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ENVIRONMENTAL PROVISIONS IN TRADE AGREEMENTS

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Abstract: Trade and environmental issues are interrelated, have become part of the negotiating process for free trade agreements, and are included in a substantial number of such agreements since being included in the North American Free Trade Agreement (NATA) and the Marakesh Agreement from Uruguay Round of GATT negotiations. Although the NAFTA agreement contained extensive environmental provisions and institutional mechanisms for their implementation in its environmental side agreement, most of those signed since that time are more modest. Typically they contain provisions for environmental cooperation, pledges to enforce environmental laws and to not to weaken their enforce so as to become environmental havens, and when developing countries are included pledges for technical and/or other assistance. While environmental issues are included in the ongoing Doha Round of the WTO negotiations, most international environmental efforts continue to be handled through a relatively large number of Multilateral Environmental Agreements.

Keywords: Environment, Free Trade Agreements, NAFTA, Doha Round, WTO

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Introduction

Trade and environmental interactions are varied, complex and important (UNEP and IISD 2000). Trade liberalization, as other presentations at this meeting have indicated, does not necessarily either improve or harm the environment, but can have both types of effects. Historically, trade and the environment were treated as separate issues, trade through the General Agreement on Trade and Tariffs (GATT) together with several regional and bilateral trade agreements and the environment through a set of Multilateral Environmental Agreements (MEAs)—as well as by domestic policies. Some analysts still believe that is the system that should prevail (Bhagwati 2000, 2002), while others think that the interrelated nature of the two issues indicates that they cannot be separated (Esty 1994; Repetto 2002); some promote free trade while also supporting the inclusion of environmental issues in trade agreements (Gray, Krisoff and Tsigas 1996). However, largely as a result of the tuna/dolphin dispute ruling, which aroused and invigorated environmentalists, environmental issues have become part of the trade negotiating process and many trade agreements include important environmental provisions. Nonetheless, MEAs remain the primary way that international environmental issues are addressed and some MEAs include trade provisions, generally referred to as specific trade obligations or STOs (ICTSD 2003b).

The Tuna/Dolphin Ruling: a Triggering Event

The United States, at the urging of environmentalists, had adopted the Marine Mammal Protection Act that prohibited the importation of tuna that had been caught in ways that killed dolphins, which often accompany and feed on schools of the fish (NOAA 2002). Mexico brought this to the trade dispute process of the GATT, claiming it was an illegal trade constraint under GATT (Esty 1994; Eglin 1999). The GATT appeals process ruled in favor of Mexico which produced an immediate and very unfavorable reaction from environmentalists in the U.S. who felt the ruling unfairly removed an important protection for an endangered species.¹ This invigorated and energized environmental groups, who were already wary of trade agreements. The responses by the groups, individuals and others had a profound influence on both the trade and environmental communities and their approaches to trade, trade agreements and the environment (Eglin 1999). Among the procedures affected was the North American Free Trade Area agreement (NAFTA), the Uruguay Round of GATT negotiations, and its final agreement; it was a factor in the organization of opposition to and scuttling of the World Trade Organization's (WTO) Seattle meeting which was to launch the next round of trade liberalization talks. The forces unleashed have continued to be a

¹ Although Mexico won the dispute, it did not attempt to enforce the ruling and the U.S. negotiated with tuna fishing nations to protect the dolphins. As a consequence the estimated number killed declined from over 139,000 in 1988 to around 2,000 in 1998 (NOAA 2002).

factor.

While the tuna/dolphin ruling was unfavorable for trade restrictions based on environmental protection, a subsequent case—the shrimp/sea turtle dispute—reversed that ruling, at least to a limited extent (Sampson 2000, Hudson et al. 2003). This case was brought by a group of East Asian nations against the U.S. as a result of a ban on the imports of shrimp caught under techniques that result in harm to sea turtles. Although the dispute panel ruled in favor of the complainants, the appeals panel largely reversed the ruling while calling on the U.S. to enter good faith negotiations to resolve remaining issues—the U.S. was held to have applied the regulations in a discriminatory way but the ruling seemed to allow the ban if applied equitably (Sampson 2000). The U.S. claimed victory as a result of the appeal panels ruling (USTR 2001b).

Environmental Provisions in Trade Agreements

Prior to the NAFTA agreement and the Uruguay Round GATT agreement environmental issues had not been an important factor in trade negotiations, although it had been discussed in the context of Technical Barriers to Trade (TBT) during the Tokyo Round (WTO 2002). However, environmental provisions were included in both the NAFTA and Uruguay round agreements, have been factors in many subsequent negotiations, and are included in several more recent trade agreements. However, the inclusion of such provisions remains controversial and is often resisted, especially by many developing countries.

Pros and Cons

The incorporation of environmental provisions in trade agreements is controversial. Some argue that the two issues should not be mixed, while others think the issues are inseparable. The arguments for including the two issues in trade agreements include:

- Trade and the environment are interrelated with each affecting the other and, therefore, it is unrealistic to treat them separately.
- The interrelations will lead inevitably to conflicts and the dispute settlement process under GATT/WTO provisions will automatically assure that free trade will triumph and that, consequently, the environment will suffer, as in the tuna-dolphin case.
- Many MEAs tend to be weak and unenforceable, especially since many nations do not ratify them and tend to ignore their provisions; see Speth (2004) for an analysis of the weaknesses in using multilateral environmental agreements.

Arguments against including environmental provisions in trade agreements include:

- Environmental regulations inhibit or prohibit trade and tend to be non-tariff barriers, which are not justified.
- Trade promotes economic development and raises incomes which are essential for implementing programs to improve the environment; this is based on the idea of an inverted Kuznets curve (Runge 1998; Grossman and Krueger 1995).

- MEAs tend to be effective means for improving the environment;² and
- There have never been conflicts between the MEA environmental measures and GATT/WTO provisions (the conflicts have arisen due to domestic policies that conflict with GATT).

Some free trade proponents, however, support including environmental issues in trade agreements (Gray, Krissoff and Tsigas 1996). This position is taken, in part, because its proponents believe that it may be easier to get agreement on trade barriers than for separate environmental agreements.³ Thus, including environmental issues in the trade agreement is a way to get broader acceptance and approval of the environmental provisions; trade agreements also have enforcement mechanisms which generally are missing from the MEAs.

Early GATT Activities

During preparations for the 1972 Stockholm Conference on the Human Environment, the GATT Secretariat was asked to make a contribution (WTO 2002). Thus, in 1971 the Secretariat prepared a study entitled “Industrial Pollution Control and International Trade.” The GATT Director-General (Oliver Long) subsequently presented it to the membership and encouraged them to examine the implications of environmental policies for international trade. The members concluded that the implications needed to be analyzed more completely and that a mechanism should be created for the purpose. Consequently, in November 1971 the GATT Council of Representatives agreed to set up the GATT Group on Environmental Measures and International Trade (EMIT) with participation open to all members. However, the group had never met until the European Free Trade Association requested a meeting to help prepare for the upcoming 1992 UN Conference on Environment and Development. According to the World Trade Organization (WTO), factors that led to this request included the TBT discussions during the Uruguay Round negotiations, developing country concerns about exports to them of chemicals whose use was prohibited in the exporting countries, and the U.S.-Mexico tuna/dolphin dispute and its consequences as well as a rising international awareness of the importance of environmental problems and issues. Eglin (1999) claims that fear of failure of being able to conclude the Uruguay Round due to environmental concerns stemming from the tuna/dolphin dispute led to the calling of the meeting of the group and that this contributed to the successful completion of the Round with the signing of the agreement in Marakesh in 1994.

NAFTA and the Environment

Negotiations for NAFTA began under the administration of George H.W. Bush and included environmental issues in response to opposition by environmentalists who feared that it would exacerbate environmental problems, especially in Mexico (Hufbauer et al. 2000). Consequently, it was decided to address the problems in both the negotiations and a parallel process, a decision that

² It has been suggested that a World Environmental Organization (WEO) is needed to assure that international environmental issues are adequately addressed (see, e.g., Meyer et al. 1997; Sampson 2000).

³ The membership of the WTO also encompasses a large share of the world's nations, while many MEAs have limited membership with some missing major players such as the U.S.

allowed the negotiations to proceed. However, they had not been concluded when the Clinton administration took office; Presidential candidate Clinton had criticized the negotiations with respect to both environmental and labor issues. Thus, following the election they negotiated side agreements to address those issues beyond the provisions contained in the main document. Thus, NAFTA became the first trade liberalization agreement to explicitly include environmental issues, although they had been implicit in previous GATT agreements. In NAFTA, these were achieved primarily through the side agreement (Hauer and Runge 1999; Hufbauer and Orejas 2001).

The preamble to the NAFTA agreement indicates that the provisions will be carried out in a manner consistent with environmental protection and in ways to promote sustainable growth. Environmental provisions also are contained in Chapter 1 (giving precedence to MEAs), Chapter 7B on sanitary/phytosanitary provisions, and Chapter 11 on technical barriers to trade; several other chapters also deal indirectly with environmental issues. However, the main environmental provisions are contained in the side agreement which, *inter alia*:

- Created a trilateral commission, the North American Agreement on Environmental Cooperation Commission (NAAEC), to address and monitor environmental issues.⁴
- Created the Commission for Environmental Cooperation (CEC), a three-member commission, with a secretariate seated in Montreal, to carry out the environmental provisions.
- Created the Joint Public Advisory Committee, which provides a channel for Non Governmental Organization (NGO) and public input (de Janvry, Sadoulet and Davis 1997; Hufbauer et al. 2000; Kotvis 1995).

NAFTA's environmental provisions are based on three important principles:

- The three countries agree not to induce investment by becoming pollution havens;
- They established rules about the use of regulations to protect consumer, plant, animal and environmental health; and
- They give priority to international treaties such as the WTO (and MEAs).

Another primary characteristic of the agreement is that each country enforces its own environmental laws (the CEC has some enforcement powers through investigation of citizen complaints that a country is not enforcing its environmental laws and regulations). Additional CEC functions include overseeing implementation of the side agreement, providing a forum for discussing issues, and cooperating in solving environmental problems. It incorporates cooperation through the exchange of information, technical assistance, consultation, and coordination of environmental laws. It also operates through contention or conflict resolution under provisions for observing/monitoring, receiving and evaluating complaints, and enforcement if the complaints are judged valid (de Janvry, Sadoulet and Davis 1997, p. 13; Kotvis 1995). In addition, the North American Development Bank (NADB) was established to help finance infrastructure and environmental improvements along the U.S.-Mexico border which works with the Border Environment Cooperation Commission (BECC) which provides technical assistance (see, e.g., BECC and NADB 2004). The CEC also made grants, generally small, for environmental cooperation with an average of more than 20 per year from 1997 through 2003—they were discontinued in 2004 (NACEC 2004a)

An innovation of NAFTA is that governments, organizations, firms, and individuals can file

⁴ The NAAEC has been suggested as a model trade and environmental institution (Gallagher 2000).

complaints with the CEC when they believe environmental laws are not being enforced. These complaints are evaluated by the Evaluation Committee of Experts and, if found to have merit, are sent to dispute resolution panels. Trade and/or monetary sanctions may be used to enforce the findings: Canada is exempt since it did not agree to these provisions (Hufbauer et al. 2000, p 18). NAFTA, thus, provides a basis for evaluating the effects of combining the two types of agreements as a way to test some of the theoretical models and projections made prior to the agreements implementation. Between 1995 and 2004, some forty-nine submissions have been made with most being from either in Mexico or Canada, nine involved complaints by U.S. based parties (NACEC 2004b).

Uruguay Round of GATT

Environmental issues had not been an explicit part of the Uruguay Round of GATT negotiations, but the process had been delayed and the response of the environmentalists to the tuna/dolphin decision seemed to place them in jeopardy, resulting in the GATT Director-General calling a meeting of the EMIT group and taking other actions to defuse the issue (see, especially, Eglin 1999). Despite a lack of specific negotiations on the environment, environmental provisions were part of the final draft of the agreement signed in Marakesh in March 1994 (Eglin 1999, n4, pp 252-53). The provisions contained in the agreement include the following:

- The preamble includes objectives stating the need for sustainable development and preservation of the environment;
- The need to protect human, animal and plant health was explicitly recognized in both the sections dealing with technical barriers to trade and the sanitary/phytosanitary measures;
- The Agreement on Agriculture (AoA) exempts environmental and conservation payments from limitations on subsidies to agriculture (these are included in the green box along with some other payments, e.g., those decoupled from production); and
- The Agreement on Subsidies and Countervailing measures allows governments to provide subsidies to industries of up to 20 percent of the costs of pollution control facilities.

The meeting of EMIT resulted in a Chairman's Report with four conclusions (Nordström and Vaughan 1999, p. 10):

- Its activities should remain within its GATT mandate to consider trade related aspects of environmental policies that affect trade;
- There is no necessary contradiction between upholding the principles of multilateral trade and environmental protection;
- It is important that the multilateral rules should not present an unjustified obstacle to environmental policy making; and
- An open and secure trading system can facilitate environmental protection.

The TBT and sanitary-phytosanitary rules also were strengthened during the Uruguay Round and these can allow environmental regulations that affect (limit) imports if they are based on science, are applied in a non-discriminatory manner, and are in the least trade distorting forms (see Thornsby, Roberts and Orden [2004] for a good analysis of technical regulations in trade).

The Environment in the WTO

As a result of the Uruguay Round, the WTO was formed and environmental issues became an established part of the multilateral trading system. According to the WTO Secretariat, “At the end of the Uruguay Round, Trade Ministers adopted the Decision on Trade and the Environment which anchored environment and sustainable development in WTO work” (Nordström and Vaughan, p. 67). With implementation of the WTO agreement, a Committee on Trade and Environment (CTE) was established in 1995 and given a mandate to consider all aspects of the trade-environmental interface (Sampson 2000); however, environmental issues also are considered by other parts of the WTO regime. Despite this, environmental issues remain an area of contention and disagreement in WTO negotiations (Bridges 2001).

The WTO also undertook a study to further clarify the relationships between trade and the environment (Special Studies Report 4). As indicated by Nordström and Vaughan (1999, pp. 2-7), the report concluded the trade would raise welfare *if proper environmental policies were in place* (emphasis added), trade barriers generally make poor environmental policy, effective international cooperation is essential to protect the environment, and the cooperative model of the WTO ... could potentially serve as a model for a new architecture of environmental cooperation (see Colyer 2003b or Nordström and Vaughan 1999 for a more complete list of the report’s conclusions). This study and other actions by the WTO and its members have set the stage for negotiations in the current, Doha, round, although the failure of the Seattle WTO meeting to successfully launch the round and the impact of the anti-free trade groups at that meeting has also affected approach to the negotiations, especially the need to more fully consider the positions of the developing countries and non-governmental organizations (NGOs).

Other Trade Agreements

Numerous regional and bilateral free trade agreements (FTA) have been negotiated and signed by a variety of countries. Several of these have included environmental provisions either as part of the main agreement or as side agreements or annexes to the main document. The United States and Canada, for example, have both negotiated agreements which include such provisions and, although the approaches are somewhat different, the objectives are often similar.

U.S. Trade Agreements The U.S. has signed several bilateral and regional trade agreements in recent years, is in the process of negotiating additional agreements, and has placed increased emphasis on these since the failure of Cancun meetings.⁵ The U.S. is required to include environmental objectives in trade agreements under PL 107-210, the Trade Promotion Act (TPA), which reestablished fast-track authority under which the Senate can only approve or disapprove a trade agreement (Shiner 2002). TPA provisions require that countries signing trade agreements with the U.S. assure that their environmental laws are enforced and, in addition under TPA, the trade negotiations must also (Audley 2004, p. 17):

- strengthen the capacity of US trading partners to protect the environment;

⁵ This section is based on information from the website of Office of the U.S. Trade Representative (<http://www.ustr.gov>), the texts of the trade agreements, and the OAS Foreign Trade Information website (<http://sice.oas.org>).

- promote the sale of green products and services;
- reduce or eliminate government practices or policies that unduly threaten sustainable development;
- establish consultative mechanisms to strengthen the capacity of US trading partners to develop and implement environmental and human health standards;
- conduct environmental reviews of trade agreements;
- respect the Doha Declaration on Trade-related Aspects of Intellectual Property Rights clarifying a developing country's right to break patents during a public health crisis; and
- promote consideration of multilateral environmental agreements (MEAs) in negotiations on the relationship between MEAs and trade rules, especially as they are related to GATT Article XX.

The agreements signed to date include bilateral agreements with Chile, Singapore, Jordan, Morocco, and Australia; negotiations are underway with a number of countries including Pakistan, Panama, and Thailand as well as the Andean Region and the Southern Africa Customs Union (SACU). A regional agreement has been reached with the Dominican Republic (DR) and Central America (the DR was added at the last minute to Central American Free Trade Agreement (CAFTA)) and negotiations are underway for an agreement with the Andean Region as well as for the Free Trade Area of the Americas (FTAA), which includes all hemispheric countries except Cuba. With the exception of the FTAA, all of the agreements have, in the preamble a statement that an object is to protect the environment, and a chapter or article with specific environmental provisions.⁶

While there are variations among the agreements, there also is a common core and other similarities. All the agreements have the basic provisions similar to NAFTA that:⁷

- Each country has the right to “establish its own levels of domestic environmental protection and environmental and priorities...and shall strive to improve those laws”;
- “A Party shall not fail to enforce its environmental laws...” while each Party “retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters...”; and that
- “The Parties recognize that is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws.”

In addition, most of the other agreements contain other provisions; the agreement with Jordan for example, has definitions to clarify what is meant by environmental laws (see Appendix A). While varied from one to another, the other agreements tend to have, in addition: procedural matters such as administrative, quasi-judicial or judicial procedures that are fair and equitable, opportunities for public participation, voluntary and/or market based approaches to improving the environment, encourage ways and procedures for measuring environmental performance, provide for environment cooperation between the countries, allows for submissions when citizens/groups believe that the country's environmental laws are not being enforced, and some—especially those in the Americas—have provisions for an Environmental Affairs Council to evaluate procedures, work to

⁶ The draft version of the FTAA agreement, negotiated prior to TPA, does not contain separate provisions dealing with the environment (Colyer 2002, 2003b). Thus, the agreement will probably need to be modified to comply with TPA, a situation that is likely to further delay the agreement (which has already been stalled), since most of the Latin American countries have opposed including environmental provisions in the agreement.

⁷ See, for example, the U.S.-Singapore Free Trade Agreement (http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts).

improve the environment and address other issues that arise during the agreement's implementation. Most also have a provision that recognizes the primacy or at least need to consider multilateral agreements to which both or all parties are members, including the environmental provisions of the WTO.

Canadian Bilateral Agreements Canada currently has bilateral agreements with Israel, Chile and Costa Rica.⁸ There is an associated environmental side agreement with Chile and Costa Rica, but not with Israel—the latter agreement has a short chapter (one paragraph) that allow the same exceptions to trade rules that Article XX of GATT permits and with the environment specifically mentioned. The Canadian environmental side agreements to the free trade agreements are modeled after the NAFTA agreement as stated specifically in the introduction to the Chilean agreement on the Canadian Department of Foreign Affairs and International Trade web site (Environment Canada 2000). “The agreement establishes the forum through which Canada and Chile conduct cooperative activities. The Canada-Chile Commission for Environmental Cooperation is composed of a council, a Joint Submissions Committee and a Joint Public Advisory Committee. The Commission is supported by two secretariats (Canadian and Chilean) established in each country.” A purpose was to enable Chile to eventually join NAFTA. Thus, most of the provisions are similar to NAFTA and to the provision in the U.S. bilateral/ regional agreements described above. The Costa Rican agreement does not establish a commission, but instead sets up biennial or more frequent meetings to “review progress on implementation...” However, the other provisions are similar to those of the Canada-Chile agreement and to those in the U.S. bilateral agreements which, in turn, are based on those negotiated under NAFTA and its environmental side agreement. Thus, the NAFTA agreement has had a strong influence on the inclusion of environmental issues in trade agreements, at least with respect to those negotiated by the U.S. and Canada.

MERCOSUR Negotiators of the agreement between the southern cone countries, Argentina, Brazil, Paraguay and Uruguay, set up Work Sub-Group No. 6, to deal with and develop an agreement on the environment. After several years the group arrived at an agreement which was signed June 21, 2001, then ratified by all the member states, and entered into force June 27, 2004 (MERCOSUR 2001, 2004). The agreement is relatively short, consisting of a preamble, four short chapters and an annex listing thematic areas of environmental relevance. The objectives (Chapter II) are sustainable development and protection of the environment through economic, social and environmental dimensions which will contribute to improving the environment and lives of the areas population. The agreement in Chapter I reaffirms the group's commitment to the 1992 Rio principles, has a goal to implement those that have not been subjects of international agreements, coordinates sectoral policies, provides for free circulation of environmental goods and services, gives priority to treatment of the sources of environmental problems, promotes civil society participation in the treatment of environmental problems, and encourages internalization of environmental costs; in Chapter III procedures for cooperation and harmonization are outlined; and Chapter IV contains general

⁸ This paragraph is based on information from the website of the Canadian Department of Foreign Affairs and International Trade (<http://www.dfait-maeci.gc.ca/tna-nac/reg-e.asp>) and the texts of the agreements available through that site (accessed November 11-12, 2004).

provisions concerning dispute settlement, duration and entrance into force, and names Paraguay as the official depository of the agreement and related documents. While providing for work on environmental issues, no mechanisms for doing so are established.

Other Agreements Environmental issues do not seem to be important enough to be included in most other trade agreements, at least those between other countries in the Americas, often even when they are with the European Union or the European Free Trade Area.⁹ Mexico, the third country in NAFTA, has negotiated a relatively large number of free trade agreements (ten full-blown agreements and five others with freer trade aspects). Only one has a separate article on the environment—the Mexico-Nicaragua Agreement.¹⁰ Article 14-14, Protection of the Environment and Management of Hazardous Products and Wastes, has three paragraphs, one applying UN and GATT/WTO provisions and the other two dealing with hazardous materials. The environment or sustainable development are mentioned in some of the agreements preambles or objectives but generally treated as separate issues. A sample of other agreements listed by the OAS site produced similar results. The same conclusion applies to the drafts of Free Trade Area of the Americas agreement, which while incorporating some aspect of the environment does not have a separate and distinct chapter on the environment since most of the countries involved oppose including such issues in the agreement (Colyer 2002, 2003b).

Examination of a number of other trade agreements indicates that typically specific environmental provisions are not included in their texts; those that do tend to have provisions similar to GATT's Article XX allowing exceptions for the protection of human, animal and plant health and life as well as environmental.¹¹ New Zealand, for example, gives a set of environmental objectives in documents setting out its negotiating positions, but its agreement with Singapore, for example, does not contain environmental provisions. An exception is the European Free Trade Area's (Norway, Iceland, Switzerland and Liechtenstein) European Economic Area agreement with the EU which contains a brief chapter on the environment (Part IV, Chapter 3; Articles 73, 74 and 75). This chapter gives objectives of preserving, protecting and improving the quality of the environment, protection human health, and assuring prudent utilization of natural resources with specific measures given in an annex to the agreement. At least two other agreements between the EU and Latin American entities (Chile and MERCOSUR) have brief provisions for environmental cooperation. The purposes of these include promoting sustainable development, protecting natural resources and preventing environmental degradation. Procedures incorporate the possibility exchanges of information, environmental education, and of providing technical assistance although no

⁹ This information is based trade agreements given on the Organization of American States web site for trade information—SICE (<http://www.sice.oas.org.Trade>) and on the websites of several other countries with free trade agreements.

¹⁰ Deere and Esty (2002b, p. 2) maintain that the Mexican government objected to the inclusion of environmental issues in trade agreements and felt “forced to ‘swallow’ the environmental provisions advanced by the United States...” Thus, at least until the Fox administration, have opposed such provisions in the FTAA and other agreements. See, also, Mancera (2002) and other essays in Deere and Esty's (2002a) *Greening the Americas*.

¹¹ The information in this section is based on the material and trade agreements contained on the web sites of various countries and organizations.

mechanisms are spelled out in the agreements—the relevant articles from these two agreements are reproduced in Appendix A of this paper.

Environmental Assessments of Trade Agreements

Both the United States and Canada require environmental assessments of trade agreements and some other countries voluntarily carry out such assessments; under the Doha Ministerial Declaration developed countries are urged to provide expertise, technical and other assistance to enable developing countries to voluntarily carry out environmental assessments. The U.S. program was established under Executive Order 1341 of President Clinton and continued by the Bush Administration (Clinton 1999, USTR 2001a); this requirement was legislated in U.S. PL 107-210, the Trade Promotion Act passed in 2002 (Audley 2004). Canada established a similar program in 2002 (Canadian Department of Foreign Affairs and International Trade 2002). Under Doha Ministerial Declaration, Paragraph 33 requires that the CTE to determine how knowledge in environment assessments and capacity-building can be enhanced through sharing of expertise and the provision of technical assistance, including the carrying out of environmental reviews (ICTSD and IISD 2003b). The EU presented a proposed multi-year program to conduct sustainability impact assessments of the Doha negotiations (ICTSD and IISD 2003).

Developing Country Concerns and Issues

Developing Countries (DC) have a number of concerns about the role of the environment in trade agreements, historically opposed their inclusion and tend to oppose expansion beyond those included in the Doha Ministerial Declaration (Ingco and Nash 2004).¹² Primarily, DC's tend to see the inclusion of environmental issues in trade agreements as just another way the industrialized countries are imposing trade barriers to the goods produced by the world's low income countries, which do not have the resources or expertise to undertake the costly environmental programs, and which the fear might be imposed as conditions to export products to those industrialized nations (da Motta Veiga 2003; Hoekman and Anderson 2000; Huff 2000). Argentina, for example, specifically states this in a position paper submitted to the WTO's Committee on Trade and the Environment (ICTSD 2002b). A second concern is the costs imposed on those who attempt to comply with environmental regulations of developed countries, costs which are difficult to meet by smaller countries with limited resources and many competing needs. Furthermore, many lack the expertise, skilled manpower and institutions needed to develop and enforce strong environmental regulations.

GATT/WTO rules require that the same regulations must apply to domestic and imported products. Furthermore, it is the final product that matters, not the production process or method (PPMs) (although adopting particular processes may be essential to meet environmental regulations). This was the situation faced by countries which contested the tuna/dolphin and shrimp/sea turtle

¹² The DC's have a long history of distrusting GATT which they perceived as unfair to their interests. See Srinivasan (2003) for an excellent discussion of the history of DC's involvement in GATT and how, typically, GATT rules were not in their interest—of course DC's also tended to follow an import substitution policy that was not favorable to development.

cases, since the final product is not distinguishable by the method used to catch the fish or shrimp. However, the processes are important in both cases and Article XX of GATT allows regulations to protect animal life, which includes endangered species. Such provisions can be interpreted in different ways and, thus, developing nations continue to be concerned that their products produced by methods not acceptable in the industrialized countries for environmental reasons will be banned.

Doha Round Environmental Negotiations

The Doha Ministerial Declaration provides the scope for the negotiating issues that the Committee on Trade and Environment (CTE) and other negotiating groups are conducting during the current round (WTO 2001). Paragraph 31 of the Declaration contains the main environmental issues to be negotiated, although other parts also have environmental components or implications (ICTSD 2001, 2003).

The Doha Ministerial Statement's Environmental Provisions

The provisions of paragraph 31 will be listed and discussed, followed by a brief outline of other Doha Round provisions with environmental aspects, then the various negotiating positions will be covered, followed by a discussion of the current status of the environmental negotiations.

Paragraph 31 Provisions This paragraph, which follows, has three parts, each of which has conflicting interpretations by the negotiating parties.

31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome on:

- (i) the relationship between existing WTO rules and specific trade obligations set out in multinational environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any member that is not a party to the MEA in question;
- (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for granting observer status;
- (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

The provisions of the paragraph, while allowing scope in the negotiations, are limited to issues related to the MEAs plus negotiations for eliminating or reducing barriers to trade in environmental goods, without defining environmental goods. All three topics have been subject to different interpretations by individual or groups of the negotiators.

Other Provisions A number of other parts in the Doha declaration have environmental provisions or implications and, hence, are in the province of negotiating groups other than the CTE (ICTSD 2003b). Paragraph 6 of the preamble reaffirms and expands on the environmental and

sustainable development commitments made in the preamble of the Marakesh Agreement. Other provisions include fisheries' subsidies (para. 28); trade in intellectual property rights--or TRIPS--and biological diversity (para. 19, 32ii); sustainable development to be a joint activity of the CTE and Committee on Trade and Development--CTD (para. 51); market access (para. 32i); technical assistance and capacity building (para. 32iii); and labeling requirements for environmental purposes (para. 33). The WTO Secretariat staff periodically briefs the CTE on the status of negotiations in the other groups.

Negotiating Issues and Positions

The CTE is negotiating under each of the three items in paragraph 31, but progress has been slow and there are fundamental disagreements about the basic issues under each (ICTSD 2003b, 2004a, b, c). The negotiations are based on position papers presented to the CTE as well as on the discussions at CTE meetings, workshops and other fora.

Paragraph 31(i) Negotiating on relationships between WTO rules and specific trade obligations (STO) of the MEAs involves determining which MEAs to include, mandatory vs. non-mandatory obligations, and other issues. There seems to be a developing consensus to cover six of the MEAs with explicit trade obligations: Convention on International Trade in Endangered Species (CITES), the Montreal Protocol on Ozone-Depleting Substances, the Basel Convention on the Transboundary Movements of Hazardous Waste, the Rotterdam Convention, the Stockholm Convention on Persistent Organic Pollutants (POPs), and the Biosafety Protocol of the Convention on Biodiversity. The European Commission (EC) and Switzerland, strong demanders with respect to the environment along with Norway, favor a broad approach that elaborates on the general concepts while most other countries oppose this approach. The developing countries, as a group, want a more limited approach that would not constrain the market access. There is also a divergence with respect to an approach based on experience in implementing the two bodies of law (WTO and MEA) *versus* a conceptual approach based on broad principles. A U.S. proposal for the experiential approach has received broad support, although the EC and its supporters think that a parallel approach incorporating both aspects is required, that focusing only experience is unlikely to produce coherent results (ICTSD 2004a).

Paragraph 31(ii) The exchange of information with the MEAs is not particularly controversial, but the status of observers from MEAs and other environmental organizations such as the UNEP has been contentious. This resulted, in part, from a failure of the Trade Negotiations Committee, which also has a mandate to allow observers, to settle the issue (ICTSD 2003b). This was resolved in 2003, at least temporarily by allowing invitations to selected MEAs and others on an *ad hoc* basis. However, some of the invited observers complained about the limited extent of their participation.

Paragraph 31(iii) The CTE has concentrated on defining environmental goods while referring the issues of reducing or eliminating tariffs on environmental goods to the tariff negotiating group. Definitional issues involve how to define the goods, a general definition or lists of goods to be included, as well as what goods to include. The latter revolves around whether environmental goods

should include “environmentally friendly,” i.e., “green goods” including consumer goods or goods specifically aimed at improving the environment such as pollution control equipment. Organizations such as Organization for Economic Cooperation and Development (OECD) and Asia-Pacific Economic Cooperation (APEC) have developed lists of goods which could be the basis for a WTO list. Chinese Taipei proposed a list based on that used by APEC (ICTSD 2004c). The EC has proposed that the goods include the two categories, i.e., goods used in pollution control and those with low environmental impacts, while China has proposed that there be two lists, one general and one specifically for developing countries (ICSTD 2004a). The World Customs Organization made a presentation that noted the difficulty of incorporating environmental goods in the Harmonized System due to the lack of procedures for identifying such goods since the System is based on the characteristics of the goods and not one either production processes or end uses (ICTSD 2004c).

Some Additional Concepts/Issues

There are a number of issues that enter into the environmental debate with respect to trade and that affect, directly or indirectly, environmental aspects of trade agreement negotiations, especially those of the Doha round. These include multifunctionality, the precautionary principle, genetically modified organisms. Thus, most are directly related to food and agricultural concerns.

Some developed country supporters of agriculture (EU, Japan, Norway), cite multifunctionality as a basis for continued subsidization of the sector (see, e.g., Paarlberg, Bredahl and 2002; Peterson, Boisvert, and de Gorter 2002; Vanzetti and Wynsen 2004). In addition to food and fiber, agriculture contributes a number of benefits, positive externalities, which the prices of the products do not reflect—that is, farmers are not rewarded for providing the benefits. These include rural development, recreation, wildlife, scenic views, and green space, which include environmental benefits. Thus, it is maintained that the public is justified in providing subsidies to assure that the sector continues to provide the benefits. Givord, an agricultural official in the European Commission, defends the European multifunctional agricultural model as an “essential objective in multilateral trade negotiations” that “is not negotiable” (Givord 2000/2001).

The precautionary principle arises from the requirement that sanitary/phytosanitary regulations that must be met for exporting food (and other products) or other provisions that are technical barriers to trade must be based on science, i.e., that scientific evidence must exist that they, for example, pose a hazard to health if not enforced (Kheifets 2003; Van de Sluis, Dierson and Dobbs 2001). They must apply to domestic production as well as trade, i.e., be nondiscriminatory. In some situations science may not be able to provide definitive answers due to insufficient time or data to analyze the risks. The EU and some others have advocated that precaution should allow trade prohibitions in these situations. Opponents, however, argue that since science has not shown hazards to exist, the prohibitions are illegal constraints to trade.

Trade in genetically modified organisms (GMOs) is one of the areas where the precautionary principle has been used (Anderson and Jackson 2004; Sheldon and Josling 2002). Many people fear that these pose future health hazards as well as environmental hazards. The environmental hazards are the genes introduced into the organism might escape into the wild and affect other plants, especially weeds. Thus, a gene which makes a crop resistant to pests might get into the genome of weeds, producing a race of super weeds that would be difficult to control. It is contended that the

risks cannot be adequately assessed by science and, therefore, countries are justified in banning the products including international trade bans.

Environmental labeling is about providing consumers with information about the environmental conditions of the products or production methods (Athearn 2003; Carter and Gruere 2003; Sampson 2000, pp. 74-76). Among the labels being used are the dolphin safe labels for tuna, those indicating products contain GMO products, and organically produced products. Labeling can provide consumers with information about the products they are buying, but can also be a barrier to trade as, say, in the case of GMO labeling in the EU. Just as in the case of regulations relating to TBTs, labeling can be used for indicating product characteristics or the processes used to produce the product, as in the case of the dolphin safe tuna labels. This latter use remains controversial since many exporters, especially many developing countries, consider PPM regulations and labels to be contrary to WTO rules.

Conclusions and Implications

Environmental issues affect and are affected by international trade and, following NAFTA and the Uruguay Round of GATT negotiations, have become integrated into a number trade of agreements. However, many agreements, especially those with developing countries, either lack or minimize environmental provisions. The United States is required to include environmental objectives in trade agreements under the 2002 Trade Promotion Act and Canada generally includes environmental cooperation activities via side agreements to its agreements. Environmental concerns are explicitly included in the Doha round of WTO negotiations under the Doha Ministerial Declaration that initiated the process, although the nature and extent of the issues to be negotiated are limited. However, environmental issues remain controversial and progress has been slow, as it has for many of the other issues, as reflected in the failure and abrupt ending of the Cancun meetings in 2003. With some 135 members of the WTO, it is difficult to arrive at a consensus. One factor in this has been a better organization of the developing countries and articulation of their concerns in the negotiations, although strong and divergent views among the more developed nations also have contributed to delaying the process as has the involvement of NGOs and others with an interest in the outcomes of trade negotiations.

Environmental issues are now a permanent part of many trade agreements and of the negotiating process, especially at the multilateral level although many bilateral and regional agreements and negotiations ignore environmental issues or give them only a minimal or cursory treatment. None have developed the extensive institutional framework developed by the NAFTA agreement and its environmental side agreement. Thus, international environmental concerns continue to be addressed primarily by the several multilateral environmental agreements that have been negotiated and implemented by the international community. These, however, lack the coordination that the GATT/WTO has provided to trade issues. Many nations, including the U.S., do not belong to and have not ratified many of the MEAs. Thus, environmental organizations and other environmental protagonists are concerned that increased trade will harm the environment or that trade issues will win in trade disputes that involve environmental issues and either oppose further efforts to liberalize trade or try to assure that the environment gets protection through its inclusion in future trade agreements.

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Appendix A
Environmental Provisions of Selected Trade Agreements

Association Agreement Between the European Union and Chile

Article 28

Cooperation on the environment

1. The aim of cooperation will be to encourage conservation and improvement of the environment, prevention of contamination and degradation of natural resources and ecosystems, and rational use of the latter in the interests of sustainable development.
2. In this connection, the following are particularly significant:
 - (a) the relationship between poverty and the environment;
 - (b) the environmental impact of economic activities;
 - (c) environmental problems and land-use management;
 - (d) projects to reinforce Chile's environmental structures and policies;
 - (e) exchanges of information, technology and experience in areas including environmental standards and models, training and education;
 - (f) environmental education and training to involve citizens more; and
 - (g) technical assistance and joint regional research programmes.

Source: SICE (http://www.sice.oas.org/Trade/chieu_e/chieu1_e.asp#Title6p3)

**Interregional Framework Cooperation Agreement
between the European Community and its Member States, of one Part,
and the Southern Common Market and its Party States, of the other Part**

Article 17. Cooperation regarding environmental protection

- 1.** With the aim of achieving sustainable development, the Parties shall encourage awareness of the issues of environmental protection and the rational use of natural resources in all fields of interregional cooperation.
- 2.** The Parties shall agree to devote special attention to measures connected with the international dimension of environmental problems.
- 3.** Cooperation could cover the following in particular:
 - (a)** exchanges of information and know-how regarding matters including regulations and standards;
 - (b)** training and education regarding the environment;
 - (c)** technical assistance, the implementation of joint research projects and, where appropriate, institutional assistance.

Source: SICE (http://www.sice.oas.org/trade/mrcsr/merco%5Feu/M_EU_e2.asp)

**AGREEMENT BETWEEN THE UNITED STATES OF AMERICA
AND THE HASHEMITE KINGDOM OF JORDAN
ON THE ESTABLISHMENT OF A FREE TRADE AREA**

ARTICLE 5: ENVIRONMENT

1. The Parties recognize that it is inappropriate to encourage trade by relaxing domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party.
2. Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws, each Party shall strive to ensure that its laws provide for high levels of environmental protection and shall strive to continue to improve those laws.
3. (a) A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.
(b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.
4. For purposes of this Article, “environmental laws” mean any statutes or regulations of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:
 - (a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
 - (b) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; or
 - (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statutes or regulations, or provision thereof, directly related to worker safety or health.

Appendix B: ACRONYMS:

AoA	Agreement on Agriculture
APEC	Asia-Pacific Economic Cooperation
BECC	Border Environment Cooperation Commission
CAFTA	Central American Free Trade AREA
CEC	North American Agreement on Environmental Cooperation
CITES	Convention on International Trade in Endangered Species
CTC	Committee on Trade and Environment
CTD	Committee on Trade and Development
EC	European Commission
EFTA	European Free Trade Area
EMIT	Group on Environmental Measures and International Trade
EU	European Union
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Trade and Tariffs
GMO	Genetically Modified Organism
ICTSD	International Centre for Trade and Sustainable Development
IISD	International Institute for Sustainable Development
MEA	Multilateral Environmental Agreement
MERCOSUR	Mercado Comun del Cono del Sur (Common Market of the Southern Cone)
NAAEC	North American Agreement on Environmental Cooperation Commission
NADB	North American Development Bank
NAFTA	North American Free Trade Area Agreement
NGO	Non-Governmental Organization
NOAA	National Oceanographic and Aerospace Administration
OECD	Organization for Economic Cooperation and Development
POPs	Persistent Organic Pollutants (Stockholm Convention on)
SACU	South African Customs Union
SICE	Sistema de Información sobre Comercio Internacional (Foreign Trade Information System)
STO	Specific Trade Obligation
TBT	Technical Barriers to Trade
TPA	Trade Promotion Act
UNEP	United Nations Environmental Programme
USTR	United States Trade Representative
WEO	World Environmental Organization (proposed)
WTO	World Trade Organization