Excerpts from the Standing Committee Hearings

Stephen Shrybmen, October 97

Mr. Shrybmen, would you like to wade in?

Mr. Stephen Shrybmen (West Coast Environmental Law Association): Thank you. I'm the executive director of the West Coast Environmental Law Association, a public interest advocacy organization that exists to provide legal services to individuals and groups that wouldn't otherwise be able to afford legal advice and counsel.

I should begin by apologizing for the fact that my submission is presented to you in only one of Canada's two official languages. We simply didn't have time in the short notice available to us to have the document translated.

I should also begin by noting my concurrence with the submissions of my colleagues to you this morning with respect to the import of this agreement. ##

But I want to raise with you issues that haven't yet been a part of the debate about this harmonization accord and those issues concern how the accord fits within the context of Canada's international commitments under NAFTA and the World Trade Organization.

In stating the objectives of the harmonization accord one is omitted and the one that is omitted may at the end of the day prove to be its most consequential effect and that is to insure compliance by all levels of government in Canada with the rules with respect to environmental regulations that are set out under the World Trade Organization and NAFTA. And those rules exert a very substantial downward pressure on the prerogatives of governments at all levels to act on their environmental mandates.

So when you look at the accord in the context of Canada's international trade obligations three issues emerge.

The first one is that this harmonization agreement, because of its timing and because of its substance, seems to be very much and expression of the harmonization rules that you will find set out in the technical barriers to trade agreement under the World Trade Organization which establishes an international regime of standard harmonization which creates feelings on environmental regulation but no floor.

The second issue that emerges is that when you look at the harmonization agreement, and particularly those parts of the agreement that environmentalists would support-mainly the support in principle for the notions of precaution, for the notions of polluter pay, for the notions of pollution prevention-you find a very dramatic contrast between those principles and those to which Canada has subscribed under the WTO which does not mention the precautionary principle, which has specifically rejected the notion of polluter pay and does not in any way engender the notion of pollution prevention. That's the second issue.

The third issue that emerges is that under our constitutional arrangements provinces are insulated to some degree from the rather constraining influence of international trade rules when it comes to environmental regulation.

But by promoting CCME as an important new fora for achieving Canadian environmental goals it appears that protection that exists for the provinces now from the influence of trade regimes, will be significantly removed.

So let me try to expand on each of those three points and to explain how the two fit together-the harmonization agreement and the World Trade Organization roles-let me just give you a very brief overview of the World Trade Organization. It's by far the most important international trade regime of which Canada is a member.

Under the WTO environmental standards are dealt with in the chapter that is titled in an agreement Technical Barriers to Trade ## , which tells you a great deal about where the trade agenda is going.

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That agreement establishes an international regime of standard harmonization. Under that regime, Canada is obliged to adopt international standards where they exist. Where international standards don't exist, or where Canada might want to go further than international norms, there is a very arduous process of providing all other members of the WTO with notice of Canada's intention to regulate where no standards exist, of responding to their comments and criticisms of providing every other nation in the world with sufficient time to adjust its own productive processes to meet Canada's new standards-a very arduous regime. It also shifts the burden to Canada to prove that in the absence of international agreement that it hasn't established an environmental standard for the purposes of interfering with international trade.

So the influence of this is just to reduce all levels of environmental standard setting to the lowest common denominator. It interferes with the major dynamic of progressive law reform, which has for many years now been a "follow the leader" dynamic. We all know about the jurisdictions that go first. It might be Sweden when it comes to emissions from waste incinerators, it might be California when it comes to car emissions, it might be Ontario when it comes to blue box standards, it might be British Columbia when it comes to pulp mill effluence and then as environmentalists we try to persuade our own governments to follow suit.

If you want to interrupt that fundamental dynamic of progressive environmental regulation what you would ensure is that no one can go first, that we can only move forward when all of us agree that movement forward is necessary and only to the extent that we all agree that environmental standards are necessary. So the constraints that exist within the Canadian context as between

provinces that more or less committed to environmental initiatives are exacerbated when you look at this issue in an international context where the standard for moving forward becomes agreement among all of the hundred-odd nations that belong to the WTO.

The second issue that emerges here has to do with the-now, not only has Canada agree to submit its own environmental initiatives to this rigorous standard but it has also committed to bring the provinces along, to use all reasonable efforts to ensure compliance by provincial governments with these trade rules. So it's interesting to regard the harmonization agreement arriving on the scene in 1993 while the technical barriers to the trade agreement was being negotiated in the context of GATT negotiations as being kind an expression of Canada's international commitment to establish this regime domestically.

In other respects the two agreements don't fit together because when Canada talks about the precautionary principle or the polluter pays principle, those are principles that were explicitly rejected during ## negotiations. You won't find them written into the technical barriers to trade agreement. They're simply not there.

If governments don't live up to their obligations under these trade rules they're punished swiftly and certainly. The very first case to be resolved by the WTO involved a challenge to U.S. Clean Air Act ## regulations that had to do with the formulation of gasoline. The complaint was brought by some foreign refiners that didn't want to invest in the improvements to the refining processes that would have allowed them to bring themselves into compliance with U.S. rules. That trade complaint succeeded, as has every other trade complaint that has challenged environmental or resource conservation regulations and the conclusion of the panel, reaching its decision in less than 11 months-there was a panel decision, there was an appeal, all of that was resolved in an 11-month period-the conclusion of the panel was that the United States had two options available to it; get rid of these aspects of the Clean Air Act that offended international trade rules or pay damages to foreign refiners in the amount of U.S. $150 million a year.

The other trade case, which has brought to light the seriousness of the consequences that are visited upon you should you fail to live up to your obligations under international trade rules is taking place right now in Canada in the trade challenge brought by Ethyl Corporation to federal regulations banning the use of MMT in gasoline. That suit, brought under the investment state suit provisions of chapter 11 of NAFTA seeks, from the federal government, U.S. $210 million in damages in consequence of the federal regulations which Ethyl Corporation is an expropriation of its property to manufacture and sell this neuro-toxic ## fuel additive in this country.

$210 million U.S. in damages in consequence of the federal regulations with Esso Corporation claims is an expropriation of its property to manufacture and sell this neurotoxic fuel additive in this country. These are consequences that no government in the world can refuse to ignore.

So, when Canada commits to the principles of precaution and polluter pay and the harmonization agreement but it has undertaken to submit to trade rules that engender no such principles that would allow it to defend environmental initiatives on those grounds, the conclusion of which will give when a confrontation occurs is very apparent.

The last point that I'd like to make has to do with what all this means for the provincial level. The Canadian Council of Ministers on the Environment would, in our view, be regarded as an institution of the national level as far as growth, trade, organization and NAFTA rules are concerned.

That means that the constraints that I have described that arise under the technical barriers to trade agreement and other aspects of the WTO regime, including a chapter that deals with sanitary and phytosanitary standards, which include pesticides regulation, includes quality and safety regulation, those agreements apply very directly to national governments, but in Canada it does not apply in a direct way to the provincial level because of our constitutional arrangement.

Remember that Canada has undertaken to use all reasonable measures to enforce those rules on provincial governments. Consider then what the likely implications of investing in CCME this new authority will be when the CCME is taken out of institutions in Canada of a national level and for that reason directly subject to these international trade constraints.

So, to sum up, it's our view that the full assessment of the potential implications of Canada's international trade commitments on the implications of federal-provincial agreements on the environment must be undertaken. No one has looked at this issue. No one has completed the assessment which I describe in only a very superficial way for the committee today.

In the absence of that assessment and in light of the apparent and serious points of contradiction and discourse, it would not in our view be prudent for either level of government to include an agreement that might have serious and unforeseen consequences for the prospects of progressive environmental law reform.

Equally problematic is the likelihood that by entering into this accord, provincial governments are agreeing to submit to the constraints of the technical barriers to trade agreement and other agreements under the World Trade Organization. Thank you.

The Chairman: Thank you, Mr. Shrybmen. We have heard the witnesses.

********** Mr. Stephen Shrybmen: Can I just make a brief comment as well?

I think it's just very important to note that we live in a time when governments have lost their enthusiasm for regulatory initiative on the environmental front, when they have lost their enthusiasm for increasing their enforcement resources at both levels. We're in retreat indeed in most jurisdictions in Canada. The enforcement capacities of most governments and staff responsible for enforcement have been diminished. It's just very curious that at that moment when everybody seems to be retreating from the environmental agenda there's a great interest in avoiding duplication and overlap of effort. It just begs credulity. I think, quite to the contrary, this agreement, as our international trade agreements-efforts to lock in this kind of lower common denominator status quo so should a future government ever revive its interest in an environmental agenda it's going to confront a new obstacle, a new impediment.