the NAFTA, may open up an opportunity for countries to sign the IEA, but, by not including it under NAFTA, retain their ability to seek redress under NAFTA dispute rules against actions taken by another signatory to the NAFTA which is implementing the IEA through trade measures. Moreover, The difficulty in getting all NAFTA's parties to agree to add other IEAs could be compounded if additional countries accede to the NAFTA. The NAFTA must provide a simpler mechanism for recognizing other IEAs and must differentiate between trade measures taken to implement the IEA and other types of trade measures.

This potential problem could be addressed through a minor change in Article 104.2 which would delete the phrase, "may agree in writing to modify (the listed IEAs)" such that any trade amendment of the listed IEAs or addition of other IEAs which contain trade provisions and that are signed in an international context by all the parties will automatically be added to the NAFTA. This change could be augmented by agreement between the parties providing for consultations between the parties with an aim towards integrating IEAs into the NAFTA so that the IEAs are given full force and effect.

(This document was written collaboratively by members of the endorsing organizations. The text was compiled and edited by Alex Hittle and Scott Nilson at Friends of the Earth.)

NOTES

[1] Undertaking an Environmental Impact Assessment (EIS) on NAFTA in accordance with the National Environmental Policy Act (NEPA) would provide a chance to explore the full environmental ramifications of the agreement. To date the Administration has refused to do an EIS. An EIS would broaden both policy-makers' and the public's understanding of the environmental losses and gains in the Agreement as well as present alternatives for addressing environmental problems.

[2] The Convention on the International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances That Deplete the Ozone Layer, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

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ENERGY TRADE

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SUMMARY

The NAFTA text directly undermines the goal of energy conservation and the development of alternative energy technologies because it promotes increased reliance on fossil and uranium fuels and on destructive large-scale projects such as the James Bay Hydroelectric Dams in Quebec. The goal of the energy chapter of NAFTA is to "strengthen the important role that trade in energy and basic petrochemical goods play in the North American region...through sustained and gradual liberalization" (Article 601). Absent from this section is the articulation of conservation and resource efficiency goals and timetables. NAFTA prevents the US and Canadian governments from restricting the import or export of energy resources from other parties except under conditions of war. NAFTA also sanctions continued direct subsidies to oil and gas industries, while making no provision for incentives to promote energy efficiency projects or the development of renewable energy programs.

THE CORPORATE ENERGY AGENDA FOR NAFTA

When Presidents Bush and Salinas met in December 1991, the price that Bush demanded for reviving the stalled NAFTA negotiations was a commitment that Mexico would open up its oil service industry to US companies. Among the specific commitments that US oil companies pressed Washington to secure were: permission for US drilling companies to work for Pemex, the state owned oil and petrochemical company, on land as they already do offshore; direct contracts with Pemex for US contractors, eliminating the need to work through Mexican agents or middlemen; the ability to sign risk-sharing contracts with Pemex that would give US firms a share in the oil recovered; elimination of rules that limit or prohibit exports of oil or natural gas; and a commitment to world market prices. With the exception of the provision on risk-sharing contracts, these commitments are contained in the NAFTA energy chapter.

The Bush administration's hemispheric energy strategy aimed to guarantee US "energy security" by using NAFTA, and subsequent free trade deals, to develop and ensure access to the vast energy resources of Canada, Mexico and Venezuela. The result of such a hemispheric policy would be to prolong inefficient and polluting resource use in the US, and displace conservation and efficiency investments with a cheap supply of fossil fuels from foreign sources. It is not surprising that the NAFTA is heavily backed by many of the transnational oil companies.

1. NAFTA PROMOTES GROWTH IN FOSSIL FUEL TRADE

When the Agreement was announced in August, US Secretary of Energy James Watkins declared, "The agreement will promote the rapid deployment of new, more efficient energy technologies that promise to enhance environmental quality." But the words "energy

efficiency" are nowhere to be found in the NAFTA text. Instead, as suggested by the title of the energy chapter - "Energy and Basic Petrochemicals" - NAFTA protects the supply side of the energy equation, namely the big energy companies. Further reading of Watkins' statement reveals the intent of NAFTA's impact on energy markets: " NAFTA will encourage growth in fuels trade and will expand opportunities for US investment in electricity generation. Sweeping reform in petrochemicals offers access to a range of world-scale petrochemical investments." In conclusion, Watkins said, "While crude oil represents the largest component of our trinational energy trade, refined oil products, petrochemicals, natural gas, electricity, and coal trade are also significant and are expected to expand."

The current energy market is tilted heavily in favor of fossil fuel and nuclear industries. NAFTA institutionalizes this arrangement by providing, in Art. 608.2, for continued government subsidies and tax incentives to encourage oil and gas exploration "in order to maintain the reserve base for these energy resources." This repeats Article 906 of the 1988 Canada-US Free Trade Agreement, which formally recognized "the importance of government incentives for oil and gas resource development to the energy supply security of both countries and, therefore, allows such incentives to be maintained or created."

Unless the NAFTA energy provisions are rewritten to acknowledge and incorporate the full costs of energy development and use, the unregulated "free" marketplace will continue to favor investments in destructive energy projects and ignore cleaner, more sustainable technologies.

2. NAFTA POSES THREAT TO ENERGY CONSERVATION PROGRAMS

Since NAFTA proposes that Canada, Mexico and the US "make compatible their respective standards related measures, so as to facilitate trade in a good or service," any party that perceives any regulation to be a trade barrier can challenge that regulation. Making regulatory standards compatible through "harmonization" can work to either raise standards or lower them. Considering the omission of energy efficiency, renewables or least-cost energy planning in the NAFTA text, it is doubtful that Mexico, Canada, and the other states in the US would bring their energy standards up to the higher levels of states like Massachusetts, California or Wisconsin.

For example, if Massachusetts passes a law now under consideration that would apply US environmental standards to power purchased from Hydro-Quebec's huge James Bay hydroproject, Canada could challenge that law under NAFTA as a non-tariff barrier to trade. Although NAFTA allows "non-discriminatory" standards, it disallows "unnecessary obstacles" to trade. Thus energy reform initiatives on the state or provincial level which save energy and reduce consumption may be challenged as barriers to incoming energy supplies. Efficiency standards for machines and appliances, including those of the new US energy bill, could be seen as non-tariff trade barriers, since they prevent certain products from being sold in the US.

Article 607 goes further, prohibiting Canada and the US (but not Mexico) from restricting energy imports or exports under the guise of national security, except in time of war or when

the supply of nuclear materials for "defense purposes" is threatened with disruption. In either case, there is no incentive to redirect investment toward more sustainable energy-saving measures (ie, auto fuel efficiency standards or utility conservation programs) or renewable energy alternatives such as wind and solar power.

3. NAFTA UNDERMINES GOVERNMENTS' ABILITY TO REGULATE ENERGY SECTOR

To facilitate foreign investment, the Salinas administration has already reduced from 70 to eight the number of petrochemicals that are restricted to Mexican investors, and foreign drillers have returned to Mexico under contract with Pemex. Annex 602.3 allows foreign energy developers to "acquire, establish, and/or operate" electrical power plants in Mexico in order to meet their own supply contracts in the US or for sale to the Mexican utility. Less stringent - or weakly enforced - siting and pollution standards, as well as lower labor costs, may tempt energy companies south of the border in search of lower operating costs and higher profit margins.

In the Canada-US FTA, the US won terms that guarantee favorable prices and oil supplies in times of energy crisis. FTA articles 409 and 904 require Canada to allow continued exports of non-renewable energy resources even during periods of national scarcity (the 'proportionality clause'). If Canada were to declare a national emergency, it would still be obliged to allow the same proportion of its oil and gas production to be exported to the US as was sold over the previous three years.

In other words, once the energy export tap is turned on, it cannot be turned off. In times of shortage, priority cannot be given to national supply. NAFTA Article 605 is almost identical to the proportionality clause, although it applies only to Canada and the US. Canadian negotiators did not attempt to remove the proportionality clause in the NAFTA; rather, they tried unsuccessfully to have the provision extended to Mexico as well.

A more serious threat to the depletion of non-renewable resources is continuing unrestrained exports under normal conditions. The NAFTA restrictions on export quotas and minimum export prices (Article 603) and on export taxes (Article 604) force all three parties to allow continued sales of hydrocarbons at below their replacement cost. These market-driven exports will hasten the depletion of non-renewable fossil fuels. Such provisions greatly reduce the capacity of governments to manage and conserve resources and to use energy as a development tool.

4. NAFTA ALLOWS PERFORMANCE CONTRACTS FOR OIL COMPANIES

Despite heavy lobbying by US oil companies, Mexico refused to let private oil firms explore for oil under "risk contracts" – where the companies can keep a part of the oil they find. However, under Annex 602.3 of NAFTA, Mexico will accept "performance contracts." This is where the driller is paid a bonus fee if it strikes oil, or performs the work on time. Contractors are now only paid a flat fee.

But the distinction between risk and performance contracts may not be as critical as negotiators have maintained. For example, a

special $5 billion, five-year line of credit to Pemex from the US Export-Import Bank in 1991 gave leverage to the Bush administration in negotiating these provisions. This loan is tied to the purchase of US equipment and exploration contracts. Edward Morse, former US Deputy Assistant Secretary of State for international energy policy, explained that the Ex-Im Bank loan "could provide a wedge for the re-entry of US firms, which could be paid on a royalty type of arrangement for their services. And it is only a short step from 'pure service' to 'risk service' contracts -- the cover by which other Latin American countries permit equity investments in the oil sector."

On other energy issues, Mexican citizen organizations have criticized the Mexican government for consenting to open up the procurement process for Pemex so that it contracts more goods and services from US and Canadian companies.

ALTERNATIVES: WHAT A NEW NAFTA SHOULD CONTAIN

(1) Acknowledge and allow for continuation of programs for demand-side management of energy; protect them from being treated as trade barriers by parties to NAFTA. (Demand-side management assumes that energy saved is at least as valuable as energy added in supply.)

(2) Allow subsidies for non-polluting energy efficiency improvements and renewable energy systems and eliminate those offered for fossil fuels. The United States already offers more than $25 billion each year in subsidising fossil fuels, but virtually nothing for renewables.

(3) Protect local, state and provincial initiatives that now set stronger standards for energy use than do national regulations (such as tailpipe standards, power plant emissions, and alternative fueled vehicles.)

(4) Encourage the development in North America of clean energy alternatives and demand-side management practices that can help mitigate poverty as they contribute to sustainable development.

CONCLUSION

The NAFTA ignores the fact that wind and solar energy systems are cost-effective even without the generous subsidies given to oil and gas producers. The agreement also ignores the reality that improved energy efficiency measures can halve US energy needs and save billions of dollars in fuel costs every year. By strengthening the political and physical infrastructure to develop, transport, and consume the fuels of the past, NAFTA ensures that the clean fuels of today must battle uphill every step of the way for acceptance. If this NAFTA is enacted, it will set energy reform in North America and efforts to combat climate change back by decades.

[Comments and alternatives drawn from research by John Dillon, Carol Alexander, and Ken Stump.]

AGRICULTURE

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INTRODUCTION

Trade and agriculture policy are social policy. They determine where and how people will live, how land is held and worked, and the number and sizes of enterprises that contribute to food production and processing. Trade and agriculture policy can contribute to a regenerative strategy for rural community development, but they can also undermine it.

The NAFTA text works against sustainable rural development and an economically and environmentally sustainable agriculture in its agriculture provisions. It provides many opportunities for increased corporate concentration in agriculture through the elimination of import restrictions, lowered food safety standards, and lower world prices for agricultural products.

NAFTA AND AGRICULTURE

The NAFTA text for agriculture is really a compilation of three separate agreements. The Canada-U.S. Free Trade Agreement remains in effect to govern Canada-U.S. agricultural trade. Two new agreements, one between Canada and Mexico, and another between Mexico and the U.S. were negotiated. In addition, the three countries agree to abide by the same rules regarding market access, tariffs and quantitative restrictions, grading and marketing standards, domestic support, export subsidies, and sanitary and phytosanitary measures. Import restrictions, such as tariffs and tariff rate quotas, will be eliminated immediately or phased out over periods ranging from five to fifteen years depending on the product.

The text attempts to accomplish the objectives of the Uruguay Round of the GATT negotiations in relation to agriculture, whether or not the GATT is ultimately approved. This text guts the Meat Import Act and Section 22 for the U.S. as well as remaining protection for Mexico's most important domestic crop, corn, through the elimination of import restrictions. It supports tariffication of domestic support programs. It works toward the harmonization of sanitary and phytosanitary standards with those established by Codex Alimentarius and other international standards setting organizations with standards lower than those in the U.S., thus increasing the risk to the U.S. food supply. Under NAFTA rules of origin, it would be difficult, if not impossible, for consumers to distinguish foods produced under more strict standards from those produced under weak standards.

Through the elimination of domestic price supports and import restrictions, NAFTA will force large numbers of farmers in all three countries to switch to different crops, leading to oversupply in some commodities, falling prices, and disrupted markets for the traditional producers of the alternative crops. Additional problems may arise from import substitution, in which a country replaces its domestic consumption of a given product such as sugar

or beef with cheap imports and exports its domestic product to the U.S.

Sugar, dairy, peanuts, cotton, beef, fruits and vegetables are the commodities that will be most negatively affected by NAFTA in the U.S. Although officials claim that NAFTA will increase grain exports, these exports may increase by only 3-4% which is nearly insignificant. NAFTA's real winners are multinational agribusinesses which benefit from increased access to low cost commodities and from increased capacity to establish contract growing and processing operations for export in Mexico.

SECTOR SPECIFIC CONCERNS

SUGAR

NAFTA offers Mexico the potential of unlimited access to the U.S. sugar market in six years if it can become a net sugar exporter for two consecutive years. This is likely to occur when Mexico develops a high fructose corn sweetener industry, largely based on imported U.S. corn. Sugarbeet growers in the upper midwest and western states may have to stop planting or cut back on the acres devoted to sugar. Studies on the impacts of shifting sugar land into potatoes, wheat and other crops indicate that there would be a sharp rise in production, lowering prices. Land prices will decline when lower value crops are planted, leading to tax base erosion and possible bankruptcies.

SECTION 22 COMMODITIES

Commodities, such as dairy, peanuts and cotton, which were protected from imports by Section 22, will become vulnerable as Section 22 protections are converted to tariffs and phased out. NAFTA allows Canada to import peanuts from anywhere and then re-ship them processed as peanut butter to the United States without limit or duties. Mexico will be granted immediate access to the U.S. peanut market, with all import controls eliminated in 15 years. Canada believed that it was so important to maintain import restrictions on their supply managed commodities, dairy, poultry and eggs, that they ensured that these commodities would be protected in the Agreement with Mexico.

BEEF

NAFTA will create five major problems for U.S. cattle producers. First, NAFTA will preempt the Meat Import Act of 1979 which limits U.S. beef imports to protect U.S. producers from being put out of business by highly subsidized beef exports from Europe or by low priced beef from rainforest regions of Central and South America. NAFTA also specifically bans the use of voluntary export restraints in meat.

Second, NAFTA immediately eliminates the tariff on feeder cattle imported from Mexico. U.S. cow/calf producers could face as many as 2.33 million head of feeder cattle eligible for the U.S. market annually. Given that the average over the last few years has been less than one million head, this would be a 100% increase, amounting to 10% of the cattle on feed in the U.S.

Third, Mexico could ship more of its current domestic production to the U.S., supplying its domestic demand with cheaper imported beef from the European Community or other Latin

American countries. Beef that can be sold on the U.S. market for 70 cents per pound can be bought from these other regions for 50 cents per pound. U.S. dairy farmers, hit by low milk prices for most of the last decade, have been helped greatly by good beef prices. Many are concerned that a huge influx of Mexican beef will lower U.S. prices, taking away an important source of income.

Fourth, NAFTA provides incentives for the U.S. meatpacking industry to locate its new investments in Mexico, where it will be able to take advantage of lower wages and less restrictive anti-trust laws. Excel, a subsidiary of Cargill, has already purchased a packing plant in Saltillo, Mexico. Because livestock feeding operations are closely associated with packing plants, the movement of meatpacking operations could also result in the shift of livestock feeding. The tariff schedules provide advantages for those interested in developing feeding operations in Mexico. Tariffs on pork and live swine, for example, are remaining relatively high for a ten year period, but tariffs on breeding stock are being eliminated immediately.

Fifth, NAFTA could pose a serious threat to U.S. consumer confidence. Unless the government is prepared to increase dramatically its budget for border inspections, U.S. consumers will face declining quality and safety in the marketplace, perhaps resulting in reduced meat consumption. Reliable country of origin labeling of beef is virtually impossible, thus making it difficult to determine whether beef imported from NAFTA countries originates there or whether it comes from other regions, such as Central America.

FRUITS AND VEGETABLES

Fruit and vegetable producers, especially those in California, Texas and Florida, but including others in specific crops such as asparagus in the Upper Midwest, will be heavily damaged by NAFTA's provisions. Some fruits and vegetables which overlap with Mexican produce have been left unprotected in the tariff schedules which will result in the failure of those sectors and, where possible, conversion to other crops. Other vulnerable crops are those in which the movement of processing facilities and increased investment in Mexico could shift production patterns. These include frozen orange juice concentrate, canned tomatoes, and frozen vegetables, as well as some orchard crops, such as peaches.

MEXICAN BASIC GRAINS

Mexican basic grain farmers will suffer disproportionately under NAFTA as they lose their supported corn price, currently twice that received by farmers in the U.S., and are forced to compete with cheaper grain from foreign suppliers. Large scale displacement of Mexican farmers, estimated at anywhere from 800,000 to 3,000,000 families, will result in increased migration to the U.S. with the attendant social problems that will be created on both sides of the border. Wages for farm labor in the U.S. will be pushed downward as the number of workers increases while sources of employment, especially in sugar beets and fruits and vegetables facing competition with Mexico, decline. Enforcement of labor rights for migrant workers will be more difficult as their numbers swell.

AGRICULTURE AND THE ACCESSION CLAUSE

NAFTA's biggest agricultural impact may reside in the Accession Clause which allows any country or group of countries to accede to the NAFTA if they comply with the conditions imposed for admittance. Little or no research has been done on the implications of liberalized agricultural trade with these other countries. Not only Latin American countries, but other major agricultural exporting countries such as Australia and New Zealand could gain the same access to North American markets provided to Canada, Mexico and the U.S. by NAFTA, causing further market erosion. Under the Accession Clause, countries that are lower cost producers in nearly every commodity produced in the U.S. may increase their exports to the U.S. as a result of the elimination of import restrictions. Argentina and Brazil are the hemisphere's lowest cost producers of wheat and beef, New Zealand has lower dairy prices than the U.S., and Brazil could dominate the frozen orange juice market. Thus, while U.S. dairy producers will see little impact from liberalized trade with Mexico, the unrestricted imports of dairy products from countries like New Zealand could seriously damage U.S. dairy producers.

SANITARY/PHYTOSANITARY PROVISIONS

The NAFTA text understates the downward harmonization of food safety standards while developing the mechanisms by which it will occur. These are further delineated in the section on Dispute Resolution. The Agreement allows states and nations to have higher standards. However, if challenged, these must be defended on scientific grounds and be shown to be without intent to restrict trade. Many laws, especially those regulating pesticides at the state level, may not meet the test of scientific evidence related only to human, animal or plant health, having been instituted as precautionary measures to protect the environment. In other cases where provisions relating to health have been enacted with the intent of preventing harm where the effects of a chemical or process are unknown, there may be insufficient scientific evidence to justify maintaining the standard.

NEW INSTITUTIONS

The agriculture text establishes three bodies: the Working Group on Agricultural Subsidies, the Committee on Agricultural Trade, and the Committee on Sanitary and Phytosanitary Measures. These groups, all of which have as their mission the implementation of various subsections of the agriculture Agreements, have no expressed requirements to include agricultural producers or consumers in their memberships and therefore could seriously jeopardize accountability to the public.

CONCLUSIONS

NAFTA, in concert with the Dunkel text for the General Agreement on Tariffs and Trade, will eliminate the best farm programs in North America. U.S. farmers could lose the only programs that have established supply management and reasonable prices for farmers if Section 22 provisions are converted to tariffs that will ultimately be eliminated. Canada, although its supply management programs are

nominally respected in NAFTA, will lose them if the Dunkel text is approved. Mexican farmers will suffer the most as NAFTA, coupled with changes to the Mexican land tenure system, places an unprecedented burden on family farmers to enter the competition in global commodities markets without the infrastructure, technology and resources currently available to their northern neighbors.

ALTERNATIVES

Good alternatives for agriculture require good trade policy. A good trade policy for North America must support the following:

1. Supply management based on cost of production pricing for agricultural products.

2. The enforcement of normal trading rules that prohibit export dumping.

3. Market share for competitive products.

4. Changes in the structure of farm labor.

5. National food safety standards based on locally determined levels of risk.

SUPPLY MANAGEMENT AND COST OF PRODUCTION PRICING

Supply management is the system by which nations determine the quantities of food they will need to meet their domestic and export needs and set the production levels for farmers accordingly. Provisions are made for surpluses to protect against drought and famine. Supply management encourages farmers to produce the range of food products needed in a national economy. Successful supply management systems, such as those that exist in Canada and in the U.S. for some crops, fix quotas for production levels that will be sold at a cost of production price. Production over those levels receives a substantially lower price. Products are often sold through marketing boards or cooperatives. Because this system is structured to balance supply with demand, cheap imports that could destroy the balance are controlled. Restrictions on imports are essential to the maintenance of any successful supply management program as well as similar international commodity agreements. Under NAFTA, Canada maintained its supply management provisions, but the U.S. and Mexico negotiated away import restrictions on key commodities. Thus NAFTA must be renegotiated to respect supply managed commodities, including U.S. sugar, dairy, peanuts and cotton, and Mexican corn.

PREVENTING EXPORT DUMPING

Current GATT rules (Article 6) ban the sale of goods overseas at prices below the cost of production, which GATT states must include the cost of marketing and reasonable profit. This rule is rarely enforced in agriculture. It needs to be clarified to describe what should be included in the full cost of production, and it should be enforced. Both the GATT and NAFTA should state this directly and explicitly.

MARKET SHARE FOR COMPETITIVE PRODUCTS

Under the current NAFTA proposals, there will be "winners and losers" among major vegetable and fruit producing sectors in all three countries, not just the U.S. Such

dislocations may be unnecessary. A sectoral approach to negotiations in which quotas are allotted and production decisions take into account both historic production patterns and the needs for development of new products, especially in Mexico, could result in less dislocation and new opportunities in all three countries. Points for negotiation would include market share for each country at the beginning and end of the season when prices are higher, and fair wage rates for agricultural workers.

CHANGES IN THE STRUCTURE OF FARM LABOR

The question of farm labor and migration, especially between the U.S. and Mexico, is one which has not been adequately addressed in any current policy. Labor mobility was specifically excluded from the negotiations, except for professionals. Yet migrant labor is an integral part of agricultural production in both the U.S. and Mexico. Mexican farmers migrate to the U.S. to work in agroindustry, thus earning off-farm income that supports the farm in Mexico. U.S. corporate growers too often abuse vulnerable workers by paying less than minimum wage, reneging on contracts, and forcing employees to work in unsafe working conditions.

It is as important to assess the impact of migration on Mexico's domestic workforce as it is to examine the impact on the U.S. As men migrate to work in the U.S., women take on the burden of running the farms and the communities back home. Also, as agromaquilas grow in number, young women migrate to work in them. Thus the entire structure of rural life and work in Mexico is changing.

Migrant labor on the part of both U.S. citizens and undocumented workers is fundamental to the current production of labor intensive crops in the U.S. Thus it is unacceptable not to tackle the issue of migrant labor to ensure that farmworkers contribute to North American economies with dignity.

A Binational Commission on Migrant Labor should be established, the purpose of which would be to create proposals for a North American labor policy. Representatives of farm, farmworker, labor, human rights and legal rights organizations from all three countries should meet to develop proposals for a labor policy that would include incentives such as higher wages to reduce migration, terms of entry and protection on the job, and policies to reduce the impact of migration on the domestic work force.

NATIONAL FOOD SAFETY STANDARDS

Each nation as well as subfederal jurisdictions should have the power to determine the level of health risk each is willing to tolerate in its food system. Downward harmonization of food safety standards is an unacceptable mechanism to increase the volume of food trade. States and provinces should have the ability to promote organic and sustainable agriculture programs, as well as enact higher pesticide and environmental standards based on factors not limited to scientific justification, such as biotechnological advances and other areas in which the impact on human health has yet to be determined. In the case of bovine growth hormone, for example, Mexico has approved its use but it has yet to be approved in the U.S. Mechanisms must be established to ensure that BGH dairy

products do not enter the United States, thus making consumers vulnerable to a product not approved by the FDA and placing U.S. farmers who comply with the prohibition against the use of BGH at an unfair competitive disadvantage.

To ensure food safety, adequate inspection systems must not only be maintained, but improved. Safety guidelines should be improved on processed beef in all three countries. Border testing should be systematic for all entry and exit of beef for health reasons including the detection of screw-worm. The testing will also increase consumer confidence about beef production, slaughter, and packaging whether in the U.S., Canada or Mexico.

There should be a consistent policy against the Streamlined Inspection Service (SIS), a failed inspection service that was being tested by the U.S. Department of Agriculture at five pilot plants. It is important that Canada and Mexico adopt this same position against the SIS. Along the U.S.-Mexico border, U.S. agencies should be responsible for verifying all testing for the first 5 years. Money for technical assistance to improve monitoring and quality control should be part of the appropriation for implementation of the trade agreement and may be raised through a two-way customs duty on imports.

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CRITIQUE

1. POTENTIAL JOB LOSS

NAFTA dramatically alters the incentives and rules facing investors, enhancing corporate mobility within the North American continent. For this reason, it would significantly increase the shift of productive investment from the United States to Mexico if ratified in its current form. Furthermore, NAFTA would encourage new investment to go to Mexico, rather than to the United States. The Conference Board, a New York-based business-oriented research firm, found that Mexico accounted for "nearly all of the net growth in business spending throughout North America in 1992," and that growth in business spending in Mexico will be three times faster than that in the United States from 1993 to 1995.[1]

Studies show that up to half a million high-wage U.S. jobs could be lost over the next ten years if such investment shifts occur.[2] General Motors alone has already announced 75,000 layoffs from its U.S. facilities, while it expands production in Mexico. A higher unemployment level will intensify pressure on already overburdened local, state, and federal government budgets as it increases demands for unemployment compensation, welfare, and social services.

While Mexico will likely gain some manufacturing jobs due to such a shift, it will also experience significant labor-market disruption due to large-scale displacement of small basic grain farmers and agricultural workers.[3] In addition, over one hundred thousand Mexican workers have already been displaced due to the restructuring of newly privatized industries.[4] Though it is not fully clear how these opposing effects will balance out, it is clear that many existing studies fail to take into account the channels through which NAFTA will have negative effects on employment.

Most mainstream economic studies of NAFTA are not capable of predicting its impact on overall employment because they assume (rather than concluding on the basis of research) that all those who are able and willing to work will find jobs, and they therefore assume there will be no change in overall employment. (This fact is often obscured, since the models do predict shifts in employment from one sector to another, while overall employment levels remain unchanged.) Studies that predict that U.S. employment will rise as a result of huge increases in U.S. exports to Mexico are equally deceptive. These studies take no account of increasing imports; to the extent that imports increase, they will cancel out the employment-creating effects of increases in exports.

2. IMPACT ON WAGES

Liberalizing trade and facilitating the shift of investment between the United States, Canada, and Mexico — as NAFTA proposes — will put downward pressure on U.S. and Canadian wages without necessarily pulling Mexican wages up. The threat of runaway shops -- even when it is not carried out -- contributes to keeping an increasing percentage of full-time wage earners below the poverty line. Employers have used the threat of moving to Mexico, for example, to scare workers out of voting for unionization. [5] Professor Edward Leamer of the University of California—Los Angeles has predicted that NAFTA will further polarize the U.S. income distribution, reducing the wages of "low-skilled" workers by about $1000 a year.[6]

During the last ten years, as trade between Mexico and the United States has accelerated and investment by U.S. corporations in Mexico has increased, real wages in Mexico have fallen by about 40 percent. During this same period, productivity in Mexican manufacturing production has increased dramatically. This suggests that growth, investment, and productivity improvements are not *sufficient* to raise wages if other conditions are not conducive to a free and independent labor movement.

Since 1979, the real median wage for all U.S. workers has fallen by 7.3 percent. For those workers without a high school degree, the decline was almost three times as great — 20.5 percent.[7] This suggests that workers at the bottom of the wage distribution have borne the brunt of the "globalization" of the U.S. economy, but that all workers have felt its impact. Recent immigrants, women, and people of color are disproportionally concentrated in some of the labor-intensive industries that may be most vulnerable to wage erosion and job loss due to NAFTA.

If ratified in its current form, NAFTA could cost U.S. workers up to $320 billion over the next decade in lost jobs and lower wages.[8]

3. EROSION OF LABOR STANDARDS

Any trade agreement among the nations of North America should integrate basic labor rights and protections to prevent "social dumping" – violating worker rights to gain an advantage in the international marketplace. Several U.S. trade statutes already set forth such standards as a condition of in various beneficial trade programs, including the Generalized System of Preferences (GSP), the Overseas Private Investment Corporation (OPIC), the Caribbean Basin Initiative, and Section 301 of the Trade Act. The basic worker rights specified in those statutes are:

- -- the right of association
- -- the right to organize and bargain collectively
- -- prohibitions on forced labor
- -- restrictions on the use of child labor
- -- minimum acceptable conditions regarding minimum wages, hours of work, and workplace health and safety.

A NAFTA that does <u>not</u> contain an equivalent formulation of basic worker rights in trade would actually be a giant step backward for worker rights. NAFTA would displace other trade statutes, so worker rights now protected under U.S. law would be left unguarded under NAFTA, at least as far as Mexico and Canada are concerned. A later "Enterprise for the

Americas" trade pact modeled on NAFTA would exempt all of Latin American and the Caribbean from labor rights conditions in trade with the U.S.

In addition to their incorporation in U.S. law, these standards reflect human rights declarations of the United Nations, the Organization of American States and other international bodies. They are also contained in conventions of the International Labor Organization either ratified by the U.S., Mexico and Canada, or protected under the domestic legislation of each country. Thus, there is sufficient consensus on this minimum set of worker rights to insist that they be included in NAFTA.

One other standard missing from labor rights clauses in U.S. trade statutes should be added to a NAFTA labor rights provision: non-discrimination in the workplace. This is critical in light of the race, gender and national origin-based division of labor in the transnational economy of the North American continent. While an anti-discrimination clause is lacking in the labor rights provisions of U.S. trade privilege programs, it is a cornerstone of domestic employment law. Congress went as far last year as to extend the Equal Employment Opportunity Act to protect citizens working for U.S. corporations in foreign countries. An anti-discrimination clause also reflects human rights instruments and ILO Conventions and Recommendations.

In addition to its Conventions and their careful definitions of these labor standards, the International Labor Organization has developed an extensive body of case law in many of these areas. Each signatory to NAFTA also has its own national experience under constitutional, statutory and judicial enforcement of worker rights. All together, a consensus is already in place to establish at least this minimum, six-point labor rights standard covering:

1) free association

2) organizing and bargaining

3) forced labor

4) child labor

5) acceptable conditions

6) non-discrimination.

4. SAFEGUARDS

NAFTA effectively weakens existing U.S. law (Section 201 of the Trade Act, which is compatible with GATT rules) to protect domestic workers and industries from injurious import surges. Currently, workers and trade unions have the right to file escape-clause petitions when they believe imports have caused substantial injury to the domestic industry. These petitions allow the injured country to restrict trade temporarily.

While NAFTA ostensibly allows for safeguard petitions in the event that imports surge into a country after the signing of the agreement, it severely limits the circumstances under which such cases could be brought. For example, safeguard actions can be brought only once during the transition period (while tariffs are being phased out). After the transition period is over (from five to fifteen years, depending on the product), actions may be

brought only with the consent of the other party. As the Labor Advisory Committee pointed out in its report to Congress, this means that, "as a practical matter, even the theoretical safeguard protection will end at the conclusion of the transition period."[9]

5. IMMIGRATION AND TEMPORARY ENTRY

NAFTA proponents have argued that NAFTA will stem the migration of Mexicans to the United States by creating jobs. In reality, NAFTA, in conjunction with President Salinas's other economic reforms, will slash agricultural subsidies and speed industrialization along the border. The resulting large-scale dislocation will likely mean greater migration to the United States from Mexico -- at least in the short term.

Immigration rights for most groups of Mexican, U.S., and Canadian citizens are left unchanged by NAFTA. Maria Jimenez, director of the American Friends Service Committee's Immigration Law Enforcement Monitoring Project, writes that, "A free trade pact that does not expand to include a flexible immigration framework, such as that adopted by the European Economic Community, effectively freezes wages within national boundaries and guarantees continuing large wage differentials between the two countries."[10] By continuing to restrict labor mobility while increasing corporate mobility, NAFTA will maintain "the availability of an undocumented labor force that is highly exploitable and [will] insur[e] that runaway shops in Mexico continue to diminish the integrity of the work forces in the United States and Canada," Ms. Jimenez argues.

The only labor mobility addressed in NAFTA is in the temporary-entry provisions, which significantly alter the conditions under which professionals and businesspeople can enter and do business in the other North American countries. This provision undermines U.S. immigration law without enhancing the rights of these non-immigrant workers. Current U.S. law does not permit employers to hire temporary entrants without showing that they are unable to recruit resident workers.[11] NAFTA specifically precludes this type of labor certification.

NAFTA's temporary-entry provisions create a disenfranchised group of workers, whose right to remain in the country depends on the whim of a single employer.[12] NAFTA will significantly expand this class of entrants, as the Canada-U.S. FTA did in 1989. The "business-people" and "professionals" covered by NAFTA include nurses, medical technicians, tour bus operators, and truck drivers, as well as many other categories such as architects, engineers, doctors, and lawyers.

These workers will be eligible for temporary entry, so long as the individuals can show that they have been offered a job in the country of their destination. Their permission to remain in the country depends entirely on that employer; they may not seek another job if they lose the original job. Temporary entrants under NAFTA will not be subject to labor certification requirements or quotas applicable to other non-immigrant workers. Their status may be renewed indefinitely, unlike the H visas currently available.

NAFTA should not provide for expanded temporary entry of professionals or other "guest-worker" programs disguised as free trade in services. At the same time, the rights of

temporary entrants working in the United States must be better protected.

Border entry and immigration policies must be administered in an orderly, consistent and humane fashion. The legitimate need of every country to regulate its borders can never justify the violation of human rights or the exclusion of persons seeking refuge.

ALTERNATIVES

Our goal is to enact a trade and development agreement that truly benefits the majority of people in all three nations. The present NAFTA, on the contrary, facilitates the ability of major corporations to move their operations around the continent while forcing working people to bear the costs of those moves. Our proposed alternatives facilitate trade that does not depend on driving down wages, working conditions, and health, safety, and environmental standards in order to gain a short-lived competitive advantage.

1. LABOR RIGHTS

Mechanisms to enforce labor rights and standards in a renegotiated trade agreement can also be crafted to address the specific concerns of workers. Negotiators created a detailed, tough enforcement structure for intellectual property rights. Nothing less should be accepted for the protection of worker rights.

Elements of an enforcement regime specific to worker rights in the North American Free Trade Agreement should include the following features:

Standing

Any worker or group of workers engaged in commerce among the three countries of North America, or any trade union representing such workers, or any non-governmental organization whose charter contemplates worker rights advocacy in North America, should have standing to bring any complaint of worker rights violations under NAFTA or to intervene as a bona fide interested party in any dispute settlement proceeding under NAFTA.

Corporate Responsibility

Notwithstanding separate or artificial forms of incorporation in the three countries, a parent corporation should be held accountable for the labor practices of its subsidiaries. If a parent corporation is not headquartered in one of the three countries of North America, its principal operation center in any of the three countries should be subject to liability for labor rights violations of a related enterprise.

Choice of Forum

Regardless of nationality, workers or unions complaining of labor rights violations by a multinational corporation, or by a government, should be allowed to bring an action in a court of competent authority or before an appropriate administrative agency of either the country where the violation occurred, or the country of the complaining party, or the country where the headquarters of the offending employer is located, if it is different. Alternatively, a complaining party should be permitted to press its claim under NAFTA dispute resolution mechanisms. Where labor law and precedent is more favorable to workers than a NAFTA labor

rights standard, the more favorable rule should apply.

Country-specific, Sector-specific and Company-specific Sanctions

Complaints of labor rights violations should be permissible against a country that is signatory to NAFTA, against an industrial sector or association of enterprises engaged in commerce with another NAFTA signatory, or against a single company engaged in commerce with another NAFTA signatory. Upon determination of a violation of worker rights under NAFTA, the offending entity should be stripped of benefits under the treaty until such violation or violations have been cured by adequate remedial measures (for example, reinstatement and back pay for workers fired in violation of the right of association; back pay to workers paid below the applicable minimum wage, a halt to the use of child labor or forced labor, and compensation for its victims; an end to race or sex discrimination, with compensation to its victims, and so on).

A Broad Range of Available Sanctions

As in the case of intellectual property, an array of sanctions against worker rights violators should be available to tailor the punishment to the crime. Applicable sanctions can include:

--duties or fees on goods or services from a labor rights violator entering another NAFTA signatory country;

--application of a quota limiting the entry of goods or provision of services from a labor right violator;

--an outright ban on goods or services from a labor rights violator;

--compensatory and punitive damage awards to workers or unions whose rights are violated (where injury, disability or disease results from health and safety violations, the limitations of workers compensation laws can be lifted to permit compensatory and punitive damages);

--criminal prosecutions in case of willful violations of worker rights;

--denial of government contracts from any or all NAFTA signatories to firms that violate worker rights;

--award of lawyers' fees to workers, unions or human rights groups whose action vindicates worker rights.

Injunctive Relief

In cases where continued violation of worker rights under NAFTA threatens to cause irreparable harm either to the workers whose rights are being violated, or to workers affected by the beneficial treatment of goods or services entering North American commerce produced under conditions of labor rights violations, injured parties or their advocates (including unions and human rights groups), or administrative agencies, or NAFTA dispute settlement panels, should be authorized to seek immediate injunctive relief from a court of competent authority to halt such violations. Failure to comply should subject violators to contempt of court sanctions.

Composition and Proceedings of Arbitral Panels

There is nothing inherently wrong with consultative or arbitral panels set up under NAFTA as long as they are not an exclusive forum. Such panels ought to be open to claims of labor rights violations, too. But NAFTA should be amended to provide that:

1) Lists of potential panelists include persons with experience and expertise in labor, environmental and human rights matters;

2) Panelists be prohibited from representing any NAFTA disputant in other forums or different NAFTA proceedings;

3) NAFTA panels must consult a range of outside experts and scientific advisors, including those with expertise in labor and human rights matters (or scientists with such expertise, in cases, for example, of occupational health disputes);

4) Proceedings before NAFTA panels must be open to the public and briefs and decisions must be published, with only genuine trade secrets or proprietary information subject to a protective order;

Translation Costs

The costs of translating documents, depositions and testimony in legal proceedings asserting worker rights under NAFTA shall be borne by the budget of the NAFTA Free Trade Commission, so that workers, unions and human rights groups are not prevented by language barriers from seeking to enforce their rights under NAFTA.

As a condition for negotiating liberalized trade, each of the three governments should commit to comply with internationally recognized standards for the rights of free association, collective bargaining, the right to strike, and non-discriminatory wages and conditions of employment. Failure to respect these basic rights should be considered an unfair trade practice, punishable by trade sanctions or other financial remedies. Only then will workers be able to negotiate for a fair share of their production and a safer working and living environment.

Other labor-related issues that should be addressed by a continental trade and development agreement are the following:

2. INVESTMENT IN EDUCATION, TRAINING, SOCIAL INFRASTRUCTURE

In order to raise living standards in all three countries, the three governments must invest substantially in the education and skills of their work forces. In addition, companies that invest in other countries should be compelled to contribute their fair share to support the social infrastructure in the communities in which they operate, including medical care, community development, and education. This could be achieved by a tax on investment.

3. LIVING WAGE PROVISION

The agreement should explicitly recognize the goal of creating jobs which pay a "living wage" in all three countries. As a start, it should mandate a higher minimum wage in Mexico, to be implemented immediately in export industries and expanded as rapidly as possible throughout the rest of the Mexican economy.

4. PROTECTION OF IMMIGRANTS' RIGHTS

The labor rights of immigrant workers, both documented and undocumented, both permanent and temporary, should be protected and improved. Ultimately, we should work toward harmonizing wages and working conditions up to the highest level prevailing in any of the countries. As progress is made on this front, legal barriers to labor mobility could be eased.[13]

5. SHIFT TRANSITIONAL COSTS TO TRANSNATIONAL CORPORATIONS, NOT WORKERS

Corporations in all three countries should be compelled to compensate workers and communities for losses suffered as a result of the movement of production facilities. Compensation should include the following:

- -- 120-day advance notification of plant closing;
- -- severance pay;
- -- continuation of medical benefits for one year after the closing, or until comparable work has been found;
- -- retraining and job search assistance.

By forcing corporations to absorb some of the costs their location decisions impose on the community, this provision would change the incentives facing firms.

NOTES

[1]Daily Labor Report, Bureau of National Affairs, August 27, 1992, p. A-4.

[2]See Jeff Faux and William Spriggs, *U.S. Jobs and the Mexico Trade Proposal* (Washington, D.C.: Economic Policy Institute, 1991); and Timothy Koechlin and Mehrene Larudee, "The High Cost of NAFTA," Challenge, September/October, 1992.

[3]See the agriculture chapter by Karen Lehman. For research suggesting that, without mitigating income support from the Mexican government and a lengthy transition period, NAFTA will cause a large exodus of workers from the Mexican countryside to the U.S. and urban Mexican areas, see also Sherman Robinson, Mary E. Burfisher, Raul Hinojosa-Ojeda, and Karen E. Thierfelder, "Agricultural Policies and Migration in a U.S.-Mexico Free Trade Area: A Computable General Equilibrium Analysis," Working Paper No. 617, California Agricultural Experiment Station, Giannini Foundation of Agricultural Economics, December 1991.

[4]See Kim Moody and Mary McGinn, Unions and Free Trade: Solidarity vs. Competition. Jan.92, p. 30.

[5]See, for example, Wall Street Journal, July 30, 1992, p. A-1.

[6]6 Edward E. Leamer, *Wage Effects of a U.S.-Mexican Free Trade Agreement*, NBER Working Paper No. 3991 (Cambridge, Mass.: National Bureau of Economic Research, February 1992).

[7]Lawrence Mishel and Jared Bernstein, Declining Wages for High School *and* College Graduates. (Washington, D.C.: Economic Policy Institute, 1992).

[8]Koechlin and Larudee, Challenge, Sept/Oct 1992

[9]Labor Advisory Committee on the NAFTA, "Preliminary Report," September 16, 1992, p. 11.

[10]Maria Jimenez, "Labor Mobility and the North American Free Trade Agreement," *Immigration Newsletter*, vol. 19, no. 4, p. 3.

[11]Labor Advisory Committee Report, p. 15.

[12]From "Comments of the Service Employees International Union (SEIU) Before the U.S. International Trade Commission on the Probable Effects of Free Trade Agreement Between the U.S. and Mexico," April 16, 1991, Docket # 91-3421.

[13]There are very different perspectives on this issue. Some analysts advocate completely open borders; others think we should not call for any easing of barriers. Please send any ideas on reaching a consensus position to Thea Lee.

INVESTMENT AND CORPORATE RIGHTS

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A. CRITIQUE OF NAFTA TEXT (September 6 text)

1. RIGHTS WITHOUT RESPONSIBILITIES

The NAFTA draft gives corporations tremendous rights without asking for any responsibilities in return. The investment section lays out the framework for the further liberalization of investment rules for corporations of the three nations. The basic principal is that a corporation should be able to operate freely and without discrimination in the other two countries. This includes freedom from government-imposed performance requirements, freedom to repatriate profits, freedom to move top management, provisions ensuring compliance by sub-national governments, etc. This approach has led President Carter's Labor Secretary, Ray Marshall, to label NAFTA an "Investment Protection Act," and Maude Barlow of the Council of Canadians to call it a "Corporate Bill of Rights."

At the same time, the NAFTA draft requires nothing from corporations in terms of advancing worker rights, community viability, environmental health, or the common good. A NAFTA under these terms will benefit a few hundred large corporations at the expense of the vast majority in all three countries.

2. ENCOURAGING LOW WAGES AND POOR WORKING CONDITIONS

Such freeing of investment rules without requirements on labor and environmental standards and community protection will only promote an acceleration of capital flight from the United States (and to a lesser degree from Canada) to the border area in Mexico. As a result, corporations will be in a position to dictate wage levels in all three countries leading to a downward push on wages and job security. In early June, Ross Perot told a group in Washington, D.C. that he had phoned the executives of 15 of the largest U.S. corporations and had asked them where they would build their next plant if NAFTA went through. According to Perot, they all said Mexico. A new Roper Organization poll of 455 senior executives of U.S. manufacturing firms found that 40 percent said they were likely or somewhat likely to shift some production to Mexico if NAFTA is ratified.

The increased mobility for corporations will enhance their bargaining power vis-a-vis U.S. and Canadian workers to further erode wages and working conditions in these countries, while failing to raise them in Mexico. The same Roper poll found a quarter of U.S. manufacturing executives were likely or somewhat likely to use NAFTA as a "bargaining chip" to keep wages down in the United States.

Whereas protections for investors are enforced by a dispute resolution mechanism

that provides for binding arbitration, violations of basic worker rights are subject to no channel of appeal and violations of environmental standards result only in non-binding consultations.

3. EXTENDING DEVELOPMENT THAT EXPLOITS WOMEN AND PEOPLE OF COLOR

Women in all three countries (but particularly in Mexico and the United States) have borne the brunt of the current strategy of economic integration of the three countries. In the 2,000 maquila factories on the Mexican side of the border, a workforce that is predominantly female suffers from low wages, violation of worker rights, hazardous working conditions, and sexual harassment. NAFTA will only expand the border slum further south.

In the United States, as real wages and working conditions have eroded over the past decade, women have again borne the brunt of adjustment as many are forced into low-paying, temporary jobs devoid of benefits in order to make family-ends meet. The job loss and the bargaining down of wages from NAFTA will hit workers at all levels, from highly-skilled technicians to unskilled labor. But recovery from job displacement and scaled-down wages in a country where social services are being eroded will be disproportionately difficult for poor, poorly educated, minority, migrant and women workers.

4. UNDERMINING STATE AND NATIONAL PREROGATIVE ON STANDARDS

The liberal lists of corporate freedoms enumerated in the investment chapter of NAFTA (freedom from government-imposed performance requirements, freedom from rulings by sub-national governments, etc.) undermine governments' ability to protect the basic rights, health and safety of their people. Corporations have used the weakening of Canada's regulatory structure that accompanied the U.S.-Canada Free Trade Agreement to gain the authority for two energy megaprojects--the James Bay Hydroelectric Project and the Arctic Gas Project--that are having devastating effects on energy conservation, indigenous peoples and fragile ecosystems. NAFTA will accelerate this erosion.

Likewise, the agreement prohibits governments' ability to stimulate economic activity through such techniques as domestic content rules. Such limits restrict legitimate government activities to stimulate local activity.

B. ALTERNATIVES

Investment flows are important to development in all three countries. Investment flows across borders can enhance the quality and quantity of jobs, the stability of communities, and a healthy environment only if they are carried out under conditions that respect basic rights and standards and that compensate communities that are dislocated by capital flows. The Mexican Action Network on Free Trade suggests that investment meet the

following minimum requirements: be productive; be non-polluting; respect national legislation; and contribute technology in areas required by the national strategy.

1. INTEGRATED DEVELOPMENT

U.S. citizen groups and elected local, state and national officials need more avenues to discuss the development priorities of our nation. NAFTA accelerates the shifting of most key decisions to unaccountable private corporations. Our vision of development is grounded on the notion of basic human rights as enumerated in the UN Universal Declaration of Human Rights. Our vision recognizes the social and economic contribution of women and therefore considers it necessary to improved the level of protection of basic rights of both women and men, using the highest existing standards in our societies as a base for further improvement. Overall, we insist on development through democratic means that is based on social participation in national decisions. Inasmuch as the future development of the United States will be closely tied to the development the rest of the region, we must explore new ways to carry out the dialogue over development in new hemispheric fora.

2. CHECKS AND BALANCES

If trade and foreign investment are to serve the needs of communities, workers and the environment, then there must be an adequate system of citizen and government checks and balances on the global corporations engaged in trade and investment. State, provincial and federal governments must have the right to pass standards to protect the health, safety and environment of their inhabitants. Higher standards in one area should not be subject to "unfair trade practice" complaints.

In accordance with United Nations principles, the people of each nation have the right to preserve local efforts at achieving viable communities, sustainable and subsistence agriculture, and food security for all citizens. Indigenous peoples and other communities should maintain the right to reject corporate incursions that are destructive of their communities and cultures.

The NAFTA text does provide certain exemptions to the total unleashing of investment flows: Canada and Mexico are allowed to screen and restrict certain investments, particularly those related to natural resources and culture. There should be far greater public debate on what other areas should be subject to special treatment in all three countries. The Action Canada Network argues that each country should be able to require foreign investors to use local content or buy local goods and services or require transfers of technology.

3. CODE OF CONDUCT

Any firm that desires to reap the benefits of freer trade should agree to subscribe to the Maquiladora Standards of conduct, a set of guidelines that address environmental contamination, unsafe working conditions, violations of worker rights, and inadequate public services in border cities. Recently, Levi Strauss and Sears have taken steps toward their

own codes of conduct; we acknowledge these first steps but ask that their codes be revised to upgrade the descriptions of worker rights to be consistent with the Maquiladora Standards of Conduct and the worker rights enumerated in the U.S. trade law.

Any agreement between our countries should also include mechanisms to ensure that corporations contribute to necessary infrastructure and social services in those communities in which they establish operations.

4. TRAINING AND INVESTMENT

President-elect Bill Clinton has proposed that firms spend 1.5 percent of payroll for continuing education and training programs. Clinton has proposed a Rebuild America Fund, with a $20 billion Federal investment annually leveraged with state, local, private sector and pension fund contributions. Rev. Jesse Jackson has proposed an American Investment Bank along the same lines financed by public sector pension funds. These and similar proposals can be part of a program to revitalize the U.S. economy and reinvest in communities.

5. COMMUNITY NOTIFICATION

Workers and communities should not have to bear the cost of economic dislocation and integration. This is one rationale for international standards on health, thy and environment. Likewise, corporations leaving a community should be forced to give lengthy advanced notification and should pay for part of the costs for dislocated workers' training and social support.

6. CHANGING INCENTIVES ON CORPORATIONS

At present, the United States has a wide range of incentives that encourage U.S. firms to invest overseas in ways the exploit workers and the environment. These include AID programs that help U.S. firms set up plants overseas, tariff exemptions, tax deferral on reinvested foreign income, OPIC insurance, among a host of others. These should be eliminated and replaced with programs that advance worker rights and environmental protection globally and that encourage investment in the United States. These would include a reorientation of aid programs to help the poorer majority overseas, the inclusion of labor and environmental standards in all trade agreements, removing the tax breaks on overseas investment, among others.

NOTE:

I have tried to use the tri-national "Final Declaration" from Zacatecas of October 1991 as a basis for the alternative; I have also drawn from the April 6 Canadian document; and the April 6 US document; August documents by the various networks and the September 16 LAC report.

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AUTOMOTIVE SECTOR

Steve Beckman
UAW

Auto trade between the three NAFTA countries accounts for more trade than any other single product group. The U.S. and Canada negotiated an Auto Pact in 1965 that was modified, but not eliminated, by the implementation of the bilateral "Free Trade Agreement" in 1989. The main focus of the NAFTA negotiations, though was the phased elimination of Mexico's Auto Decree. Adopted in 1989, this decree was the latest in a string of decrees that affected auto production and trade in Mexico since the early 1960s.

The goal of the negotiators, as was the case in the 1965 U.S.-Canada auto talks, was the integration of auto production of the three countries into a single "rationalized" production system. For the companies, this means closing inefficient production plants, removing government regulations concerning the location of production, taking advantage of the lowest cost production site and forcing workers, communities and suppliers into competition to lower their costs. The NAFTA agreement accomplished these goals for the companies at the expense of auto workers.

Following is our analysis of the terms of the agreement on automotive issues:

1. The current Mexican requirement for each auto assembler to balance its trade in Mexico ($1 in exports for every $1 of imports) would be immediately cut to 80 cents of exports from Mexico for each dollar of imports into Mexico. This would be phased down to 55 percent over 10 years and eliminated entirely at the end of the tenth year.

The companies already assembling in Mexico (GM, Ford, Chrysler, VW, Nissan) could increase their imports into Mexico without having to increase their exports out of Mexico under this formula. Companies that do not have substantial operations in Mexico would find it hard to sell vehicles in Mexico and still meet the diminished trade balancing requirement during its ten year phase-out. The trade balancing requirement has had the effect of an export performance requirement.

2. The current Mexican requirement of 36 percent sourcing from domestic parts companies (or joint ventures with majority Mexican ownership) would be cut to 34 percent for five years and then phased down one percent each year, reaching 29 percent in the tenth year. This requirement would be completely eliminated after the tenth year.

Also included in this part of the Auto Decree phase-out is an understanding that the Mexican parts industry would be assured of a large share (starting at 65 percent, declining to 60 percent and then 50 percent for years eight through ten) of the growth in the Mexican market compared with the 1991-92 model year production. IT is not clear yet how this calculation will be made, but it is clear that the Mexican government has made certain that production by local parts companies will not shrink as the Mexican market becomes more open to imports of vehicles and parts.

Under these terms, Mexico retains protections for its domestic producers (for at least ten years, and longer if the Mexican government arranges future commitments from the companies), the Canadian government retains the safeguards of the Auto Pact, and the U.S. has no comparable protection for either parts production or assembly and the U.S. government remains opposed to the adoption of any such protection.

The fundamental inequity of this arrangement is due to the ideological position of the Bush Administration and the relatively low priority given to the impact of this deal on U.S. employment in automotive assembly and parts production.

The companies are interested in "rationalization" of their operations in the three countries. This includes increased Mexican sourcing for U.S and Canadian operations and increased vehicle and parts exports from the U.S. and Canada to Mexico. In the past, this shifting of production has intensified competition between workers for a shrinking total number of jobs. The companies can be expected to continue to promote this competition to depress the wages of workers in all three countries.

3. The rule of origin for automotive vehicles and parts was raised, in stages, from the 50 percent in the U.S.-Canada FTA to 62.5 percent in the eighth year of NAFTA. While there was some progress in specifying the "tracing" of non-North American value incorporated into vehicle parts, the tracing should have been more extensive, the percentage of North American value should have been substantially higher (at least 80 percent) and the "net cost" measure should have been rejected in favor of the definition used in the U.S.-Canada agreement. Too many high-value parts and components can be incorporated into North American-assembled vehicles which will qualify for NAFTA benefits. Increased production, employment and research and development in Mexico, Canada and the U.S. would have been promoted had the rule of origin been tougher.

The NAFTA auto negotiators missed an opportunity to address the most serious problem facing the North American auto industry -- the high level of imports of vehicles and parts from outside North American and the low level of local content in the vehicles assembled here by non-North American companies. Workers in all three countries would benefit by raising the share of the market served by locally made vehicles and parts. But the multinational corporations opposed this form of government policy, because it would have regulated trade by multinational corporations to produce employment rather than let the corporations manage their trade to promote profits. Auto workers in all three countries will suffer as a result of the narrow focus of this agreement.

4. The light-duty truck tariff will be reduced from 25 percent in the U.S. and 20 percent in Mexico to 10 percent for each country immediately. It will then be phased out over five years for imports into the U.S. and Mexico.

The reduction in the tariff to 10 percent initially and the quick U.S. phase-out will eliminate an important protection for U.S. production in this growing sector of the auto market. Both GM and Chrysler will be building new Mexican plants to produce vehicles subject

to this tariff; they would be the biggest beneficiaries of this provision. A large share of light-duty truck production for the North American market could shift to Mexico under the terms of this tariff phase-out. However, imports of light trucks and vans into Mexico could also increase at the expense of local production for the domestic market.

5. The negotiated rules for CAFE (Corporate Average Fuel Economy) allow each company to choose, after the second year of the ten year phase-out period, to have its Mexican value counted as "domestic" (counted with U.S. and Canadian value to reach the 75 percent value-added level); however, a company can choose to continue to have its Mexican production count as "foreign". If a company makes the choice to have its Mexican production count as "domestic", this is not reversible. At the end of the ten year period, all Mexican output will be considered "domestic" for CAFE purposes.

This provision is structured to benefit the Big 3 and foreign assemblers now in Mexico and to facilitate investments in small car production in Mexico by additional foreign-based companies.

The inclusion of Mexican value-added as "domestic" will allow the Big 3 U.S. companies to concentrate their small car production in Mexico. This would leave U.S. production vulnerable to a sharp increase in oil prices or a change in the share of sales held by small cars. This change could lead to significant job loss for American auto workers if production in Mexico for export to the U.S. increases as a result of such a shift in small car production or if the U.S. demand for small cars increases sharply.

Companies that import large cars into the U.S. from outside North America could assemble small cars in Mexico meet the CAFE standards for their total "foreign fleet" by keeping their Mexican production as "foreign" until the end of the ten year period. This option is beneficial for current Mexican producers, Volkswagen and Nissan.

The instability of small car production in the U.S. has its mirror-image in the increased reliance on imports of vehicles in the Mexican market. With fewer restrictions on imports of fully assembled vehicles into Mexico, the domestic industry could be restructured in ways that could cause serious dislocation for the current auto industry workforce.

RULES OF ORIGIN

Pharis Harvey
International Labor Rights Education and Research Fund

RULES OF ORIGIN

The "rule of origin" is used to determine which goods are eligible to be exported within the region of the free trade agreement under lower or no tariffs or to receive other preferential treatment on the grounds that they originate in Mexico, Canada or the U.S.

Determining the criteria for the rules of origin has been a contentious issue for the negotiating parties of NAFTA. The U.S., as the largest and most diverse economy of the three NAFTA countries, is in principle the least dependent on external sourcing. However, U.S.-based transnational companies are also the most integrated outside the region and depend upon manufactures from throughout the world. Thus, the conflict over rules of origin, like many conflicts in NAFTA, is essentially a clash between economic forces anchored geographically in this country or region, such as labor, smaller business, resource-based producers (e.g. agriculture and mining) and communities on the one hand, and economic forces operating globally and seeking to maximize their advantage by loose rules of origin that allow them greater flexibility to produce anywhere under any conditions and still claim the benefits of NAFTA.

Identifying the "country of origin" of products has become increasingly complicated, since international trade now frequently involves products which are produced from components originating in many countries and products which are assembled, processed, or packaged in a country that did not produce the parts. Furthermore, calculating which costs should be included in determining regional content involves determinations that depend increasingly on largely hidden internal company cost assignments across subsidiaries and contractors in many countries, only a small part of which is visible outside the corporate boundaries.

Since the purpose of a free trade agreement is to give advantage to production within the countries making the agreement in order to strengthen and increase the complementarity of the three countries, it makes sense to require a high degree of regional content for products to qualify for the specially lowered tariffs and other advantages. A low percentage of regional content would lead to distortions of trade by enticing other producers from outside the region to locate low-wage assembly plants or environmentally damaging processing plants in Mexico, where labor and environmental law enforcement is lax and wages are among the lowest in the industrialized world, while keeping parts production and other higher-value or environmentally safe aspects of production in other countries. Anticipation of such loose rules has already enticed Japanese and Korean firms to rapidly increase their investment in Mexico and nearby countries of Central America.

U.S. citizen groups support rules of origin which are stringent, clear and are not amenable to or based on highly subjective interpretations of fact. Rules of origin promote the notion of channelling trade and investment benefits to serve the needs of communities and jobs. Well drafted rules of origin promote industrialization where more value is added, research and development are undertaken, and more and better jobs remain, in the region.

One other particular concern is that loose rules of origin make it impossible to condition the benefits of free trade on production that is environmentally sound or responsible to worker rights and workplace safety considerations. Regardless what conditionality is established internally in the region for these standards, loose rules of origin allow producers to escape by conducting the labor-repressive or environmentally damaging aspects of production elsewhere.

MARKET ACCESS AND NATIONAL TREATMENT

"National treatment" establishes the limit to which the products of any of the three countries are given identical treatment as domestic products. A "liberal" definition of national treatment in a free trade agreement creates difficulty for any economic policy that gives preferences to local or national producers. For example, it makes it impossible for governments at local, state or federal levels to limit government procurement to goods produced in their own territory. Nor does it allow states or federal governments to place restrictions on products on safety grounds based on the place of origin. For agricultural states, such rules have been an important means to prevent the spread of diseases and blights affecting animal or plant life.

Also at issue in NAFTA are the different rates at which the three countries allow products from the others to gain "national treatment," and the differential rates at which import restrictions and export requirements are lowered. The NAFTA negotiations have resulted in an agreement which keeps in place Mexican restrictions far longer than U.S. restrictions and allows Canada to have a lower level of regional content on certain exports to the U.S. than Mexico. While different development levels in the three countries might justify differential treatment in order to allow each country to adapt to changed conditions at a pace which is least disruptive, the net effect of these differences in the present NAFTA draft represents nothing more than differential yielding to the power of various industry lobbies, rather than an overall approach to economic health in the three countries.

ANALYSIS

Within this general framework, we offer the following comments and questions about the current NAFTA text:

A. The US-preferred language of "substantial transformation" to determine whether goods imported from outside the region have been sufficiently processed or altered into a new article of commerce to qualify for regional treatment was accepted over Canadian objections that this language will be subject to arbitrary, subjective and political distortions in interpretating what constitutes "substantial"

transformation. The formula that was selected to meet these objections was to require a change in tariff classification to qualify, in accordance with a lengthy schedule attached to the agreement.

While the determination of what effect various levels of transformation will have on various industries can only be made by the industries involved, we would note that the concept of "substantial transformation" itself makes it possible for *all* the raw materials for many goods to come from outside the region, with only the value added by processing to be done inside the region, and yet for the goods to be shipped within the region as though they were wholly of regional origin. The impact this may have on various resource industries will have to be examined on a case-by-case basis, but no agreement should be accepted by the U.S. Congress until this analysis has been done.

B. The Canadian-proposed "regional value content", as a measure of origin, was accepted where substantial transformation in non-regional goods has not taken place, or where goods are comprised of a complex of parts and components from inside and outside the region. For most goods a 60% regional content was approved, although for the automobile sector, it was raised to 62.5%. This methodology requires that this specified amount of the product's value be added within the NAFTA region.

C. This has resulted in a four-fold scheme by which goods are divided into the following categories: (a) those which are "wholly obtained or produced" in North America; (b) goods that use imported materials that undergo a change in tariff classification; (c) goods that are processed or assembled in North America using North American inputs; (d) goods that are processed and assembled in North America but do not undergo a change in tariff classification but which have a regional value content not less than a certain percentage.

D. The major problems center on category (d), where for most goods the allowable percentage of non-regional content is 40% (In automobiles it is 37.5%, and in textiles it is 20% or less.) When 40 percent of products can be produced externally, a sizeable incentive exists for non-North American companies to locate assembly plants in Mexico, take advantage of cheap labor, while keeping research and development, component production and other facets of manufacture outside the region, in order to penetrate the U.S. and Canadian markets on a tariff-free basis. This also provides a strong incentive for Mexico to lower its external tariffs for such goods in order to entice such investment and imports at the lowest possible cost.

E. On agricultural products, the substantial transformation methodology has been accepted, whereby agricultural products sold in the region are considered to be of regional origin if they have undergone change from one category to another, eg. from "live animals" (01.01-01.10) to "meat" (02.01-02.10) U.S. agricultural organizations worry that such a definition will open up Mexico as a meat processor for beef originating in Guatemala and other Central American countries without adequate inspection for disease. The same problem persists for other agricultural products.

F. Other questions to raise about rules of origin and market access in this agreement include:

1) Does it provide sufficient safeguards against the import of goods through Mexico to the U.S. from countries currently under trade embargoes, such as Haiti, or of goods produced by prison labor in other countries barred by the Smoot-Hawley Tariff Act? Much depends on the adequacy of labelling of origin and the honesty of the Mexican customs officials. It must be clear that such goods are not acceptable as components of trade, regardless of how "substantial" a transformation" has occurred in an interim phase of production. While some specific exceptions are made to assure compliance with certain international environmental protection agreements such as the Montreal Protocols, it is not clear how the agreement affects national barriers to goods produced in countries or under conditions barred by national law. Without assurances that NAFTA does not supersede these laws by allowing regional origin to goods partially consisting of products imported to Canada or Mexico from such sources, the agreement should not be approved.

2) U.S. law now allows for "unfair trading practice" complaints to be filed against countries exporting goods to the U.S. produced under conditions of persistent violation of internationally-recognized labor rights. Does NAFTA as currently drafted allow these same procedures against third-country producers of components of goods made in Mexico or Canada and shipped into the United States as "regional" goods? At the very least, goods or component parts originating in countries outside the region which have been produced under labor or environmental conditions that have suppressed their price below market value[1] must have the extra-regional value attributed to these goods set in terms of the price those goods would be worth under conditions of environmentally and socially responsible production, or allow for the revocation of tariff-free entrance into the United States for that portion of such goods that originates outside the region under conditions that are barred by the U.S. GSP program for that country.

3) While the NAFTA text allows each country to exclude goods under the same terms as Article 20 of GATT, i.e on grounds that they are produced under conditions that endanger human, animal or plant life, it is not clear that this ability pertains to goods that partially originate outside the region and that otherwise qualify for regional treatment. This must be clarified in order for NAFTA not to become an indirect conduit for products otherwise barred from import.

CONCLUSION

The issue of rules of origin raises the most basic questions about the attempt to build economic integration without a political or judicial framework to harmonize standards upwards, to adjudicate differences impartially or in the public interest, or to enforce common standards of labeling, inspection, etc. in the customs services of the three countries. It is, like so many other areas of concern, a troubling reminder that the attempt to short-circuit the social, political and environmental implications of trade leaves all three countries at the mercy of a handful of giant corporations and their willing accomplices in the governments of the region.

NOTES

[1] Section 301 of the U.S. Omnibus Trade and Commerce Act defines "*any act, policy, or practice or combination of these which constitutes a persistent pattern of conduct that denies worker rights*" as an unfair trade practice, actionable if it burdens or restricts US commerce.

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DISPUTE RESOLUTION

FOOD SAFETY, CONSUMER PRODUCT STANDARDS AND ENVIRONMENTAL ISSUES

Lori Wallach
Public Citizen

The NAFTA text establishes highly secretive negotiation and dispute resolution processes that eliminate citizen oversight of NAFTA on vital citizen concerns such as food safety, consumer product standards and environmental regulations on hazardous substances. Under NAFTA dispute resolution:

• one country can challenge existing and proposed environmental or consumer laws of another country as noncompliant with NAFTA rules, and

• under a clause on "non-violation impairments," can bring cases against measures that do **not** violate the NAFTA rules, but that cause another NAFTA country to miss an economic opportunity it "could reasonably have expected to accrue to it[1]."

This latter provision is outrageous, allowing another NAFTA country to bring a U.S. federal or state environmental or consumer law into dispute resolution merely on the basis that it has impaired an economic expectation of the other country. This provision greatly undermines the meaningfulness of the specific rules of the NAFTA. It puts the United States in the position of having its trading partners interfering with environmental and social choices that could impact their trade, but meet the NAFTA requirements.

If a law is found either to violate the NAFTA's rules or to cause impairment of an economic benefit, NAFTA dispute resolution requires that the law be removed or not implemented. Failing such a resolution, one NAFTA country can pay the challenging country compensation for the economic loss caused by maintenance of a successfully challenged law. The possibility of paying to maintain environmental and consumer laws is used by the Bush Administration as support for the position that the United States can maintain any law it chooses. However, considering current budgetary constraints and political pressures for deregulation of environmental and consumer standards, it seems that the pressure to eliminate or lower such a ransomed standard would be immense.

NAFTA dispute resolution maintains the tight secrecy that plagued the NAFTA negotiations. In fact, the NAFTA secrecy language is stronger than that of GATT, requiring strict confidentiality on all documents submitted in dispute resolution, actual dispute proceedings, and panel reports until absolutely finalized. Opening up trade policy to the sunshine of public participation was a major goal of environmental and consumer activists. This is particularly important because the NAFTA gives to the Executive branch the sole role as protector of challenged environmental and consumer laws.

While absolute secrecy is mandatory, the much-touted allowance of scientific review boards for environmental, health safety or other

scientific matters is only allowed at the consent of the disputing parties. If the Parties agree to allow such input, the NAFTA text requires the panel to take it into account. However, the scientific boards when allowed, are limited to questions of fact. Thus, under NAFTA dispute resolution, five person panels of trade officials meeting in tight secrecy will be empowered to second guess the non-factual aspects of environmental and consumer laws such as the priorities set by national and state democratic political bodies.

The Bush Administration has made an important, though narrow improvement in the NAFTA dispute resolution in comparison to that of GATT. For two narrow categories of cases:

- those arising under the Sanitary and Phytosanitary or Technical Standards texts concerning factual issues concerning environmental, health, safety or conservation, including directly related scientific matters,

- those concerning conflicts with three named environmental treaties (Convention on Trade in Endangered Species, the Montreal Protocol, and the Basel Convention)

a defending Party can insist that a case that could rise under GATT or NAFTA be taken to NAFTA. It seems this provisions would not apply to many environmental and consumer health and safety issues because they do not rise under the SPS or TBT chapters. Additionally, if a challenge of an environmental law does not raise factual issues, it seems the defending Party would not have the NAFTA option and could be forced into GATT dispute resolution where the defending Party bears the burden of proof in all cases.

Finally, the NAFTA creates a new North American organization, the Free Trade Commission. The Commission has broad powers to interpret and apply the NAFTA. The Commission is empowered to establish Model Rules of Procedure for NAFTA dispute resolution. The only procedural rules the Commission is required to include are for secrecy and the right to a hearing and the submission of written documents to dispute panels. Yet, it seems that other rules are contemplated though not set out in the text. For instance, reference is made to "scientific bodies set out in the Model Rules..." yet no such bodies are described. Why a complete reporting of planned procedural rules wouldn't be part of the NAFTA text is disconcerting.

[1] NAFTA 9/6/92, 20-19, Annex 2004-1. *"If any Party considers that any benefit it could reasonably have expected to accrue to it... is being nullified or impaired as a result if the application of any measure that is not inconsistent with this Agreement, the Party may have recourse to dispute settlement..."*

MISSING FROM NAFTA: WORKER RIGHTS AND ENFORCEMENT

Lance Compa
National Lawyers Guild Free Trade Task Force

An analysis of dispute resolution clauses in the North American Free Trade Agreement from a worker rights perspective starts with a fundamental flaw in NAFTA: the total absence of provisions promoting, or even recognizing, worker rights as a factor in continental trade.

Whole chapters of NAFTA are given over to the rights of agribusiness, investors, corporate executives, bankers, owners of intellectual property and other commercial interests. But the pact is silent on workers and their rights in a new trade regime.

To take just one example, NAFTA carefully defines intellectual property rights and sets strong standards for protecting such things as patents, copyrights, trademarks, service marks, plant breeders' rights, industrial designs, trade secrets, semiconductor chips, computer programs and databases. What's more, these careful definitions of protected rights are followed by swift, tough enforcement mechanisms. Violators of intellectual property rights face punitive damages, injunctive relief, sanctions against due process violations, IPR inspection and seizure at the border, and other strong and rapid means of halting violations.

In contrast, NAFTA is silent on the right of association, organizing, collective bargaining, forced labor, child labor, minimum wages, workplace health, and race or sex discrimination -- all basic worker rights spelled out in other U.S. trade laws and in international human rights instruments.

The hammer-ready enforcement measures for intellectual property rights reflect the toughest of three levels of dispute resolution in NAFTA. A mid-level enforcement regime can be found in the chapter on "Review and Dispute Settlement in Antidumping and Countervailing Duty Matters", which lays out procedures and sanctions against "dumping," an unfair trade practice of selling goods in export markets below the cost of production. The goal of a "dumper" is to drive "fair" competition out of the market.

Right now, U.S. courts and established administrative bodies enforce anti-dumping laws. NAFTA replaces recourse under U.S. law and procedures with exclusive use of a binational panel applying the law under NAFTA . There could be no appeal to the judiciary from a NAFTA panel decision.

NAFTA's chapter on "Institutional Arrangements and Dispute Settlement Procedures" sets a baseline enforcement level under the treaty. This clause applies to disputes arising generally under NAFTA about subjects that do not have a dedicated dispute resolution mechanism (like intellectual property rights). It creates relatively complex complaint, response, consultation, mediation and arbitration procedures under a tri-national, cabinet-level "Free Trade Commission" advised by a permanent Secretariat, and consultation and arbitration panels charged by the Commission with settling disputes.

Each of these three levels of dispute settlement procedures are flawed in several respects:

*Workers, unions and human rights groups generally have no standing to bring complaints or to intervene as interested parties under NAFTA dispute resolution mechanisms.

*NAFTA dispute settlement mechanism comprise the exclusive forum for hearing complaints, except where the GATT dispute resolution system (which is even more closed than NAFTA to claims of labor or environmental rights) is specified as an alternative. Recourse to potentially sympathetic courts or established administrative bodies is prohibited.

*Proceedings before NAFTA panels are largely private, and much of the evidence adduced in NAFTA proceedings is secret.

*Mediation and arbitration panels are composed mainly of international trade lawyers who are likely to have represented, or can look forward to representing (especially after a favorable decision) parties whose claims they are judging. While NAFTA guards against gross conflicts of interest, a more subtle, "revolving door" system of potential conflicts is intact.

*NAFTA specifies that lists from which consultative or arbitral panels will be drawn should be comprised of individuals with experience and expertise in trade law and commercial affairs, but sets no such requirement for familiarity with labor, environmental or human rights matters.

*While NAFTA dispute resolution procedures permit advice from outside experts and, where needed, of scientific experts, such a turn to outside advice is not mandated. Moreover, there is no means of assuring that the views of a range of experts -- not just experts chosen for the conclusion they are likely to reach -- will be solicited.

Whatever their flaws, the three models of dispute resolution in NAFTA afford no recourse to workers or trade unions concerned about labor rights violations, because labor rights standards are absent from the Agreement. The only real debate in the United States is over worker retraining and adjustment programs, how far-reaching they will be, and how they will be financed.

Framing the debate as how best to treat workers who lose their jobs under NAFTA concedes too soon that jobs are going to be lost. It does not address underlying issues of worker rights and labor rights enforcement that could help prevent job losses by creating a "level playing field," not of equal wage levels or equal standards of living throughout North America, but of equal rights in the workplace.

Criticizing current NAFTA dispute settlement procedures from a worker rights perspective is somewhat an exercise in futility, since there are no worker rights standards to give rise to disputes. However, since NAFTA ratification is not a foregone conclusion, and the possibility remains that negotiations might re-open in the wake of Congressional rejection or the change in the White House, the following issues must be addressed (see Labor analysis):

1) minimum labor rights standards -- the least that ought to be contained in any trade agreement (a broad program of worker rights -- "maximal" standards, one might say -- akin to the Social Charter of the European Community is a more ambitious undertaking, one that has

been formulated in Social Charter legislation introduced in the House of Representatives by Rep. George Brown (D-CA), which would be applicable to all trade agreements), and

2) an enforcement regime tailored to worker rights concerns, just as intellectual property rights merit a dedicated enforcement clause.

NAFTA as it now stands should be either rejected by Congress or renègotiated by the Clinton Administration. A new NAFTA must contain both generous retraining and adjustment programs for workers displaced by trade, and basic worker rights provisions providing a foundation for upward harmonization of labor standards, not a downward spiral toward the lowest common denominator. Dispute resolution mechanisms under NAFTA labor rights provisions should provide for the broadest possible participation by workers, unions and human rights organizations, a choice of forums for asserting worker rights, open, accessible NAFTA panel proceedings, and tough sanctions against labor rights violators.

PRE-EMPTION OF STATE LAW

Lance Compa
National Lawyers Guild Free Trade Task

In the U.S. system of mixed federal and state lawmaking, the problem of federal pre-emption of state laws is a recurring one. As a general proposition, Congress has the Constitutional power, enabled by the Commerce Clause and limited by due process requirements, to contract or expand the reach of federal law in a given subject matter. For example, ERISA -- the federal law covering employee benefit plans -- contains an explicit pre-emption clause barring the states from acting in this area. Thus, where ERISA requires the "vesting" of employee pensions after five years with a company, a state could not pass a law requiring vesting after three years, even though this would be more protective of employee rights.

Alternatively, Congress can grant the states concurrent jurisdiction allowing them to enact and enforce laws more stringent, or more protective, than the federal standard. OSHA and EPA laws reflect this approach. States can choose to have workplace safety standards or environmental pollution limits more stringent than federal standards. The trade-off between the level of protection chosen by the citizens and its effect on investment decisions by employers becomes a matter for political struggle in states that seek to exceed federal standards.

Sometimes Congress is silent on the pre-emption issue. This means that the courts, through case-by-case decision making, set the balance of state and federal power. The National Labor Relations Act falls into this category. A current example arises in Minnesota, where the state legislature has passed a law prohibiting the permanent replacement of strikers. Permanent replacement is permitted under a Supreme Court interpretation of the federal statute. The Minnesota Supreme Court upheld the state law as a valid exercise of the state's peace-keeping authority, but a federal judge recently struck down the law on pre-emption grounds. The issue is likely to go to the Supreme Court, unless Congress acts in the meantime to amend federal law to ban permanent replacement of strikers.

NAFTA and other international trade agreements raise a two-fold problem of international pre-emption: first, whether national laws are pre-empted by the international agreement; beyond that, whether state and local laws in a federal system are pre-empted. Under some accepted doctrine, international trade agreements negotiated by the Executive have the full force and effect of national law. On the other hand, some analysts argue that trade agreements do not rise to that level in and of themselves. Under either approach, though, as in the domestic context, Congress can define the pre-emptive reach of trade agreements. Congress can establish pre-emption, or concurrent jurisdiction, or some mix of both approaches, either through the authorizing legislation that sets negotiating objectives for the Executive, or through implementing legislation following the conclusion of negotiations.

The status of NAFTA in relation to U.S. law, both federal and state, is still unsettled. Legislation authorizing the Executive to undertake NAFTA negotiations did not specify a level of pre-emption of federal or state laws. Explicit language in NAFTA nullifying all U.S. federal and state statutes and regulations affecting trade would likely provoke a backlash in Congress and among the states, probably jeopardizing ratification. On the other hand, language permitting any state government to override NAFTA would render the Agreement meaningless.

NAFTA clauses that speak to the role of state governments are cautiously drafted. They push in the direction of pre-emption, but they don't close the door in the face of the states. Thus, any categorical statement about the pre-emptive effect of NAFTA is premature. The new Clinton administration and the Congress still have the opportunity to devise a balance of federal and state power under NAFTA either in new NAFTA negotiations, if they take place, or in the implementing legislation yet to be drafted.

The generic approach to pre-emption in NAFTA is formulated in Chapter 1, Objectives, at Article 105, "Extent of Obligations":

> *The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.*

Two considerations come into play here. First, this is more a statement of intention than an enforceable provision in itself. Second, the "otherwise provided" exception points to pre-emption refinements contained in practically every section of NAFTA.

A review of NAFTA clauses addressing the role of state governments demonstrates how the drafters anticipated attacks on pre-emption grounds and sought to avoid them with subtle bows to state interests. Negotiators might have adopted this approach unwillingly following public outcry over the leaked "Dallas Composite" draft text, which contained much more explicit pre-emptive language. The Standards chapter of the Dallas Composite, for example, required the federal government to "use all legal means available to it to eliminate" non-conforming state standards -- arguably, license to "send in the troops" to enforce NAFTA.

Whatever the reason, the final draft text retreats from such provisions. The Standards chapter now contains a generally stated obligation to "seek, through appropriate measures, to ensure observance . . . by state governments" of NAFTA provisions. These same provisions permit a higher level of protection than that set by relevant international standards. They also put the burden of proof on a party challenging an environmental or consumer protective standard.

Analysts more familiar with environmental and consumer protection issues can criticize NAFTA's conditions for permitting deviation from international standards. But it is certain that if NAFTA takes effect, years of disputes in both policy and litigation arenas will ensue over the meaning and effect of "scientific bases," "appropriate" levels of protection, "unnecessary obstacles," "disguised restrictions on trade,"

"legitimate objectives," "compatibility of standards" and other key operative terms of NAFTA's standard-setting provisions.

The fact is that these are inherently ambiguous terms that serve to arm contending parties for political and economic struggle in a new arena. The resolution of these disputes over national standards will extend to state standards under whatever federal-state pre-emption framework is erected by Congress for NAFTA. To the extent that Congress permits the states to act in the trade area, the same struggles -- and the same mixed results -- are likely to ensue.

INTELLECTUAL PROPERTY

INTELLECTUAL PROPERTY TEAM

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November, 1992

INTRODUCTION

The North American Free Trade Agreement (NAFTA) has been touted as an historic, trade barrier busting leveller of the economic playing field among nations. NAFTA, we are told, will lead to prosperity for all.

And yet there is Chapter 17.

Chapter 17 deals with Intellectual Property, specifically, the

> *adequate and effective protection and enforcement of intellectual property rights*[1]

that safeguard the designated owners of copyrights, sound recordings, trademarks, encrypted satellite signals, patents, layout designs of semiconductor integrated circuits, geographical indications, trade secrets, and industrial designs.

Make no mistake about it. Although some of the Chapter 17 protections are cherished ones, they are protections and thereby effective barriers to trade. This is a chapter about regulation and protection. And there is little here that suggests the work of an even hand.

The chapter begins by endorsing certain previous intellectual property regimes, goes on to propose specific protections, and ends with suggestions for general enforcement, remedies, provisional measures, criminal procedures and penalties, enforcement at the border, and cooperation and technical assistance. In general, the chapter reflects a broadening of the usual intellectual property agenda. It is no secret that industry groups worked hard to ensure that the Dunkel GATT/TRIPS (General Agreement on Tariffs and Trade/ Trade-related Intellectual Property) text would

> *be considered a floor--not a ceiling-- for the level of protection that must be involved in NAFTA's section on intellectual property.*[2]

Most industry groups were happy with the NAFTA outcome. The Intellectual Property Committee(IPR), representing Bristol-Myers Squibb, FMC, Hewlett-Packard, Johnson & Johnson, Monsanto, Proctor & Gamble, DuPont, General Electric, IBM, Merck, Pfizer, Rockwell International, and Time Warner, praised the NAFTA as

> *a significant advance in the standards of protection and enforcement of intellectual*

property rights that have been negotiated by the United States to date.[3]

The "accomplishments in the NAFTA intellectual property chapter" were also praised and acknowledged as:

a critical element in determining the support of the member companies for the entire agreement (emphasis added).[4]

Clearly, the intellectual property rights proposed in the NAFTA were designed to support the continued technical and scientific advantage of transnational corporations. When one reads the proposals with an eye to discerning what(who) is protected and what(who) is not, it becomes apparent that the main beneficiaries are the pharmaceutical and biotechnology companies and the computer software industry. The potential losers are the consumer, the individual inventor or creator or performer, the indigenous, the less industrialized, and the poor. They are the likely payers of the high costs implied by the intellectual property protections offered in the NAFTA.

It is not so much that Chapter 17 creates new inequities; rather it endorses and exacerbates existing inequities: NAFTA does not recognize the intellectual property rights of indigenous peoples; it does not protect the intellectual property of large numbers of creators and performers in the entertainment and mass media industries; it does not protect the public's right-to-know while it does protect industry's right to keep trade secrets; it endorses the privatization, commodification, and ownership of life itself by compliance with the notion of life-form patenting; and it effectively shackles one of the few existing means for ensuring the public access to new products at affordable prices. In general, the NAFTA has granted corporations the privileges of intellectual property

without recognizing corresponding obligations to the broader society.[5]

OMISSIONS

Performers and Creators

The Labor Advisory Committee (LAC) for Trade Negotiations and Trade Policy on the NAFTA has noted that strong NAFTA protections for the holders of patents and copyrights stands

in sharp contrast to (the) complete absence of provisions protecting labor rights and standards.[6]

Looking to the specific provisions of Article 1706, paragraph 1 of the Intellectual Property chapter, the Committee notes that the section accords **producers but not performers** "national treatment" with respect to rights over "secondary uses" of sound recordings, and the Committee objects that:

Performers would be robbed of revenue to which they are entitled...[7]

Canadian analyst John Dillon, looking at the same section, sees

*An example of the bias towards protecting the **owners** (emphasis added) of publishing houses, motion picture studios or recording studios instead of authors, script writers, actors, musicians, or other artists.*[8]

Dillon goes on to point out that the object in giving

> *at least 50 years of patent protection "to the producer of a sound recording"... is to protect companies that make records, tapes, compact disks or any future recording technologies. There is no mention of the artists who compose or perform a musical work.*[9]

Indigenous People

Other intellectual achievers and achievements are left unrecognized in the NAFTA. The traditional knowledge and intellectual products of indigenous peoples, the result of less formal innovation systems than the NAFTA is designed to protect, are nowhere recognized and nowhere protected. The inequities of such omissions are worth remembering:

> *Indigenous peoples have in effect been engaged in a massive program of foreign aid to the urban populations of the industrialized North. Genetic and cultural information has been produced and reproduced over the millennia by peasants and indigenous people. Yet, like the unwaged labor of women, the fruits of this work are given no value despite their unrecognized utility. On the other hand, when such information is processed and transformed in the developed nations, the realization of its value is enforced by legal and political mandate.*[10]

The cost of such inequity is not one-sided:

> *The contributions that indigenous people have made to Western agriculture, medicine, and the arts have yet to be recognized....Because their knowledge is not valued or compensated, they cannot make a living in traditional ways. Children take up new lifestyles and the groups themselves (and their living libraries of knowledge) are lost....(And) consumers, who have benefitted so long from this wealth of information, also lose. Everybody loses unless we do more than just say "thanks".*[11]

In an agreement intended to set the standard for the Western Hemisphere[12], the intellectual property of indigenous peoples and minority cultures deserve protection no less than the intellectual property of transnational corporations. Expressions of "folklore" -- as indigenous peoples' intellectual property is sometimes called -- whether those expressions are attributable to individual inventors or creators or to the accretion of community effort, whether those expressions take the form of music, written word, artifact, art work, or folk variety of cultivated crop, medicinal plant, animal breed, or wild material traditionally safeguarded by the community, those expressions deserve NAFTA protection from illicit exploitation, expropriation, and other prejudicial actions.

Public Right-to-Know

A third NAFTA omission is its lack of adequate provision for the public right-to-know:

Article 1704 states that

> *Nothing in this (Intellectual Property) Chapter shall prevent a Party from specifying in its domestic law licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition*

in the relevant market. A Party may adopt or maintain, consistent with the other provisions of this Agreement, appropriate measures to prevent or control such practices or conditions.[13]

In other words, the only "abuse" of intellectual property rights this agreement fears is an abuse having "an adverse effect on competition".

The way this concern for "abuse" plays out in the Trade Secrets section of the chapter on intellectual property is for the section to grant industry extensive rights to keep trade secrets without at the same time adequately providing for the public's right-to-know. The LAC's published concern that

provisions in this chapter may have the effect of weakening or preventing improvements in "right-to-know" laws and regulations concerning hazardous goods and materials[14]

is well founded, according to one commentator:

The point is well taken. The only reference to an exception to a non-disclosure rule for the protection of the public is in Article 1711(5), but that Article refers only to test data and other data involved in product approval for pharmaceutical or agricultural chemicals. In other words, data relating to approval for other products or products for which no approval is required, e.g. cosmetics, foods, household chemicals, nuclear plants, can be maintained as trade secrets indefinitely, no matter what information about hazards to the public they contain, unless, of course, they are subject to disclosure under environmental or other provisions, a fact which Article 1711 should explicitly recognize (but doesn't).[15]

Interestingly, but not unexpectedly, industry's Intellectual Property Committee, commenting on the final version of the NAFTA,

remains concerned about...the continued use of a "gross negligence" standard relating to third party acquisition of trade secrets...and the exclusion from protection of proprietary data on old chemical entities that require considerable effort to originate.[16]

The industry concern obviously is not based in public right-to-know or common good arguments.

COLLISIONS

Life-Form Patenting

Perhaps the most hotly debated and deeply disturbing achievement of the framers of the NAFTA is their endorsement and consequent geographical extension of U.S.-style life-form patenting.

Article 1709 states that

A party may exclude from patentability inventions if preventing in its territory the commercial exploitation of the inventions is necessary to protect ordre public or morality, including to protect human, animal, or plant life or health or to avoid serious prejudice to nature or the environment...
A Party may also exclude from patentability:
(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
(b) plants and animals other than microorganisms; and

(c) *essentially biological processes for the production of plants or animals, other than non-biological and microbiological processes for such production.*[17]

Despite the apparent lengthiness of the list, the final NAFTA exclusions from patentability are considerably more limited than those which appeared in an earlier version. The leaked Dallas composite draft of the NAFTA contained Mexican suggestions to exclude from patentability:

a) *essentially biological processes;*
b) *plant species and animal species and varieties;*
c) *biological material such as is found in nature;*
d) *genetic material; and*
e) *inventions relating to living matter that compromise the human body.*[18]

The effect of excluding the Mexican exclusions is to permit claims of ownership of that which is currently non-patentable under Mexican law, notably "genetic material, biological material such as is found in nature and inventions relating to living matter that comprise the human body."[19]

Further, because the operative verb on the exclusions is "may exclude", parties to the NAFTA remain free to

implement in (their) domestic law more protection of intellectual property rights.[20]

In other words, parties to the NAFTA may take their national life-form patenting beyond the bounds suggested by the NAFTA.

Finally, despite the apparent right to exclude plants from patentability, Article 1709.3 ends with an injunction to

provide for the protection of plant varieties through patents or through breeders rights which do not convey ownership over genetic material but do give plant breeders monopoly rights over the marketing of seed varieties.[21]

As John Dillon has rightly noted,

"This requirement to implement either patent protection or plant breeders rights legislation has enormous implications. It...will not stop the biotechnology industry from pursuing an incremental strategy, seeking first patents on microorganisms, then plants, then animals, and eventually even parts of the human body." [22]

Sadly, Dillon has described the history of the biotechnology industry's attempts at patenting.

The NAFTA reflects a decision that trade will industrialize biology and make biological diversity, even the survival of organisms, a matter of privately held intellectual property.

The concern over the degree to which or whether genes and species may be patented is not a trivial concern. The objections to life-form patenting are still being raised in the United States and, in part, stem from apprehensions about whether the gains from such patents warrant the costs. The European Parliament commissioned an "ethical assessment" of life-form patenting in 1992. The assessment noted:

The patenting...in general, acts as an incentive for (the) biotechnological industry:

the exclusive nature of the rights to use the research results -- even when it concerns living organisms-should favor investments in research on the part of industry. The economic growth and international competition should translate into economic and social advantage. But, notwithstanding this, many are opposed to patenting, itself, and in this field sustain that the objective to transfer the concept of property onto modified organisms and more generally onto research products implies a change in the way in which science is conducted by limiting the freedom of information and the traditional free circulation of scientific information. Concerning patenting of plant genetic resources, many wonder if they should be subject to privatization or they should be considered a component of the "common heritage of mankind"... Going into more details (regarding)...patenting of animals: the fears raised are that the patenting of transgenic animals amplifies the instrumental use and the neglect of their sentient, non-objectual nature: patenting motivates, instead, the tendency to consider animals as the standard of things invented and as new consumer products. Patenting, in turn, increases production and this causes great animal suffering....Moreover in this case (but also in that of the micro-organisms), there are those who sustain that patenting of a life form is an attempt at the sacrilege of life or nature. (Underlining not added)[23]

Pat Mooney, of Rural Advancement Foundation International, makes the following points:

Exclusive monopoly control over patents or through plant breeders' rights (PBR) cannot be justified for the following reasons...

1. *There is no empirical data available in any country that positively correlates exclusive monopoly provisions with an increase in innovation. There is considerable evidence, in fact, that both inventiveness and information dissemination are constrained by exclusive monopoly.*
2. *Exclusive monopoly provisions and the opportunities for cross-licensing across different industrial segments and markets bias intellectual property toward transnational enterprises with large legal departments, and exclude new entrants and smaller companies from equal access to technologies.*
3. *The evolution of intellectual property law over the last 150 years shows a continual strengthening of "rights" for patent holders and a constant erosion of "rights" for society in general. The willingness of governments to challenge intellectual property law, once in place, is almost non-existent. Therefore, the adoption of any form of patent or plant breeders' rights provisions must be assumed to lead irresistibly toward adoption of ever-more powerful monopoly provisions.*[24]

The question of life-form patenting is connected to an issue raised earlier: the intellectual property rights of indigenous peoples:

Most of the naturally occurring genetic material from which new plant and animal varieties and medicines are derived comes from the Third World. Patent law does not consider these genetic resources to be the property of the countries in which they are found. They are treated as the common heritage of humankind and therefore available to any biotechnology company wishing to

exploit them. But once genetic resources have been appropriated by biotechnology firms, they become private property.[25]

The increased costs for seeds and medicines derived from the germplasms of their own plants and animals make life-form patenting particularly onerous to indigenous peoples.

Life-form patents will result in farmers being denied their traditional rights to save seeds (because) planting seeds without paying royalties is making an unauthorized copy of a patented product. Farmers will be forced to pay royalties for every seed and farm animal derived from patented stock, forced to become more dependent on fertilizers, pesticides, herbicides, and the machinery made by the same companies who collected the traditional seeds in the first place and now sell back the chemically-dependent derivatives.[26]

Pat Mooney has warned that where biological processes and products become patentable, corporations have won the right to dictate morality and evolution to governments and when this is done without recognizing the informal innovation systems of indigenous peoples,

the only innovations in the world that will not be patentable will be those of the poor.[27]

So it is in the NAFTA.

Clearly, as the signers of the Alternative Treaty on Trade and Sustainable Development enjoined,

In order to address issues of intellectual property while preserving the rights of traditional societies using non-patentable living resources, all patenting of biological resources and life-forms should be halted.[28]

Generally, intellectual property rights should imply intellectual property responsibilities. On the level of nation-states, this suggests that nations have, vis-a-vis other nations, the right, and vis-a-vis their own citizens, the responsibility, to design intellectual property regimes suitable to their cultures and their financial, social, health, and trade needs. So, it would seem, in a trade agreement, a nation's heritage should not be impoverished, its sovereignty compromised, or its citizens rights and health abused. Where this is not possible, where private self interest and the Common Good cannot be balanced, intellectual property rights should be abrogated, altered, or not granted in the first place.[29] Hence it was that the framers of the Alternative Treaty on Trade and Sustainable Development denied life-form patenting utterly and suggested:

Trade mechanisms that reduce or restrict the free flow of ideas and technologies necessary for the protection of the environment and health must be eliminated. Mechanisms such as compulsory licensing ensure nations' rights to use products with broad social value; these rights must not be compromised by GATT or any other negotiations.[30]

Unfortunately, neither these suggestions nor the Common Good was the standard by which the NAFTA was written.

Compulsory Licensing

A patent, it will be remembered, is a grant of specified rights, generally consisting in (1) the

exclusive right to make (manufacture) or use the subject matter of the patent for a specified time as well as (2) the right to exclude others from making or using.

In some countries, where patents are not "worked" -- meaning that some level of actual manufacturing does not take place -- "compulsory licenses" are awarded to a company other than the patent holder for the manufacture or use of the subject of the patent. In return, the company pays a fee to the patent holder.

Compulsory licensing, it is argued, serves to advance the public good, allowing a government to act in the interest of public health or national security or the furtherance of national development by making certain an invention deemed useful is indeed accessible and affordable to citizens. Further, compulsory licenses have served to provide relief from monopoly use of patent rights, as in the case of antitrust suits.

In Canada, for example,

> *Compulsory licensing of basic medicines saves Canadians a quarter of a billion dollars a year in drug costs since generic drugs sell for much less than their brand-name equivalents.*[31]

As would be expected, there are some who deeply resent compulsory licensing and the loss of control of market and revenue it implies. The Pharmaceutical Manufacturers Association (PMA) in the United States represents a manufacturing sector with some of the highest profits of any sector anywhere in the world. PMA has been in the forefront of the fight against compulsory licensing; it was also the first industry association to endorse the NAFTA.[32]

The NAFTA places so many restrictions on the use of compulsory licensing (Article 1709.10) that, according to John Dillon,[33] it is highly unlikely that any **new** generic copies of patent medicines will ever be authorized under the NAFTA. These NAFTA restrictions herald more than the end of the **Canadian** use of compulsory licensing. They also suggest the probability that compulsory licensing will never be adopted in **any** country acceding to the NAFTA, including the United States.

Canada has used compulsory licensing to restrain health care costs for consumers and Canadian prescription drug prices are lower than those in the United States.[34] Considering the health care burdens currently being suffered in the United States (and about to be suffered in all three NAFTA countries), the loss of the compulsory licensing mechanism is great indeed. Compulsory licenses were one of those means of ensuring that the privilege of holding an intellectual property right was balanced by the right holder's responsibility to serve the common good. Compulsory licenses might have made health care costs lower for all of us.

Computer Programs

Article 1705 recognizes computer programs as literary works and extends the 50-year protection of copyright to computer programs and to databases. This effectively protects

> *not only the source code and object code and flow diagrams but also the "look and feel" of a program.*[35]

Buried in this concession to the computer industry is a still unresolved controversy:

> *This (protection) would probably be objectionable to people who...(have) taken the position that some hypothetical computer interface or operating system may in fact be the optimal way of using computers...Then (to the holders of this position) this method should be available to all computer users, perhaps by anchoring the program in the public domain. So any 'protection' of the program would be antithetical to (their) reasoning. However, (their) position is very controversial.*[36]

The "literary work" protection afforded computer programs in the NAFTA may raise costs for all computer users and, if the "controversial" (League for Programming Freedom) position is to be believed, the extra costs, in some cases, will be payment for the obvious. As one anonymous observer has noted[37], the perception of "justice" seems to depend on

> *whose ox is being gored: the group or individual who don't want to pay some outrageous fee for a relatively simple program, which they could have devised themselves but somebody happened to devise before them, or the group or individual -- not necessarily a mammoth corporation -- who <u>have</u> devised one and don't want to be ripped off.*

The sometimes thin line between Common Good and Private Self-Interest is also reflected in the database protections of the NAFTA. While it may not be generally in the interest of "the people" to have to pay copyright fees for "compilations of data or other material", sometimes it is the "people" who have put valuable time and effort into such compilations; hence the added cost.

OTHER ISSUES

* The NAFTA provides "a term of protection for patents of at least 20 years from the date of filing or 17 years from the date of grant." (Article 1709.12) Although it might have been desirable to have at least certain public interest patents granted for shorter periods, nowhere is such a possibility considered.

* The NAFTA does not deal with the issue of the ownership of germplasms in national and international gene banks, thereby leaving those germplasms vulnerable to exploitation and patenting by bodies other than their original (indigenous) stewards. (Apparently, this is already happening at CIMMYT, the International Maize and Wheat Improvement Center in Mexico.)[38]

* The NAFTA does not discuss the rules for use by the international community, trans-nationals included, of publicly-held (and financed) research work.

* The NAFTA has some democratic process problems... The words "transparent and effective" were removed from NAFTA's Article 1714.2, dealing with the "Enforcement of Intellectual Property Rights: General Provisions":

> *Each party shall ensure that its procedures for the enforcement of intellectual property rights are fair and equitable, are not unnecessarily complicated or costly, and do not entail*

unreasonable time limits or unwarranted delays.

One wonders what harm transparency and effectiveness would have brought to this article.

* The NAFTA offers no protections for the parties from unilateral trade remedies, such as the infamous U.S. Section 301.

* The NAFTA even has some "due process" problems; for example, Article 1715.1(b) allows parties in a proceeding "to be represented by independent legal counsel". However, there is no mention of what will happen to a party who cannot afford legal counsel. There is no provision for legal aid or court-appointed counsel; there seems only to be the presumption that all the players will be big companies well able to afford legal counsel.

* Lastly and perhaps most revealingly, the NAFTA makes no provision for the **creation** of intellectual property rights. Article 1719 deals with "Cooperation and Technical Assistance" and does not mention cooperation and technical assistance for the creation of intellectual property rights. There is no mention of joint research and development and exchange of technical information.

Many areas of intellectual property, such as indigenous peoples' rights and appellations of origin, could profit from cooperative research. And certainly, future technologies will generate a felt need for future intellectual property protections. So why the omission of provision for the creation of intellectual property?

Curiously, nowhere in the NAFTA is it even stated by what standard an intellectual property right is treated. There is not even the slightest suggestion that intellectual property rights imply obligations to the Common Good.

Instead, the whole issue of intellectual property right creation is avoided and thereby the NAFTA misses the opportunity to chose for the Common Good when the desire for individual or corporate profit clashes with society's need for free access to ideas and innovation.

It is not surprising that the opportunity is missed. The intellectual property section of the NAFTA is not really about rights or what is right; it is primarily about the protection of property and the creation of wealth.

NOTES

[1]The North American Free Trade Agreement (NAFTA), Part Six, Intellectual Property, Chapter Seventeen, Article 1701.1.
[2]The Intellectual Property Committee in a letter to Carla A. Hills, U.S. Trade Representative, published in Inside U.S.Trade, March 13, 1992, p. 18.
[3]The Intellectual Property Committee in a letter to Carla A. Hills, U.S. Trade Representative, published in Inside U.S.Trade, October 9, 1992, p. 18.
[4]Ibid.
[5]John Dillon, Economic Justice Report, "NAFTA: A New Economic Constitution for North America," vol. III, number 3, October 1992, p.4.
[6]preliminary Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy on the North American Free Trade Agreement Submitted to The President of the United States, The United States Trade Representative, and The Congress Of The United States, September 16, 1992, p.21.
[7]Ibid.
[8]Dillon, Op.cit.,p.4.
[9]Ibid.
[10]Jack Kloppenburg, Jr., "No Hunting: Biodiversity, indigenous rights, and scientific poaching", Cultural Science Quarterly, Summer, 1991 (issue on "Intellectual Property Rights"), p. 16.
[11]"Introduction: The Politics of Ownership", Cultural Science Quarterly, Summer, 1991 (issue on "Intellectual Property Rights"), p.3.

[12]"Regional Approaches: U.S. Industry Goals," The Journal of Proprietary Rights, vol. 4, number 4, April, 1992, p. 4.
[13]NAFTA, Part Six, Intellectual Property, Chapter Seventeen, Article 1704.
[14]Labor Advisory Committee, Op.cit., p.21.
[15]Anonymous, Comments on Current NAFTA IP Section, fax to Beth Burrows, November 4, 1992, p. 1.
[16]The Intellectual Property Committee in a letter to Carla A. Hills, United States Trade Representative, published in Inside U.S.Trade, October 9, 1992, p. 18.
[17]NAFTA, Part Six, Intellectual Property, Chapter 17, Article 1709(2) and 1709(3)
[18]The (leaked) Dallas composite draft of the North American Free Trade Agreement, Article 2210.3.
[19]Article 20 of Mexico's Ley de Fomento y Protección de la Propiedad Intelectual, Diario Oficial, Mexico, D.F.27 junio 1991, p. 7, noted in John Dillon, Op.cit.
[20]NAFTA, Part Six, Intellectual Property, Chapter 17, Article 1702.
[21]John Dillon, Op.cit., p.5.
[22]Ibid.
[23]Bioethics in Europe, Final report. European Parliament Scientific and Technological Options Assessment, Luxembourg, 8 September 1992, p. 102.
[24]Pat Mooney, RAFI Comments on the NAFTA Intellectual Property Provisions, notes sent to Beth Burrows, June 16, 1992, RAFI International Office, p. 1.
[25]John Dillon, Intellectual Property Rights in the NAFTA, Ecumenical Coalition for Social Justice, June, 1992, p.3.
[26]Beth Elpern Burrows, Biotechnology: Coopting the Genetic Heritage of the Third World, Washington Biotechnology Action Council, November, 1991.
[27]Pat Mooney, Op. cit., p.2.
[28]The Active Negotiators of the Trade Work Group at the NGOs International Forum in Rio de Janeiro, Alternative Treaty on Trade and Sustainable Development, Final Text, June 9, 1992, p.2.
[29]The Intellectual Property Team, Draft Principles and Suggestions Regarding Intellectual Property Rights, October, 1992.
[30]The Active Negotiators, Op. cit.,p.3.
[31]"F. Intellectual Property Rights and Basic Medicines," Economic Justice Report ("Ethical Reflections on North American Economic Integration"), Ecumenical Coalition for Economic Justice, Toronto, Canada, vol. II, number 3, October, 1991, p.14.
[32]Inside U.S. Trade, August 7, 1992, p.18.
[33]John Dillon, Analysis of the Intellectual Property Rights of the North American Free Trade Agreement, Second Draft, October 2, 1992, Ecumenical Coalition for Economic Justice, Toronto.
[34]Milt Freudenheim, "Drug Costs Less in Canada Than in the U.S., Study Finds," New York Times, October 22, 1992, C1.
[35]Gary Chapman, in a letter to Beth Burrows, June 22, 1992, p.2.
[36]Ibid.
[37]Anonymous, Some Comments on the NAFTA Intellectual Property Draft, June 13, 1992 , p.2
[38]Pat Mooney, Re: NAFTA and Patents, letter to Beth Burrows, June 16, 1992, p.2

DRAFT PRINCIPLES AND SUGGESTIONS

THE INTELLECTUAL PROPERTY TEAM

*October, 1992

*Contact: Beth Burrows, 206-775-5383

After consideration of the problems and omissions of the Intellectual Property chapter of the North American Free Trade Agreement, the following principles and suggestions are offered:

When nations agree to enter into intellectual property arrangements with other nations, certain standards and principles should apply:

1. Intellectual property rights, that is, protections of intellectual property, shall be recognized as privileges granted by nations to promote the common good.

2. Privileges of intellectual property shall be balanced by responsibilities to the common good. Where a granted privilege is exercised with insufficient regard for the common good, that privilege may be rescinded or modified.

   (a) Nations shall be free to establish the criteria of patentability, to decide whether a patent should be granted to products or processes, [to decide whether a patent should be granted to the first inventor or to the first applicant for a patent,] and to decide the length of term of a patent.

   (b) Mechanisms, such as compulsory licensing, that ensure a nation's right to use products with broad social value, shall not be compromised. Where a patent holder does not make available, in a timely manner, to its country's trading partners, the knowledge and technology implied by its patent, that patent shall be subject to automatic compulsory licensing in the offended countries. However, adequate remuneration shall be paid to the patent holder.

3. Nations have the responsibility to design intellectual property regimes suitable to their cultures and their self-perceived social, health, financial and trade needs. Hence, nations shall not be required to impoverish their heritage, compromise their sovereignty, adopt technologies they consider inappropriate, or abuse their citizens' rights and health. Therefore, even for the furtherance and increase of trade:

   (a) No nation shall be required by another to extend patents to or recognize patents of biological products, processes, or parts thereof. Among nations, all life forms shall be strictly excluded from patentability.

   (b) Intellectual property rights that, without adequate and democratically negotiated compensation, infringe on or alienate the property and achievements of any community or individual inventor or creator, shall **not** be granted.

      (1) Since transnational intellectual property rights impact the creations and achievements of many sectors of society, representatives of those sectors from all countries party to an intellectual property agreement shall be included in the creation,

maintenance, and oversight processes of any transnational intellectual property rights.[1]

(2) Specific provision shall be made for the recognition of indigenous peoples' and minority cultures' intellectual property. Expressions of "folklore", that is, forms of indigenous or minority culture intellectual property, whether those expressions are attributable to individual inventors or creators or to the accretion of community effort; whether those expressions take the form of music, written word, artifact, art work, or folk variety of cultivated crop, medicinal plant, animal breed, or wild material traditionally safeguarded by the community, access to, use of, and recompense for such folklore shall be at the will of and by the rules agreed to by the cultural community involved. Mechanisms shall be created to so safeguard the intellectual property of indigenous people.[2]

(3) The materials deposited in national or international gene banks, or the components of those materials, shall **not** be considered the subject of patents.

(4) Research and research materials that are the result of public funding and/or reside in public institutions shall **not** be considered the subject of patents.

(c) Trade secret protection that does not adequately protect the public right to know shall **not** be granted.

4. The parties to an agreement concerning intellectual property rights shall cooperate and offer mutual assistance both for the **protection** of intellectual property rights and for the **creation** of intellectual property rights. Mechanisms shall be established and endowed by the agreement to ensure joint research and development and exchange of technical information.

5. Procedures for **enforcing** and **creating** intellectual property rights shall be fair, equitable, transparent, and effective and shall not be unnecessarily complicated, or costly, or entail unreasonable time limits or unwarranted delays. Where such is not possible for a proposed intellectual property right, that "right" shall not be granted to or insisted upon among trading partners.

(a) Parties to a civil suit concerning intellectual property rights shall not only entitled to be represented by legal counsel but shall also be provided legal counsel should they not be able to afford such counsel on their own. Parties to an intellectual property agreement shall endow and maintain a fund for this purpose.

(b) Time limits established for the initiation and completion of proceedings for enforcement of intellectual property rights shall be made explicit in any intellectual property agreement in terms of number of days.

6. The sharing of ideas and technologies shall be encouraged and rewarded. Therefore:

   (a) Each party shall accord to the nationals of the other parties treatment no less favorable than it accords to its own nationals with regard to the protection and enforcement of intellectual property rights.

   (b) Mechanisms shall be created to ensure the compensation of Third World countries and indigenous communities for the use of biological life forms which they have preserved, selected, bred, and cultivated, and which are **now** the basis of agricultural and pharmaceutical products.[3] (Future use is covered in 3 (b) (2).)

   (c) No party shall be required to extend intellectual property protection to technologies, designs, or programs that are commonplace at the time of their creation. The meaning of "commonplace" shall be democratically determined on an industry-by-industry basis.

NOTES

[1]Among these representatives shall be the elected spokespersons of each nation's artists, freelance writers, musicians, small business owners, composers, computer programmers, dancers, inventors, healers, scientists, and any pertinent others.

[2]Among the mechanisms that have been suggested are the expansion of the Appellation of Origin system, the expansion of the interpretation of the Berne Convention for the Protection of Literary and Artistic Works (Article 15(4)), and the development of a sui generis form of intellectual property. Pat Roy Mooney, in his statement RAFI Comments on the NAFTA Intellectual Property Provisions, notes:

> Include provisions that could allow Mexico and indigenous peoples to maintain their intellectual integrity over biological materials. Areas to be specifically developed include the following:
>
> A. Appellation of Origin:
>
> Extension of Appellation of Origin system that currently protects certain products such as champagne and cognac to include other biota indigenous to countries. This provision is particularly useful to Mexico which is a Centre of Genetic Diversity for maize, cocoa, various beans, and tomatoes. The present system is based on the specificity of know-how that has been acquired and refined over the centuries and is still undergoing refinement today, and on geological and climatic peculiarities of the region from whence the product comes. The system operates at both the national level (through statutory law and enforcement regulations), and the international level (through the International Vine and Wine Office - IWO). Unfortunately, the system is a highly specific legal regime, enshrining no general principle since it has only been applied to finished products. Nevertheless, Mexico and indigenous peoples in all three countries should explore approaches to expand Appellation of Origin to folk varieties of cultivated crops, folk medicinal plants, and wild material traditionally protected by local communities.
>
> B. Berne Convention for the Protection of Literary and Artistic Works:
>
> Under the Berne Convention for the Protection of Literary and Artistic Works (Article 15(4)), and pursuant to the Acts of Stockholm (1967) and Paris (1971) Conferences of the Convention, it is a matter for the legislation of the country concerned to identify a national "authority" who shall represent and protect the rights of unknown authors (in case of an unpublished work). While the text does not explicitly refer to expressions of folklore, the UN Food and Agriculture Organization (FAO) argues it is reasonable to suppose that the phrase "unpublished works" is of sufficiently wide connotation to cover any traditional creative activity. Customary rules governing the precise designation of this authority and the organizing of protection for a work during the "author's" lifetime do not apply under the Berne agreement.

Folklore, the resulting product or process of an ongoing evolution, is the common heritage of a given cultural community. New recording and other technologies have made it possible for outsiders to distort and/or profit from expressions of folklore. The purpose of the Berne provisions was to protect the interests of cultural communities.

Mexico and indigenous peoples should explore the full enactment of the Berne provisions to cover biological products and processes as well as manufacturers.

C. Model Provisions for National Laws on the Protection of Expression of Folklore against Illicit Exploitation and Other Prejudicial Actions:

To protect community intellectual integrity against expropriation, Bolivia and Morocco have specific legislation protecting expressions of folklore. UNESCO and WIPO have prepared Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions. These provisions pave the way for a degree of harmonization within the different legal systems and set forth certain basic rules governing the designation and protection of folklore. Under these provisions, "expressions of folklore" are taken to mean productions consisting of characteristic elements of the traditional artistic heritage developed. While UNESCO and WIPO assumed in their 1985 Model Law that the expressions might be verbal, musical, by means of action (of the human body) or tangible (productions of folk art, musical instruments, and architectural forms), FAO has concluded that a broader construction including folk plant varieties or animal breeds and medicinal plants is now justifiable under the provisions.

NAFTA should explore the entrenchment of the UNESCO/WIPO Model Provisions for indigenous peoples, and for Mexico, in order to secure their intellectual integrity over folklore.

. . .

(As a third option re patents:) Develop a sui generis form of intellectual property for biological products and processes (as proposed by Dunkel for plant varieties), that amounts to a "trade union" for local communities and indigenous peoples to safeguard the intellectual integrity of their innovations. This initiative would build upon the recognition given to "informal innovation" in UNCED's Agenda 21 and in the biodiversity convention ("indigenous knowledge and technologies"), and would utilize "Farmers' Rights" as adopted by NAFTA Parties (among others) at FAO.

Another commenter, who wished to remain anonymous, adds:

(This) is fraught with difficulties, largely because "folklore", by definition, is in the public domain and things which are in the public domain are, by definition, not subject to protection in the form of any of the traditional intellectual property rights. So it does require the invention of a "sui generis form of intellectual property." One precedent would be the law enacted four or five years ago which protects native American symbols against unauthorized misuse. In terms of already existing institutions, as I have suggested ..., use of collective marks should be explored; so should certification marks and jointly owned patents and copyrights, as well as the excellent references in Pat Mooney's footnote C.

3. Among the suggestions for the form this compensation may take is a fund into which "royalties" are paid, the "royalties" to be distributed on a basis to be determined in conference with all concerned. As John Dillon pointed out in his commentary, Intellectual Property Rights in NAFTA,

Precedents exist in intellectual property law for collecting funds to remunerate the originators of materials that are copied by others. For example, several states place a surcharge on the sale of blank cassette tapes and on the use of library photocopiers to collect funds for distribution to recording artists or authors.

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FINANCIAL SERVICES

Nikos Valence
Fair Trade Campaign

DISCUSSION

The salient issue with respect to the Financial Services chapter is that it enables US financial service providers to enter the Mexican market for financial services and essentially take control of the Mexican market for capital. Limits on aggregate control of capital in Mexico by foreign financial affiliates will be phased out and be eliminated all together by the year 2000. Although Mexico retains some discretionary ability to limit foreign aggregate control of capital past the transition period, this ability is prescribed and may be applied only once during the four years after the transition period and then only for three years. This has potentially enormous implications for domestic monetary and financial regulatory policy in the US. There are also potentially broad implications for the Mexican economy particularly monetary policy. Additionally, it sets precedents regarding the hemispheric dominance of US financial institutions over capital distribution issues and policies as the Enterprise for the Americas Initiative moves forward. Remember that the E.A.I. essentially allows other countries in the hemisphere to sign onto NAFTA as a way of joining the trade bloc.

There is a very definite bottom line for financial services however. It was most clearly expressed by the Treasury official who negotiated the financial services chapter at a meeting at EPI when he said "they gave us their financial system".

In order to understand the policy implications and concomitant issues that derive from his statement some background on the Mexican economy generally and the Mexican financial services sector specifically should be provided. My knowledge in these areas is superficial at best although these are areas in which I am trying to develop as much expertise as possible as quickly as possible as part of the vast research necessary to understand what free trade in financial services will mean.

BACKGROUND AND COMPETITION

This section takes a look at some of the issues of the Mexican economy and the competitiveness of US banks versus Mexican banks.

Wealth in the Mexican economy is distributed highly unevenly as you well know. This creates high concentrations of capital on the one hand. On the other hand this does not create a large market for consumer banking. For some reason I have heard the argument given, mainly in the press, that opening the Mexican financial system to US banks will enable them to develop the consumer banking market. This seems to be a fairly ridiculous assertion since almost 70% of the Mexican population currently lives in poverty. (The only way to make any sense of it is to subscribe to the notion that MAFTA will create wealth for Mexicans and that this wealth will be more evenly distributed than anything they have ever seen). To the extent that most Mexicans have

banking accounts they are likely to be savings accounts rather than checking accounts. Thus, there is very little "culture" around deposit banking, unlike in the US.

The only consumer market for banking services which is at all developed in Mexico is for credit cards. Since the interest rates are high, (near 30% in some cases), it is likely that US banks will be able to compete efficiently with Mexican banks for this market by being able to offer lower rates which will still be high by US standards.

It is important to understand what consumer debt means to US banks in the 90's. This is their life blood. It is the only thing that is making them any money right now. In the 70's banks made their money by lending to developing nations until that market collapsed. During the 80's banks made their money by lending for speculative real estate purposes, until that market collapsed. Currently US banks are relying on high rates of return on consumer debt, including credit cards, to provide them with profits. Thus, in an atmosphere of very low interest rates in the US, there has been intense pressure not to lower credit card rates very much. The fact that Mexico has a market (and a "culture") which is developed around credit cards is therefore not insignificant in this context.[1]

The second important consideration is the general health of the Mexican economy and its financial system. The two issues are very intertwined. I will start with the latter. For all intents and purposes the Mexican banking system is in dismal shape. Very few people with any insights into this sector will disagree with this. Modernizing the Mexican market for financial services and making it efficient is precisely the intention of free trade in financial services per NAFTA and a key first step if investment is to proceed apace. Thus, "they have given us their financial system" rather than their oil industry or telecommunications industry, where monopolies will still be allowed.

There are 18 banks in Mexico. Three of them are quite large and control somewhere between 60% to 70% of all capital in Mexico. It is unlikely that they will be able to compete effectively with US banks. But it is not only their size relative to US financial institutions which puts them at a competitive disadvantage. Their portfolios contain significant amounts of non-performing loans. I have been told that industry-wide this figure is currently around 5% and is growing rapidly. This is very large and seriously affects the ability of such a bank to earn profits. Thus, one could argue that the Mexican banking system is "bankrupt". Thus one could further argue that NAFTA represents a US bailout of the Mexican banking system.

It is important to remember that bankers in Mexico although a small group are are also an extremely powerful group. Not unlike bankers in the US.

The current fragility of the Mexican banking system is due in large part to the economic policies of the Salinas administration. Salinas had pursued a "jobs, jobs, jobs' policy of unilateral trade liberalization over the last four years. Similar to what we anticipate from the Bush administration's "jobs, jobs, jobs" policy of trade liberalization under NAFTA (and GATT) this has been more of a disinvestment policy than the reverse. (Even in low wage Mexico!)

The reason being that there is no public sector investment in infrastructure development, education, etc. Thus job creation has not met demand for employment. In fact the policy may have exacerbated unemployment. The economy has relied on imports rather than exports since the overall cost of producing may still be relatively cheaper elsewhere. The cost of funds in Mexico (i.e. interest rates) is still high. Small businesses have attempted to form but there has been no creation of demand. Thus small businesses have been failing, creating the above mentioned problems for banks. Thus economic policy has given rise to weaknesses in the banking system.

The upshot currently remains the Mexican stock market. It has been Salinas' only ace in the hole with regard to attracting any kind of investment. However that is unravelling and not surprisingly. The market's value is very inflated and is already beginning to correct itself. This has resulted in serious swings in the value of the peso relative to the dollar recently. What Salinas had hoped for was that he could keep the market increasing in value until his term was over. The best he can hope for now is to stem the decline so that it doesn't crash any time soon. The theory is that once he's gone he doesn't care what happens. The Mexican banking system was recently privatized. The prices paid were typically well in excess of book value. As these prices begin to adjust and come more in line with the firm's book value, (you can call this a correction, adjustment or crash depending on whose side you're on), it is likely that the entire financial sector, including the stock market, will also feel pressure bringing some sort of collapse.[2]

There is a development bank sector but this is becoming disenfranchised as the government cuts back its spending and therefore the capitalization of these agencies. Furthermore, there is a class/race issue here with regard to the inclination of these development agencies to lend to peasants with sombreros and mariachis. This sounds vaguely (I mean that cynically) reminiscent of patterns of credit allocation in inner cities in the US, where banks just find it harder to lend money to people with dark skin no matter what their income levels.

There is a debate among neo-Keynsians, a conservative branch in economics, which roughly stated says that if you are ardently opposed to deficit spending and transfer payments as a means of stimulating the economy (because you believe they are completely unnecessary to create full employment, the economy will do it on its own) then what you do is, realizing that you won't be in power forever (Reagan-Bush, PRI?) you create so much debt towards the end of your run that when your opposition does get in there's no way he can turn it around. There will be no ability to fund programs through fiscal stimulus due to the already mammoth deficit and public debt. This argument as I said rests on the assumption that the economy will achieve equilibrium on its own, without any participation by the government. Remember, most Mexican economists, including Salinas, studied in the US. Certainly most US economists studied here. It is, perhaps, a fairly cynical argument. But as applied to the US and Mexico it is an interesting one.[3] No further comment.

WHAT DOES IT MEAN?

The one area where banks have been active in Mexico has been intermediation. Roughly defined this means they have tried to participate in raising capital for businesses rather than providing consumer banking services, for which there is very little demand. This is what I believe makes NAFTA make sense. And it is, I also believe, the name of the game with respect to US banks in Mexico.

Lets assume therefore that certain US banks do want to go into Mexico. Two scenarios present themselves. Either they buy up one of the fifteen small banks or open a completely new subsidiary and remain within the 4% limit on an individual foreign banks ownership of aggregate Mexican capital. This limit was obviously designed to protect the large banks from foreign control. US banks therefore have a window for intermediation either through directly setting up a subsidiary or through the purchase of one or more small banks whose total capital does not add up to more than 4% of total capital.

A second and perhaps somewhat less likely scenario would be that US banks form a new kind of association with the larger banks and get around the 4% limit. This would require the formation of a bank holding company type of entity and I'm not sure how that could be done under current Mexican law.

Given either of these scenarios, however, what are the implications? One obvious advantage to US banks is to gain a foothold to operate under Mexican law. This would exempt them from restrictions against universal banking effectively allowing them to provide not only commercial banking services but also investment banking services. Combining these activities in the US is illegal under the Glass-Steagal Act, although banks have been waging a battle in Congress to repeal Glass-Steagal piecemeal. In fact I am told that Mexican banks have been transferring assets between their commercial operations and their investment banking operations which has undermined their financial health and stability, contributing to their fragility beyond the problems created by bad loans. One has to remember that the owners of these banks paid "top dollar" for them and must make a profit.

So, we have US banks going into Mexico, buying smaller banks and establishing a window for investment. Now they are competing with the larger banks which are financially fragile. US banks are underwriting the investments of US firms doing business in Mexico and perhaps of other foreign firms investing in Mexico. The US banks can offer better terms on investment because they are more efficient and are backed by the capital of their US parent. Perhaps the three large banks merge to save themselves or perhaps they split up under the pressures of competition and a US bank holding company establishes several small banks each controlling less than 4% of aggregate Mexican capital. In any case the strength of the largest Mexican banks will be challenged by the presence of US banks, due to their ability to attract business from US firms and potentially other foreign firms doing business in Mexico. This underwriting ability could be extended to other parts of Latin America as economic integration goes forward through the EAI.

A second major issue raises its head here. In which currency will the US banks in Mexico be lending, or underwriting. It is possible that with the presence of so many US banks in Mexico, backed by US dollars, that US firms will do their borrowing and obtain their underwriting services from these banks regardless of their interest in investing in Mexico. Because financial service costs will be lower in Mexico relative to the US, particularly because US banks will now be able to offer a variety of financial services under one roof, it may be that US firms will prefer to do their business there. This kind of intermediation will allow a market for NAFTA dollars to be created whereby the US banks will create dollars in Mexico based on their dollar deposits and assets. The creation of NAFTA dollars in Mexico could effectively lead to investment strategies which would be denominated in dollars rather than pesos thereby creating an unofficial second currency in Mexico.

This would have obvious implications for US and Mexican monetary policy, perhaps resulting in some sort of linkage of these policies. Certainly if the exchange rate between the dollar and peso is not fixed there will be more demand for dollars from US banks in Mexico by investors. The uncertainty about the rate of exchange will eliminate the peso as a contender for investment strategies by firms. However, the cost of doing business will be an incentive for investment, with (perhaps) dollars as the preferred currency, particularly if US banks are able to create NAFTA dollars in Mexico.

The even bigger question then becomes what does this mean for eventual monetary union between the two countries. Implicit in the above paragraph is a form of monetary union for investment purposes which is the crux of the issue. At this stage of the game however it is unlikely that nationalist sentiment either here or in Mexico would allow for direct monetary union. But as events proceed it is not so far-fetched to imagine a debate over monetary union to develop if the integration of the two economies becomes substantial.

Even more important then is the issue of regulatory control, particularly government guarantees on deposits and other assets and the extent to which the arm of the SEC and the Federal Reserve will reach into Mexico. One obvious question remains to what extent will the US government be willing to bail out failed financial institutions in Mexico. Given the ability of US banks to provide a mix of services, thus exposing themselves to more risk, and the unprecedented nature of the policy issues which may develop due to NAFTA, it is important to understand from the outset exactly what the taxpayers liability will be.

I have outlined above what I believe to be the salient issues with regard to US entry into the Mexican market for financial services. Financial services is the only sector of the Mexican economy where control by foreign firms is allowed. This is certainly not true in oil, nor is it true in telecommunications.

Essentially I have stressed capital integration in the macroeconomic context. I am continuing to focus on the language in the text and its bearing on these issues. These issues are complex and I believe I have only scratched the surface. So there is still much work to do. I do believe however that the importance of financial services is major with regard to the integration of the two economies.

There is one other issue I would like to draw attention to. It is the description in the text of what constitutes prudent measures. A party can adopt measure for prudential reason such as protection of investors, depositors, policy holders or financial market participants. This is a very different approach regarding who is to be protected in this scenario. The US government typically understands itself as providing protection for depositors but not necessarily investors. Investors take risks. So do financial market participants. This is clearly vague language which might be interpreted in a number of different ways. In particular I think it deserves more careful analysis as we proceed.

One final thought. As we develop our program and agenda I think we should try to integrate the development concerns of groups here with the development concerns of groups in Mexico and Canada. We have precedents with the Community Reinvestment Act. In Mexico there are precedents with respect to development banks. Perhaps some sort of technical advisory groups could be set up between the three countries that would collectively address these issues. For instance, get the CRA community here in touch with the credit union organizers there. I think this bears more consideration.

NOTES

1. I am not going to make any predictions, however, if the past trend is any example it will be interesting to see what happens to the market for consumer debt, i.e. credit cards in the second half of the nineties. The banks are relying on it for profits. They did that with Third World Debt and then with Real Estate. Both of these markets for debt eventually collapsed. Get my drift? What will it mean and what will it be like if the market for consumer credit collapses? What will it mean for overall demand. What will it mean in the context of a developing hemispheric trade bloc? What if any sector of the economy could then be relied on for bank profits? Sorry to ask so many questions.

2. It is interesting to note the reverse imaging here between the privatization of the Mexican banking system and the process of socialization quickly followed by privatization of failed financial institutions in the US. Whereas in Mexico the price of the banks which the Mexican government wished to unload were in excess of book value, in the US it was the exact opposite. While the agencies involved were mandated to try to maximize profit for the government in the disposition of banking assets, many, if not most, have been "re-privatized" at deep discounts.

3. May I make a prediction here? If I were a betting person I would wager that in 2 years the PRI, bowing to political pressure and recognizing the mess the domestic economy is in, will allow the opposition to capture the Presidency. Being strangled by the problems created over the last several years and fiscally unable to do very much to prevent the inevitable collapse of what's left, the opposition will be discredited perhaps paving the way for the triumphant re-entry of the PRI into Jerusalem, I mean Mexico City. I'm speculating, but much stranger things have happened.

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ENTERPRISE FOR THE AMERICAS INITIATIVE

Karen Hansen-Kuhn
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BACKGROUND

On 27 June 1990, President Bush unveiled his Enterprise for the Americas Initiative (EAI), a hemispheric program that he projected would establish a free-trade zone stretching from "Anchorage to Tierra del Fuego," expand investment and provide a measure of debt relief for countries in Latin America and the Caribbean. The EAI has three components: the negotiation of a number of anticipated free-trade agreements; an investment-sector loan program and a proposed five-year US$1.5 billion Multilateral Investment Fund (MIF) to be administered by the Inter-American Development Bank; and a program of official-debt relief, in which the interest payments on the reduced debt would be paid in local currency and could be used to finance environmental projects in Latin America and the Caribbean.

The North American Free Trade Agreement (NAFTA) is the first of the projected free-trade accords. To date, every country in the Western Hemisphere except Cuba, Haiti and Suriname have signed "framework agreements" with the United States which establish Trade and Investment Councils in each country. These are designed to monitor commercial relations and to identify and remove any impediments to trade and investment flows as a prelude to the negotiation of free-trade agreements.

So far, the U.S. Congress has been very reluctant to fully fund either the MIF or the debt-reduction programs. The Bush Administration requested $202 million to fund AID debt relief in fiscal year 1993; Congress appropriated just $50 million. Even if the full Administration request for both programs were appropriated, it is highly unlikely that they would have a significant impact on development needs in Latin America and the Caribbean. The US$300 million per year in grants from the United States, Canada, Japan and several European and Latin American countries projected under the MIF would be spread across all participating countries in the region and, like the investment-sector loan program, would be directed solely at reforms to facilitate private investment.

In the case of the debt-relief program, even if the program to forgive debt to AID were fully funded, the total amount eligible for forgiveness would come to less than two percent of the region's foreign debt. Certain countries with high levels of bilateral debt, such as El Salvador and Costa Rica, would receive relatively greater debt relief, but in many cases the debt forgiveness would simply validate shortfalls in the debt repayments made by these countries over the past few years.

LINKAGE TO STRUCTURAL ADJUSTMENT PROGRAMS

Each of these components is conditioned on or supports the implementation of an International Monetary Fund (IMF)/World Bank structural adjustment program (SAP).

These programs typically include currency devaluations, cuts in government spending (especially in social programs), reduction in credit (effectively squeezing small producers), export promotion, price liberalization, wage restraints, privatization of state-owned enterprises and public services, and deregulation. Supporters of SAPs argue that decreasing the role of the state in economic affairs and adjusting the prices of resources, including labor, will restore macroeconomic balance, leading to renewed growth and, eventually, benefits to all members of society.

Many of these measures are designed to attract foreign investment, to facilitate its entry and to minimize local constraints on profit maximization. The NAFTA and subsequent free-trade agreements are intended to further deregulate the investment environment, to open new sectors in Latin America to Northern capital, to provide international legal guarantees to foreign investors and to remove barriers to the exports of these investors to the United States and Canada. Structural adjustment, in its liberalization of domestic economies, is, therefore, the necessary precursor to the liberalization of trade relations between and among these national economies.

The United States undertook similar economic reforms in the 1980s, with profound negative consequences for many lower-middle-class and poor people. In many Latin American and Caribbean countries, these programs have had a devastating impact on the majority of the population. While new economic policies are clearly needed in many countries, the terms set under structural adjustment programs have generally led to increased poverty and income inequality, as well as environmental degradation resulting from industrial deregulation and increased pressures to expand exports of primary commodities. They have also resulted in falling incomes for the majority of the population and the weakening of unions and other organizations representing the interests of working-class people.

Women have been especially hard hit by these programs, which have often forced them to enter the work force under poor working conditions and to accept low wages. Faced with limited opportunities in the formal sector, women have been compelled to seek work in the informal sector, often at wages too low to support a family. Since there has been no reduction in their home duties, many women now work "double shifts", one at their jobs and one at home. In many cases, due to cuts in social spending brought on by structural adjustment programs, women must spend even more time than before attempting to satisfy health-care, education and other social-service needs for themselves and their families. They are caught in an impossible and clearly unsustainable situation, squeezed between their increasing responsibilities and decreasing resources. This phenomenon is likely to worsen under a NAFTA, which is premised on structural adjustment and labor "flexibility".

As the negative social, environmental and economic consequences of structural adjustment programs build in the Americas, political instability has also increased. Although the Bush Administration asserts that these programs (and the proposed free-trade agreements) strengthen democracy, they in fact have had the opposite effect. Social unrest, riots and coup attempts have increased as people have begun to lose their stake in the

stability of these economic systems. In response, governments have cracked down on dissident groups, using emergency powers and abusing human rights.

ACCESSION TO THE NAFTA

Extending free-trade agreements like the NAFTA throughout the hemisphere would build on and reinforce the IMF/World Bank-imposed structural adjustment programs currently in place; in fact, that is one of the stated intentions of the EAI. Myles Frechette, Assistant U.S. Trade Representative for Latin America, recently stated that Chile will be the next candidate for a free-trade agreement precisely because of its long history with these free-market policies. These agreements would severely limit future governments' abilities to implement industrial policies, sustainable development programs or other alternative economic programs that conflict with the goals of orthodox structural adjustment as defined by the Fund and the Bank.

The accession clause (Article 2205) will compound the impact of these constraints on democratic policymaking. This clause specifies that other countries or groups of countries may join the NAFTA subject to the terms agreed on by the member countries and in accordance with domestic approval procedures in each country. It does not preclude other countries outside of the Americas from joining the NAFTA. It does make NAFTA the model for any future agreements. This would mean that future negotiations could proceed much more quickly than has the NAFTA, leaving very little time for informed debate with or within these countries.

The accession clause will make input from citizens' groups in fashioning future free-trade agreements practically nonexistent, seriously limiting the ability of people throughout the hemisphere to determine the nature and future direction of their respective societies. The elicitation of such input was rare enough in the case of the NAFTA negotiations, and they lasted more than a year.

THE ALTERNATIVES

While the proponents of these programs argue that there is no viable alternative to structural adjustment, alternative development and trade models have begun to emerge in Latin America. A coalition of Chilean non-governmental organizations, for example, is promoting an Initiative of the Peoples of the Americas as an alternative to the EAI. They propose qualitative, rather than just quantitative, changes in local production to increase productivity and the domestic value-added content of both agricultural and industrial goods. They also stress the importance of diversifying export markets beyond the United States and Europe, including the expansion of trade among the countries of the South. They maintain that these changes would permit countries in the region to broaden their markets and to escape the primary-commodity-export development mode that has proven so unfavorable over the years and that has been reinforced by structural adjustment. Like Mexican opposition leader Cuauhtemoc Cárdenas, the Chilean coalition argues that their country's development cannot continue to depend on the "comparative advantage of poverty" resulting from the strategy of

exploiting the work force and natural resources in order to maintain low production costs.

The problem is not a lack of alternatives but rather the refusal of Northern governments and financial institutions to underwrite any economic program in the South that does not minimize constraints on foreign investors. Space for economically viable alternatives must be created in which each and every country can exercise its "Right to Development", as defined in the 1986 United Nations General Assembly Resolution. This includes the right of all peoples to determine "appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom."

A responsible, alternative approach to development could contrast fundamentally with the package of structural adjustment and trade liberalization measures intrinsic in the EAI and yield far more positive economic results than has the wage-depressing, deregulating, export-promoting model. It could include a measure of self-reliance, particularly in key areas such as the national food supply, thereby also reducing the country's import bill. It would ensure equity among its citizens in terms of their access to national economic resources and benefits -- thereby creating an "even playing field" for small producers, women and the less privileged -- while giving priority in these areas to the national population generally.

Priority could also be given to economic activities that are ecologically, socially and economically sustainable and that integrate agriculture, industry and other sectors of the economy, thereby adding value to the national output and generating real development. An alternative program could also promote economic integration and trade among countries at relatively equal levels of development, providing the opportunity for the private sector to develop the capacity to better compete in the international market. It could also include the diversification of export markets, particularly if other countries also adopt economic programs based on rising real wages that increase purchasing power.

This effort to improve the quality of life in one's country could also be enhanced by the upward harmonization of environmental, labor and other social standards in international trade agreements and the application of the principle of "subsidiarity", by which economic and social decisions on standards exceeding minimum national levels, are, to the maximum extent possible, made at the lowest level of government. Overall, appropriate and effective economic development can only be generated through true democracy in which local populations, who know best their local environments and realities, are integrally involved in shaping national economic policies and programs.

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