Presentation for RMLA Conference
Workshop on Equity Conflicts in Environment and Trade

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In this presentation I will look at the effects on environment and equity of

- international trade and investment agreements
- existing and developing investment agreements
- international trade and investment itself

There are big issues here – ones which stir enormous controversy around the world. My coverage will have to be brief, skeletal, and provocative in the hope that we have time for a discussion that will draw out more detail.

Existing international trade and investment agreements

There is a rapidly growing network of international agreements constraining any governmental action that even indirectly affects trade or investment. Principles common to many of the trade agreements restrict the ability of governments to improve environmental and health standards. I will focus on the World Trade Organisation (WTO) and agreements between New Zealand and Australia under the umbrella of CER.

There is widespread concern internationally about the effect WTO agreements will have on the environment. For example, a ban on the use of native timber for anything but furniture made by local manufacturers could be ruled discriminatory or a restraint on trade. Similar measures taken by Canada with regard to fishing, have been challenged under similar rules[1].

More fundamentally, our producers will be competing with products produced using more environmentally destructive methods. To compete, we must lower our environmental standards[2] – sometimes called "environmental dumping" in that it enables countries with less regard than us for the environment to produce goods below the cost that would be required if environmental considerations were recognised. They can then "dump" those cheaper goods on our markets, putting local manufacturers out of business.

The WTO agreements aim to "harmonise" health standards. Harmonisation means that all countries are expected to use the same standards unless they can demonstrate objective scientific reasons for having a more stringent standard[3]. Though superficially reasonable, it is impracticable in many cases because the sensitivity of humans,

[1] See for example, "The new protectionism - protecting the future against free trade", Tim Lang and Colin Hines, Earthscan, 1993, p.63. The Canadian case was also challenged under the Free Trade Agreement with the U.S. (now NAFTA): see "Legal Opinion on National Reservations to the MAI", by Barry Appleton, LL.B, LL.M, http://www.appletonlaw.com/MAI/reservations.html.

[2] For example, "The new protectionism - protecting the future against free trade", Tim Lang and Colin Hines, Earthscan, 1993, p. 61 ff.

[3] For example, paragraph 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures states: "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 22."

plants or animals to toxins or environmental effects is unknown, or the method of spread of a disease has yet to be identified.

An example was "Mad Cow Disease" or BSE (Bovine Spongiform Encephalopathy). When it broke out in the U.K. in 1994, it was not agreed amongst scientists whether cattle embryos and semen could spread the disease. Obeying the WTO rules, saying that the risk was minimal, the Ministry of Agriculture and Fisheries allowed the import of embryos and semen. Some farmers and scientists objected strongly, saying unnecessary risks were being taken[4].

The health standards recognised by the WTO are set by international bodies, the most prominent being the Codex Alimentarius Commission[5]. Codex allows food to contain concentrations of the pesticide DDT that are up to 50 times higher than permitted under U.S. law. It allows residues of Parathion, Paraquat and five cancer-causing pesticides unacceptable in the U.S. Consumer groups give evidence of excessive influence by commercially interested transnational corporations on the Commission as the reason.[6]

Effectively what the trade rules do is set *maximum* standards, rather than *minimum*, scarcely a policy that puts people and the environment first. It conflicts with the *precautionary principle*: that in the absence of sufficient scientific knowledge, the benefit of the doubt should be given to the course of action that has least risk of serious damage to health, safety and the environment.

A current heated dispute between the U.S. and the European Union has similar underlying issues. The Europeans refused to accept beef from cattle that had been treated with the genetically engineered bovine growth hormone, rBST, the major producer of which is Monsanto. That brings us to the genetic engineering debate, which has a number of facets in this context[7].

The first I have just discussed: in many cases the safety of genetically modified food has not been determined, and may not be for many years.

Secondly there is the issue of labelling which has come up against another principle embedded both in many WTO rules, and in New Zealand's Food Act (as amended in 1996). These make any action taken to meet protect public health subject to being "not more trade restrictive than required to achieve their appropriate level of protection, taking into account technical and economic feasibility" (in the words of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures)[8]; or in

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[4] "Mad Cow programme 'unbalanced' say MAF, but farmers stand firm", *Press*, 8 September 1994. Frontline, TV1, 3 September 1994.

[5] Agreement on the Application of Sanitary and Phytosanitary Measures: preamble, paragraphs 9-13, etc.

[6] "Food Fight: How GATT Undermines Food Safety Regulations", by Eric Christensen, *Multinational Monitor*, Volume 11, Number 11, November 1990; "Diet for a Corporate Planet: Industry sets world food standards", *Multinational Monitor*, July/August 1993, pp12-15. See also for example, "Good and bad news from the number-crunchers", *NZ Herald*, 16 December 1993, section 1, p 9.

[7] Many of the following issues are alluded to, but not fully addressed, in the Ministry of Health and Australia New Zealand Food Authority's discussion document on labelling of genetically modified food, "Labelling Food Produced Using Gene Technology", 10/5/99.

[8] For example, Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 21.

the words of the amended Food Act[9], preconditions for food standards include "the desirability of avoiding unnecessary restrictions on trade", "the desirability of maintaining consistency between New Zealand's food standards and those applying internationally", and "New Zealand's obligations under any relevant international treaty, agreement, convention, or protocol, and, in particular, under the Australia-New Zealand Joint Food Standards Agreement". Trade considerations constrain safety, rather than the other way around. A country outside Australasia could take action under the WTO if it considered that a labelling requirement was effectively a trade restriction or "a disguised restriction on international trade"[10]. That could be a labelling requirement that had the effect of putting its companies at a disadvantage in the Australasian markets.

An illustration comes from the U.S.A. Regulations were made under their Clean Air Act for reducing compounds in gasoline (petrol) that contribute significantly to air pollution. Oil refineries required to file with the U.S. Environmental Protection Agency, could use their 1990 actual performance data as the baseline. Those were naturally mostly U.S. refineries. Other refineries had an absolute baseline because the accuracy of their 1990 baseline data could not be assured, and compliance could not be monitored. These were mostly foreign suppliers. Venezuela took a case to the WTO on the basis that the rule was discriminatory and that its exporters were disadvantaged. The WTO disputes panel rejected the U.S. view that the different treatments were necessary to achieve the environmental goals of the Clean Air Act. The U.S. was forced to change its rules to allow foreign refiners of conventional gasoline to select the least stringent baseline option. That will lead to a deterioration in air quality[11].

Thirdly, the issue of genetic engineering raises the issue of process versus product. That is an important issue in the consideration of labelling standards. Existing regulations require labelling when genetically modified food is "not substantially equivalent in any characteristic or property" to its unmodified counterpart. However, the current debate also covers genetically modified material that may be nutritionally or compositionally identical, and have identical allergenic properties, to the unmodified equivalent. The issue for many people is the way such foods were produced, the risks involved in their production, and the ethics of genetic modification, as well as the end product.

There have been two WTO rulings that would undermine such considerations. In one, a U.S. ban on shrimp imports from nations whose fishing fleets do not use devices to keep endangered seas turtles out of the nets was ruled illegal; in the other, changes were forced to its Marine Mammal Protection Act, which banned imports of tuna unless it was caught in nets that excluded dolphins[12]. A basis of both rulings was that discrimination could not be made between products on the basis of how they were produced: trade could not be restricted based on the way the product was made or harvested. This has profound implications, not only in the area of the environment and

[9] Sections 11E (b), (c) and (d).
[10] Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 7.
[11] See for example the Sierra Club's web site, http://www.sierraclub.org/trade/Promises1.htm, or "1996 developments in customs and trade law", http://www.brc-dc.com/ABA.htm.
[12] See for example, Sierra Club, op cit; www.noaa.gov/noaa-ola/tb1.html; and "U.S. Laws diluted by Trade Pacts Rulings stir criticism across political spectrum", *San Francisco Chronicle*, 24/7/99.

health. The U.S. is arguing that a country's right to mandate labelling of products on the basis of production method is similarly limited[13].

There is considerably more that could be said about the WTO and the Australia New Zealand Food Authority, and I will mention some further issues shortly, but perhaps other matters will come up in the discussion.

Existing and developing investment agreements

What I would like to pass on to now is the effect of international investment agreements. There are two primary examples – the Multilateral Agreement on Investment (MAI) and the North American Free Trade Agreement (NAFTA) – but the WTO is likely to consider including similar provisions to these in the negotiating round that is due to start next month in Seattle. APEC also has so-called "non-binding investment principles", which read like a prototype MAI. Although it is probably dead, the MAI is still important because it is likely to arise from the ashes in other forms at the WTO and in bilateral and plurilateral agreements such as those the government is currently negotiating with Singapore, the U.S.A. and others.

The MAI was negotiated by the OECD (Organisation for Economic Co-operation and Development) over several years, ending unsuccessfully in 1998 after widespread public opposition from individuals, non-governmental organisations, local governments and some national governments when its nature became known and understood. It was intended to be a binding agreement that would eventually remove all restrictions on foreign investment and the international activities of transnational corporations which dominate the world economy, including two-thirds of world trade. The OECD is an organisation of 29 developed nations, and the source of the great majority of foreign investment. The MAI was being negotiated within the OECD because developing nations resisted the negotiation of a similar agreement under the World Trade Organisation.

Countries that signed the MAI would have agreed to the following:

1. To open up all of their economy to foreign investors. The definition of investment was very broad. It included investments you would expect such as enterprises, and stocks and shares, but also rights under contracts, intellectual property rights (including cultural property) and concessions, rights and permits (such as those conferred by local government).
2. To treat foreign corporations at least as favourably as local companies.
3. To treat corporations from all countries equally.
4. To let foreign investors enforce new rights in special international courts. Foreign corporations would be able to take a government to binding international arbitration. A government would have no such right against corporations.

Unusually for such agreements, "subnational" governments (such as states in the U.S.A. and local government here) would have been included in its jurisdiction.

Though countries could list reservations setting out areas where their policies did not conform with the MAI, those reservations were expected to be rolled back over time,

[13] "A citizen's guide to the World Trade Organisation", Working Group on the WTO/MAI, July 1999, p.12. http://www.citizen.org/pctrade/gattwto/wto-book.pdf

so affording only short term protection, and could not be added to after signing ("standstill").

One of the MAI's most important provisions with regard to resource management, the environment and local government was that concerned with "expropriation". The MAI text said "A contracting party shall not expropriate or nationalize *directly or indirectly* an investment … or take any measure or measures *having equivalent effect* … except for a purpose which is in the public interest … accompanied by payment of prompt, adequate and effective compensation" [my emphases]. Problems arise from the inclusion of indirect expropriation, or measures having "equivalent effect" under the definition. That would include environmental and social regulations that restrict the use of property. A change to environmental regulations could be considered indirect expropriation and the New Zealand government could be taken to an international tribunal by a foreign corporation or another government, and be forced to pay compensation.

In an example under very similar provisions in the NAFTA agreement, the Ethyl Corporation of the U.S.A. took a US$250 million suit against the Canadian government, claiming expropriation, because Canada banned import and trade between provinces of a gasoline additive, MMT, that the Canadians say is environmentally harmful, being a nerve toxin. Ethyl has a factory in Ontario that makes the chemical. It claimed "expropriation" because of loss of future profits. In 1998 it obtained a US$13million settlement, and the Canadian government was forced to reverse the ban. A number of similar actions under NAFTA are in process[14].

Investments covered by the MAI include "rights conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits". Hence possession of a right such as a building consent, to dump rubbish, pollute waterways or provide a bus service is regarded as an investment. If a Council decided to change any regulations affecting the value of those rights – stricter environmental or health and safety standards, for example – it would be liable to challenge by foreign investors both as to whether it was in the public interest, and for compensation for loss of profit or loss of the "asset". Similarly, loss of value in a property through changes to a City Plan or through a building being declared historic could lead to legal challenges if owned by a foreign investor. An overseas owned contractor – for rubbish collections for example – could take action if it considered the value of that contract was reduced by Council actions – perhaps by banning certain types of rubbish at a landfill – that made it less profitable. Foreign owned manufacturers of coal-fired heaters could demand compensation for loss of profits due to the proposed tightening of the restrictions on the burning of coal in Christchurch to improve community health.

The bigger picture:
The effects of international trade and investment

There is a huge amount of detail here, and it is easy to lose sight of the bigger picture of the effects of international trade and investment on equity and the environment.

[14] See for example, "Liberalized Investment and Investor-State Suits: Threats to Governmental Powers", Brief No. 372, by Michelle Swenarchuk, Counsel, Director International Programmes, Canadian Environmental Law Association, 20/4/99.

While trade has many benefits, free trade does nothing to improve equity internationally. On the contrary, it probably exacerbates existing inequities. In 1960, the richest fifth of the world's population had 30 times as much wealth as the poorest fifth, but by 1995, over a period of rapidly increasing international trade and investment, the top fifth had 82 times the bottom fifth. The 200 richest people in the world more than doubled their net worth between 1994 and 1998, but in nearly half the world's countries, per capita incomes are lower now than they were ten or twenty years ago. The three richest officers of Microsoft have more assets than the combined GNP of the 43 least-developed countries and their 600 million people[15]. Inequality within countries is similarly growing, with real incomes stagnant or falling for all but the top 5-10% of the population[16].

When we see the apparent hypocrisy with which countries enter trade negotiations – "everyone should open their markets except me" – it reflects a real dilemma. Countries must trade to thrive, but fully open markets mean the death of nascent or essential industries that will provide jobs and provide growing living standards through rising productivity. If you want to see a model for this, you need just look at the fully open market that exists within any country. In New Zealand we see the growing inequalities between, for example, Auckland and the West Coast. Only intervention in the form of taxation and the national provision of social services and welfare prevents that becoming desperate. On the international scale, these are quite literally life and death issues.

But what makes these issues intractable is not that they cannot be solved: there is certainly enough food in the world to feed everyone, and we know how to vastly improve people's health by preventative measures very cheaply. The problem is that power relationships are involved. When we talk about an objective of "free trade" (supposing for a minute that were desirable) we should be clear that if we are thinking of trade on an open market between two equal and willing parties, much trade is not, and is not intended to be, "free": it is highly regulated by corporations (rather than by states). Transnationals are at least one of the parties in two-thirds of world trade, and half of that is in fact trade within a single corporation.

The gains economists calculate from freeing trade are miniscule: the New Zealand government expected an annual increase in GDP due to the Uruguay Round settlement of 0.2-0.3%[17], and even that was probably not realised because of games played by other countries in the round. If all the promises made under APEC were carried out (and that is unlikely), the gain is projected to be 0.4%[18]. These values are probably in reality so small as to be unmeasurable, lying well within the errors of measurement of GDP. So who provides the enormous momentum behind the negotiations to open up trade and investment? Even former leaders of the WTO and OECD are now worrying that it is coming from those transnationals rather than government. At a seminar in New York in July, several leaders raised this issue. Arthur Dunkel, the WTO head

[15] From various United Nations Human Development Reports.
[16] For New Zealand, see for example, *New Zealand Now: Incomes*, Statistics New Zealand, 1999.
[17] "Trading Ahead: the GATT Urguay Round: results for New Zealand", Ministry of Foreign Affairs and Trade, April 1994, p.18.
[18] "Big Income Gains in Store if APEC Goals Achieved", media release by Dr Mitsuru Taniuchi, Chair, APEC Economic Committee, 8/9/99.

during the Uruguay Round asked "who is driving the process in trade policy – governments or the business community?"[19] For it is corporations that most urgently need international trade and investment so they can continue to grow, and most directly benefit from it.

Let me give some examples that are relevant to our subject of trade, equity and the environment.

An open trade and investment regime leads to specialisation in a number of ways.

The theory of economic benefits from trade rests on increasing specialisation in each country. Industries in which the country has an advantage thrive; other enterprises are put out of business by imports. This has social and environmental effects. The types of industries which survive determine whether there are enough jobs, and whether those are skilled, high paying ones, or menial and low-paid.

In New Zealand we see dairying thriving and some other forms of farming faltering. The increased intensity of dairying is leading to significant pollution and water quality problems[20]. All farming activities have some such problems, but they are more diverse and hence manageable. Similar intensification of production gives rise to concern at the accelerated demise of tropical rain forests. We are seeing the problems of heading towards a monoculture. That also brings dangers in terms of both environmental and economic risk – putting greater proportions of our eggs in one basket.

In Third World countries, that specialisation can have hugely disruptive effects[21]. Mexico joined NAFTA in 1994. Between 1994 and 1996 the proportion of its food that it imported rose from 20% to 43%; at the same time food intake dropped by 29%, 2.2 million Mexicans lost jobs and one out of every two peasants is not getting enough to eat.

Kenya was self sufficient in food in the 1980's. Now 80% of Kenya's exports are agricultural yet it imports 80% of its food. Local supply is undermined by imports of subsidised European Union grain, leading to poverty in the countryside because farmers cannot selling their grain.

In the Philippines, the acreage under rice declined between 1986 and 1991, while the area under "cut flowers" rose. Three hundred and fifty thousand rural livelihoods were destroyed by shifting from corn, rice and sugarcane to cut flowers and vegetables for export.

Those export crops are frequently farmed by agribusiness transnationals, either directly or by contracting peasant farmers. That often demands massive displacement of farming families from their land. They lose access to food and shelter, leading frequently to poverty and unemployment in the urban centres to which they are forced to

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[19] "WTO hijacked by big corporations, South countries the victims", by Martin Khor, *Third World Resurgence*, No. 108/109, August/September 1999, p.46-48.
[20] For example, "Danger to land from dairying", by Guy Salmon, *Press*, 14/8/99, p.10; "Warning in West Coast water study", by Peter Christian, *Press*, 6/9/99, p.7.
[21] The following comes largely from "Globalisation of agriculture and rising food insecurity", *Third World Network*, http://www.southbound.com.my/souths/twn/title/food-cn.htm.

migrate. Where food is grown under contract, profits frequently go to the transnationals rather than the farmer.

With these arrangements, and the need to compete internationally, may also come a requirement to use commercial seed stock rather than local traditional varieties. This further reduces genetic diversity, and makes farmers even more reliant on transnationals and the cash economy. Added to this are intellectual property laws, forced under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which undermine the traditional "Farmers' Right" to retain seeds for the next year's planting, and genetic engineering which creates infertile "terminator" seeds. We begin to see why intellectual property and genetic engineering are crucial issues in the Third World.

Insult is added to injury when transnationals patent plant varieties using knowledge developed over the centuries by Third World farming communities. Examples include the Neem tree, greatly valued as a pesticide and for medicinal properties, and Basmati rice, one of the most valued rice varieties. While farmers may be able to continue to use traditional varieties, the effect is that world rights to the name and the proceeds has been stolen from them without compensation. Maori have similar concerns. Transnationals are said to be "mining" biodiversity, and the knowledge of those communities. Then they may sell seeds of the patented varieties to the same farmers, having taken away their rights to save seeds for next season's planting. In the Third World, biodiversity is much more than an ecologist's theoretical concept[22].

This concept of mining the Third World of its wealth fits well with the economist's view of how specialisation should work for maximum efficiency. I will end with a quote from the current U.S. Secretary of the Treasury, Lawrence Summers, written when he was Chief Economist of the World Bank. It describes candidly how some in power in the developed countries think about trade, equity and the environment, and how many in Third World see the developed nations and their transnational corporations treating them:

> ".. shouldn't the World Bank be encouraging MORE migration of the dirty industries to the LDCs [Less Developed Countries]? …
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> The measurements of the costs of health impairing pollution depends on the foregone earnings from increased morbidity and mortality. From this point of view a given amount of health impairing pollution should be done in the country with the lowest cost, which will be the country with the lowest wages. I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that…
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> I've always thought that under-populated countries in Africa are vastly UNDER-polluted, their air quality is probably vastly ineffi-

[22] See for example "The TRIPS Agreement of the WTO and the Convention on Biological Diversity: The need for coordinated action by the South", by Dr Tewolde Egziabher, General Manager of the Environmental Protection Authority in Ethiopia and the Chairperson of the African group of delegates at the Biosafety Protocol negotiations, Third World Network, http://www.twnside.org.sg/souths/twn/title/berhan-cn.htm

ciently low compared to Los Angeles or Mexico City. Only the lamentable facts that so much pollution is generated by non-tradable industries (transport, electrical generation) and that the unit transport costs of solid waste are so high prevent world welfare enhancing trade in air pollution and waste."[23]

[23] From memo by Lawrence Summers, 12 December 1991, then Chief Economist of the World Bank, now U.S. Treasury Secretary.