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The Politicization of the Trade-Environment Nexus in Canada

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The relationship between international trade and the environment is a complex one. While environmental policies can affect trade and trade policies, so too can trade flows, trade policies and trade agreements have impacts on the environment and environmental policies. It is not surprising, then, that the relationship has become politicized in a variety of ways. Because this politicization has major implications for both environmental policy and trade policy, a deeper understanding of the dynamics of this politicization process is an important step in the effort to reduce obstacles to both environmental protection efforts and a healthier global economy.

The trade-environment relationship has been politicized in Canada perhaps longer than in any other part of North America or Europe. Canada's experience with this politicization can provide insights that may be helpful in better understanding the current politicization of transatlantic trade and in developing effective responses to it. The analysis presented here examines the ways in which the relationship between trade and environment has been politicized in Canada and how this politicization has affected the country's trade and environmental policies. Drawing on this analysis, a series of policy options are suggested that could avoid some of the conflicts that have arisen between these two policy areas.

The Politicization of Trade Agreements

The politicization of the trade-environment relationship began in Canada in the 1980s, during negotiations for a Canada-U.S. free trade agreement (Shrybman 1991). Initially, the politicization took the form of civil society organizations (CSOs) contesting international trade agreements on the grounds that certain provisions within those agreements would restrict the ability of governments to protect the environment. The provision that was the most strongly contested over the longest period of time was the Investor-State Dispute Settlement (ISDS) mechanism included in Chapter 11 of NAFTA. This mechanism allowed investors in one NAFTA country to submit to arbitration a claim against the government of another NAFTA country for actions that diminished the profits the investors expected to gain from the investment. By 2021, some twenty-five claims had been filed for environmental measures taken by the governments of NAFTA countries, fourteen of which were against Canada (Sinclair 2021). These cases resulted in some measures being reversed and tens of millions of dollars paid out to corporate investors as compensation.

Canada's experience with the ISDS process became a major point of contention for CSOs over the years and contributed to their ability to build opposition not only to this provision of NAFTA but to trade liberalization in general. Canadian NGOs shared information about these Chapter 11 cases

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with CSOs in other countries in campaigns against negotiations for a Multilateral Agreement on Investment (MAI) and a Free Trade Area of the Americas (FTAA), neither of which were successfully completed. The Canadian CSOs that were active in these campaigns later also joined with European CSOs that opposed the inclusion of ISDS provisions in the Comprehensive Economic and Trade Agreement (CETA), which have not yet been ratified by all EU governments. These ISDS cases became so contentious in North America that they were eliminated altogether for investment between Canada and the U.S. in the USMCA agreement that replaced NAFTA.

Table 1: Sample of claims filed against Canada under Chapter 11 of NAFTA involving environmental protection.

Claimant, year filed:	Target of Arbitration Claim:
Ethyl Corporation, 1997	Ban on the import and inter-provincial trade in gasoline additive MMT, a suspected neurotoxin.
S.D. Myers Inc., 1998	Ban on the export of PCB wastes in accordance with Basel Convention.
Clayton/Bilcon, 2008	Cancellation of quarry/marine terminal project following environmental assessment.
Dow AgroSciences LLC, 2008	Ban on the use of certain pesticides.
St. Mary's VCNA LLC, 2011	Refusal to approve quarry project that could affect groundwater.
Windstream Energy LLC, 2013	Moratorium on a windfarm project.
Lone Pine Resources Inc., 2013	Cancellation of oil and gas exploration licenses.
Westmoreland Mining Holdings LLC, 2019	Coal-fired electricity plant phase-out.

Source: Global Affairs Canada.

One of the major concerns civil society groups have expressed about ISDS provisions is that they may not only result in governments deciding to reverse existing environmental protection measures, but that they will make those governments reluctant to introduce new ones because of the potential that an arbitral panel will interpret these measures as constituting violations of their treaty obligations. Indeed, the potential for such a chilling effect on environmental regulation was even cited by a Canadian member of one of the arbitral panels in a NAFTA ISDS case and by a federal court judge reviewing the case (Sinclair 2021). In addition to their concerns over this form of "regulatory chill", civil society groups also warned that the intensified competition unleashed by trade liberalization would make governments reluctant to strengthen their environmental policies for fear of making their export industries less cost competitive and less attractive to investors. Concerns about this second form of regulatory chill were ultimately validated in the case of Canada's climate change policies.

The Politicization of Environmental Policy

Although politicization is often associated with the activities of civil society groups, other political actors, including governments, can also contribute to the politicization of issues. The history of carbon pricing policy in Canada provides an excellent example of this form of politicization. Proposals for putting a price on carbon emissions had been considered within successive Canadian governments since the early 1990s, but it was not until 2016 that a nation-wide carbon pricing system was adopted.

A number of influential political actors contested carbon pricing proposals on the grounds that such a policy would harm the competitiveness of the country's energy-intensive and trade-exposed (EITE) industries and result in carbon leakage, in which these industries would move to other jurisdictions that have not adopted carbon pricing, allowing carbon to continue to be emitted elsewhere. These opponents of carbon pricing promoted a 'trade-off' frame of the trade-environment relationship in which more stringent climate policy was depicted as incompatible with Canada's economic interests (Blair 2017). In this case, the politicization was not due to concerns about the impact of trade policy on the environment, but on the impact of environmental policy on trade and investment.

This trade-off frame was challenged by a number of other political actors who saw positive synergies between climate policy and international competitiveness, arguing that carbon pricing policies were not only compatible with competitiveness, but necessary to preserve it. At first, the number of adherents to this 'synergy frame' was somewhat limited, but over time the numbers grew to include former opponents of carbon pricing, such as the governments of some fossil fuel producing provinces and even major oil and gas companies, including those operating in Canada's oil sands.

Interestingly, trade and investment considerations were key contributors to this shift in support for carbon pricing. Canadian oil companies were increasingly concerned about their ability to gain access to both capital and markets. Growing public demand in Canada and worldwide for action on climate change was having an impact on investors, who wanted assurances that companies seeking their investment were prepared to adapt to the more demanding regulatory regimes that they saw as inevitable (Belfry Munroe 2016). Demands from institutional investors for greater carbon disclosure encouraged many large oil companies to build various carbon price scenarios into their corporate planning in order to demonstrate their preparedness for such an eventuality (Sustainable Prosperity 2013). With those plans in place, oil companies began advocating for the adoption of carbon pricing in Canada. Proposals for new fuel standards in the EU and California to tax or restrict the sale of fuels produced from high-carbon sources such as oil sands crude, and opposition to the Keystone pipeline in the United States, led some provincial premiers and oil companies to argue that more stringent climate policies were needed to protect foreign market access for Canadian oil exports.

Consequences of the Politicization of the Trade and Environmental Policies

These cases illustrate some of the inter-related ways in which politicization can be an obstacle to both trade policy and environmental policy. On the one hand, certain provisions within trade and investment agreements, such as ISDS, fueled opposition to further liberalization because of concerns about their impact on environmental protection efforts. This opposition appears to have contributed to the failure of certain trade and investment negotiations (MAI and FTAA) and to the blocking of the ratification of other agreements (CETA). One consequence of such obstacles to trade liberalization in future may be the loss of opportunities to increase the global diffusion of environmental goods, technologies and services that could help mitigate environmental problems like climate change. On the other hand, the continued politicization of environmental policies on competitiveness grounds will result in further costly delays in strengthening climate policies, which in turn may jeopardize the ability of exporters to access foreign markets and to attract foreign investment.

Reconciling Trade Policy and Environmental Policy

In light of their potential for such mutually harmful outcomes, how might these different forms of politicization be addressed? The cases presented here provide some lessons for reconciling trade liberalization and environmental protection.

One option is to remove or relax some of the provisions of trade agreements that have been the focus of intense, widespread and enduring contestation. The partial elimination of the ISDS provisions in the USMCA demonstrates that this can be done, and in doing so has effectively removed one of the main objections to NAFTA from many members of the environmental policy community. Short of eliminating ISDS altogether, trade agreements could be designed to exempt from trade disciplines those measures taken by governments to protect either their national or global environment. Such right to regulate provisions are already included in numerous international investment agreements, including in the preamble to the CETA (UNCTAD 2019).

Secondly, public information campaigns can be a useful instrument for countering deceptive or inaccurate messaging about the competitiveness effects of environmental policies. For example, in cases where competitiveness concerns are exaggerated or used indiscriminately to oppose the strengthening of climate policy, efforts should be made to present evidence clarifying the actual extent of any alleged competitiveness effects. At the same time, more effective communication about the ways in which more ambitious climate policies improve the ability of certain industries to compete for foreign markets and investment (and conversely, how the failure to adopt such policies will harm competitiveness) can help to counter the influence of a trade-off discourse.

Thirdly, significant progress in strengthening environmental policies could have the effect of overshadowing the impacts that trade policies and agreements may be having on environmental protection and relieve some of opposition to international trade liberalization.

Finally, as environmental standards are strengthened in some countries more cases will likely arise in which companies are demonstrably being harmed by the competitors in other countries that benefit from the much lower costs of production resulting from inadequate environmental policies.

This will be a particularly pressing problem in the case of climate change policy. Negotiating multilateral agreements that reduce disparities in levels of climate policy ambition would be a preferred approach to dealing with such situations, but if such agreements cannot be reached governments may have to consider turning to trade measures to reduce the cost advantage these competitors enjoy. Given the gravity of the climate crisis, a departure from the norm of trade liberalization for carbon intensive products seems justified. The EU has already drafted proposals for a Carbon Border Adjustment Mechanism (CBAM) that would impose a carbon tax on imports of goods in major EITE sectors, and there is growing support for some form of border carbon adjustment as well in the United States (Droege & Fischer 2020). As was mentioned earlier, the mere prospect that these large markets might adopt such measures helped reduce opposition to carbon pricing in Canada and their adoption by major economies could have a similar effect in other countries as well. Such an outcome would alleviate much of the politicization of climate policies that has been an important obstacle to effective action to mitigate climate change.

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