Environmental Protection Measures And The Internal Trade Agreement

April 28, 1994

Honourable John Manley
Minister of Industry
Parliament Buildings
Ottawa, Ontario
K1A 0A6

Dear Mr. Manley:

Re: Environmental Protection Measures and the Internal Trade Agreement

We are writing to express our support for the inclusion of strong environmental protection measures in the agreement on internal trade (the "Agreement") currently being negotiated amongst Canada's federal, provincial and territorial governments. We recognize that the economic cost of provincial barriers to trade can be high; however, environmental measures are seldom, if ever, barriers to trade. Nonetheless, based on briefings we have recieved from officials in your Department, we are concerned that an inter-provincial trade agreement may be used to resist bona fide and needed environmental measures.

We believe that an agreement on internal trade can be developed which does not inhibit the development of sound environmental measures for non-protectionist reasons. Indeed in doing so we believe that Canada can provide leadership to the world in indicating how strong environmental protection measures can be incorporated into trade liberalization agreements.

This letter outlines a number of components and safeguards that may need to be included in the agreement to ensure that provinces are not stymied in their efforts to protect the environment and achieve other legitimate goals. We look forward to your governments' commitment to ensuring these are incorporated into the final agreement.

Scope of Agreement's Application to Environmental Protection Measures

- The Agreement should only apply to environmental protection measures which have an effect on the trade between parties in goods and services. Since most environmental measures do not have effects on trade in goods or services [(1) -- 1. Stephen Krajewaki, *Industrial Competitiveness, Trade and the Environnment: Report on Phase II* (Ottawa: Conference Board of Canada, March 1992); Stelios Loizides and Michael Grant, *Barriers to Interprovincial Trade: Fifty Case Studies* (Ottawa: Conference Board of Canada, April

1992); and Conference Board of Canada, *Interprovincial Trade Barriers: Five Case Studies* (Ottawa: Conference Board of Canada, November 1991).] it is inappropriate that all environmental regulatory and standard related measures be subject to the requirements of the Agreement.

Purpose of Agreement

- The defined purposes of the Agreement should include promotion of sustainable development, and the Agreement should state that all economic and commercial objectives of the Agreement be pursued in a manner consistent with environmental protection and conservation. These provisions should be included in the body of the Agreement where they carry greater legal weight than if included only in the Preamble.

Investment

- The Agreement should not in any way inhibit the adoption of higher environmental standards whose only trade related effect is discouragement of investment in the province adopting the standards due to higher costs of compliance in that province. This is an important issue since many members of the business community have described higher environmental standards as being interprovincial trade barriers even though the standards have no effect on the flow of goods or services. If a province chooses to adopt an environmental protection measure which imposes higher costs on industry operating in that province, it should not in any way be restricted from doing so.

- The Agreement should prohibit encouraging investment by relaxation of environmental measures or their enforcement.

Appropriate Test for Legitimacy of Environmental Protection Measure

- The Agreement should not require that environmental measures be the least trade restrictive measure possible. The least trade restrictive measure may be inappropriate for legitimate environmental, social, economic or political reasons.

- We have no objection to an Agreement involving an undertaking by all parties to implement environmental measures which do not create unnecessary obstacles to trade. However, unelected dispute resolution panels should not be the arbiters of whether an environmental protection measure is more trade restrictive than necessary to reach a goal.

For instance, if a provincial government decides to rely on deposit refund systems rather than blue box systems to decrease its solid waste, this decision should not be challengeable by someone arguing that blue boxes are a less trade restrictive means to achieve the goal of reduced municipal waste. An agreement is unacceptable if it allows environmental measures which have been hard fought for by those concerned with the environment, and which have been adopted for environmental protection reasons, to be challenged by out of province producers who would prefer that the objective be achieved through some other means.

If a dispute resolution panel is to arbitrate on the legitimacy of an environmental measure the test they apply should be limited to whether or not the environmental protection measure was adopted for environmental purposes; whether or not the choice of that measure over alternative measures was made for purposes of restricting trade; and whether or not the government adopting the measure has some rationale for choosing that measure over alternative less trade restrictive measures. As long as the intent of a measure is not protectionist and some rationale can be offered for its adoption, trade panels should be restrained from interfering in policy decisions by elected and accountable officials.

- Any test for whether or not an environmental protection measure is legitimate should not restrict the measure to fulfilling only environmental goals. An environmental protection measure may be adopted for a combination of legitimate environmental and other social or non-protectionist economic reasons.

- The Agreement should not give a dispute resolution panel the power to arbitrate whether a measure's trade effects are proportionate to its environmental benefits. This is an issue which would affect determination of whether it is a *bona fide* measure, but the trade panel's assessment should not replace the assessment of governments that are democratically accountable and can draw on the considerable expertise of their bureaucracies.

Precautionary Principle

- The Agreement should clearly support the Precautionary Principle. In this regard we urge you to support a definition or statement of the Precautionary Principle which is broader than the often cited definition contained in the *Rio Declaration on Environment and Development*. That definition is often interpreted as suggesting that scientific certainty is required where the threatened damage to the environment is not deemed to be "serious or irreversible". However, in many cases good public policy will entail use of a cost effective precautionary measure to deal with a moderate environmental risk. This is especially true in the context of environmental protection where science may always have a limited ability to prove cause and effect relationships. [(2) -- 2. Randal Peterman and Michael M'Gonigle, "Statistical Power Analysis and the Precautionary Principle" (1992) 24 *Marine Pollution Bulletin* 231; Marc Jaccard, "Abatement Cost and Energy Resource Planning: Revealing Social Preferences," Presentation to the OECD, May 24, 1992.] Thus, we suggest that the following statement be included in the Agreement:

Recognizing the difficulties inherent in proving the causes of environmental degradation, lack of full scientific certainty cannot be used by parties as grounds for complaint against another parties' measures.

Product Standards

- Similarly, measures which discriminate against a product because of its poor environmental characteristics should apply equally to imported and locally manufactured products even though some of the environmental damage caused by the imported products' manufacture may occur outside of the province. Thus, provinces should be permitted to establish measures discouraging or banning the use of one

product over an alternative, more environmentally friendly product, and in making these determinations the province adopting the measure should be permitted to consider all aspects of the product's life cycle.

For instance, a province might conduct life cycle analyses of reusable bottles and aluminum cans, and, based on this, decide to establish a product ban or deposit refund system which encourages reusables. This should not be contrary to trade agreement principles merely because some of the environmental harm associated with aluminum cans occurs outside of the province. If this is not allowed under the Agreement provinces will have great difficulty in encouraging environmentally preferable products without the threat that both their policies and industry will be undermined by out of province imports produced with an unfair advantage.

Harmonization

- In light of work by the Canadian Council of Ministers of the Environment to develop a framework for harmonization of environmental standards, the Agreement should not deal with harmonization of environmental standards.

- In the alternative, if the Agreement does deal with harmonization of environmental standards it should require parties to move to the highest applicable provincial, national or international standards and should clearly promote parties adopting even higher standards. International standards should not be the goal of harmonization since, where there is difference between Canadian standards and international standards, international standards are likely to be lower. [(3) -- 3. This is based on a comparison of Canadian and international sanitary and phytosanitary standards in, Canada, *North American Free Trade Agreement: Canadian Environmental Review* (Ottawa: Government of Canada, October 1992) p. 25-26.] The Agreement must not encourage harmonization downward to national standards which reflect a lowest common denominator of environmental protection.

Dispute Resolution Process

If the Agreement establishes a "rules based approach" in which the legitimacy of measures is arbitrated, the dispute resolution mechanism must be open, balanced and fair. We are troubled by the prospect of unaccountable trade officials with no expertise in environmental affairs (and possibly a bias towards trade) second-guessing relatively open and accountable provincial governments' decisions as to the need for a particular measure.

- It is essential that any dispute settlement mechanisms under the Agreement be open. The public should have access to all documents filed in relation to a dispute and a publicly accessible registry should enable such access.

- Public interest groups who have an interest in supporting the environmental protection measure being challenged should be permitted to intervene in disputes. If dispute resolution panels deal with issues such as whether an environmental protection measure is necessary and whether the measure was truly motivated by environmental protection it is essential that the panel be exposed to the groups who have advocated a measure.

- Any dispute resolution panel created by the Agreement to review environmental measures should be chosen for their knowledge and expertise in environmental matters. If panelists are chosen from rosters we recommend development of a separate roster for disputes over environmental protection measures. This is essential since members with environmental expertise will be best placed to determine the legitimacy of an environmental measure.

- The process should be designed so that spurious complaints against a measure are not pursued in the hope that the party adopting the measure will drop it to avoid the nuisance of being involved in a protracted dispute resolution process. In particular, if non-party complainants are given any role in the dispute resolution process, they should not be able to challenge a measure without support of a party. Moreover, if the Agreement establishes a multiple stage dispute resolution process, the complainant should require approval from a Party before moving their complaint to the next stage.

- Throughout the dispute resolution process the onus should be on the party challenging a measure to show that the measure is contrary to the Agreement.

Measures Requiring Value Added Manufacture before Export of Natural Resources

- It is essential that the Agreement state that special measures are permissible in order to protect the economies of resource extraction dependent communities. Generally, sustainable local economies must have a wider economic base than extraction of unprocessed natural resources. Measures which encourage value added processing of natural resources in order to promote the sustainability of local economies should not be subject to challenge on the basis of the Agreement. In particular, where existing levels of resource extraction are unsustainable, in order to avoid economic dislocation it may be necessary to combine protection of natural areas or improved environmental standards with measures requiring minimum local processing. The Agreement should allow such measures.

We look forward to hearing your government's commitment to the above points and would be happy to discuss these matters with you or representatives of Industry and Science Canada. We appreciate your department's keeping us apprised of developments in the internal trade negotiations, and we look forward to future briefings.

Yours truly,

WEST COAST ENVIRONMENTAL LAW ASSOCIATION

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