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**Agriculturally Related Environmental
Issues in Free Trade Agreements**

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Environmental Issues in Free Trade Agreements

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Abstract: The consideration of environmental matters in trade liberalization agreements has become an issue since they were included in NAFTA and recognized Uruguay round agreement that created the WTO. Many WTO members, especially the less developed countries, remain opposed to including environmental issues in trade agreements. However, Canada, the U.S. and a few other countries now include environmental provisions in their bilateral and regional trade agreements; the U.S. is required to do so under its 2002 Trade Promotion Act (PL 107-210). Furthermore, the declaration establishing the Doha Round of multilateral negotiations recognizes a role, albeit a limited one, for the environment in negotiating the next multilateral trade liberalization agreement. Negotiations on these issues have been intense with relatively little had been agreed on in early 2006.

Key Words: Trade and Environment, Agricultural Trade, Trade Liberalization, Doha Round

1. Introduction

Environmental issues have been incorporated into numerous trade liberalization agreements since the approval of the North American Free Trade Area (NAFTA), the first to contain significant environmental provisions. This came about due, in part, to the U.S. loss in a General Agreement on Tariffs and Trade (GATT) dispute panel decision from a Mexican complaint about U.S. regulations that prohibited the importation of tuna caught by methods that killed large numbers of dolphins (see, e.g., WTO 2002a). The loss energized environmentalists, led to widespread demonstrations against GATT and threatened the ongoing Uruguay Round of GATT negotiations, which then incorporated some environmental language and set the stage for its inclusion in the Doha Round of World Trade Organization (WTO) negotiations. Thus, the final version 1994 GATT agreement explicitly recognized the environment, with an objective to

protect and preserve the environment in its preamble and with environmentally related provisions in other parts of the agreement.

While environmental provisions are now part of the WTO as well as several regional and bilateral trade agreements, many free trade proponents have argued that the trade and the environment should be kept separate with international environmental problems handled through the numerous multilateral environmental agreements (MEAs) as in the past (e.g., Bhagwati 2000). Environmentalists, on the other hand, believe that such concerns should be more directly and explicitly dealt within the WTO and other trade agreements (see, e.g., Deere and Esty 2002, Friends of the Earth 2003). Many of the developing countries also are reluctant to have environmental provisions included in trade agreements, seeing these as mechanisms the developed countries can use to exclude their goods, which might be produced by unapproved methods (Hoekman and Anderson 2000, Huff 2000).

2. NAFTA's Environmental Provisions

NAFTA was the first trade agreement to incorporate significant environmental concerns, which are included in both the main document and an extensive side agreement. The side agreement created a trinational commission, the North American Agreement on Environmental Cooperation Commission (NAAEC), to address environmental issues. NAFTA's environmental provisions operate under three principles: the three countries (Canada, Mexico and United States) agreed not to induce investment by becoming pollution havens; they established rules about the use of regulations to protect the environment; and they give priority to the GATT/WTO agreements. Each country is to enforce its own environmental laws. The Commission on Environmental Cooperation (CEC) functions include overseeing the implementation of the side agreement, providing a forum for discussing issues, cooperating in

solving environmental problems, and adjudicating complaints about the failure of governments to enforce their environmental laws. The agreement provides for cooperation that involves the exchange of information, technical assistance, consultation, and coordination. It also contains provisions for observing and monitoring the environment, receiving and evaluating complaints, and enforcement if the complaints are judged valid (Kotvis 1995). Governments, organizations, firms, and individuals can file complaints with the CEC when they believe environmental laws are not being enforced.

3. The WTO and the Environment

Environmental issues had not been an issue in the several rounds of GATT negotiations that preceded the Uruguay Round and probably would not have become a major issue then except for the concerns raised as a result of the Mexico-U.S. tuna dispute. However, GATT had established the Group on Environmental Measures and International Trade (EMIT) in 1971 to focus on issues of industrial pollution that might impact on free trade, but the group had not met until called together in response to the crisis provoked by the tuna decision and the threat it posed for concluding the Uruguay round (Eglin 1999, Esty 1994, Nordström and Vaughan 1999). Meetings resulted in a Chairman's Report with that concluded: 1) that its activities should consider only aspects of environmental policies that affect trade; 2) that there is no necessary contradiction between upholding the principles of multilateral trade and environmental protection; 3) that multilateral trade rules should not present an unjustified obstacle to environmental policy making; and 4) that an open trading system can facilitate environmental protection (Nordström and Vaughan 1999, p. 10). While the Uruguay Round Agreement did not contain extensive environmental provisions, it recognized and made environmental improvements an objective, covering environmental issues in the preamble to the Marrakesh

Agreement that established the WTO, as well as in GATT's Article XX, the Technical Barriers to Trade (TBT) Agreement, Agriculture Agreement, Intellectual Property (TRIPS) Agreement, General Agreement on Trade in Services (GATS) Article XIV (WTO 2002b). These indicate that domestic laws on the environment or to protect human, animal and plant life and health can be exceptions to prohibitions to trade barriers. Thus, according to a note prepared by the WTO Secretariat: At the end of the Uruguay Round, Trade Ministers adopted the Decision on Trade and the Environment which established environmental and sustainable development in the WTO work. With implementation of the WTO agreement, the Committee on Trade and Environment (CTE) was established and given a mandate over the trade-environmental interface.

4. Regional and Bilateral Trade Agreements

Numerous regional and bilateral free trade agreements (FTAs) have been negotiated and signed by a variety of countries. FTAs are permitted under GATT/WTO regulations, but members are required to notify the secretariat of completed agreements. Under GATT, 1948-94, some 124 notifications were received, but the pace has increased since the formation of the WTO with 130 notifications received from 1995 through July 2005 (WTO 2005). Some of these are accessions of new members of regional trade agreements (RTA) and some are separate agreements for trade in goods and trade in services negotiated by the same parties more or less simultaneously. Some 33 are regional agreements, i.e., involve three or more countries.

Several RTAs have included environmental provisions either as part of the main agreement or as side agreements or annexes to the main document (FTA will be used subsequently to indicate both bilateral and regional agreements). 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. However, the majority of

FTAs examined do not contain environmental provisions (other than to allow exceptions for trade barrier prohibitions to protect the environment).

4.1 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 the WTO Cancun meetings. 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 Congress can only approve or disapprove a trade agreement, i.e., cannot change the negotiated provisions (Shiner 2002). TPA provisions require, among other things, that countries signing trade agreements with the U.S. assure that their environmental laws are enforced (Audley 2004, p. 17). 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 approved 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 draft 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.

While there are variations among the agreements, there also is a common core and other similarities. All the agreements have basic provisions similar to NAFTA in that 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”; requires each party enforce its environmental laws while each party also retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters; and requires the participants recognize that is not appropriate 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, provides for administrative, quasi-judicial or judicial procedures that are fair and equitable, opportunities for public participation, encourages voluntary and/or market based approaches to improving the environment, ways and procedures for measuring environmental performance, provides for environment cooperation between the countries, and allows for submissions when citizens/groups believe that the country’s environmental laws are not being enforced. Some, especially those in the Americas, have provisions for an Environmental Affairs Council to evaluate procedures, work to 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.

4.2 Canadian Bilateral Agreements

Canada currently has bilateral agreements with Israel, Chile and Costa Rica. 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 with the environment specifically mentioned. The Canadian environmental side agreements to its 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 (2000) web site (Environment Canada).

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.

4.3 MERCOSUR

Negotiators of the agreement between the southern cone countries, Argentina, Brazil, Paraguay and Uruguay, set up Work Sub-Group No. 6, to 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 sector 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 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.

4.4 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. 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). One has a separate article on the environment—the Mexico-Nicaragua Agreement. 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.

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. 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, although its recent agreement with China does include environmental provisions. Since joining the WTO, China has become very active with a number of agreements signed or being negotiated although only the New Zealand agreement has an environmental section. Another 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 mechanisms are spelled out in the agreements. It has, for example, has definitions to clarify what is meant by the term environmental laws.

5. Environmental Issues in the Doha Round Negotiations

The Ministerial Declaration from the Doha meetings mandates environmental negotiations in the round announced in November 2001 (WTO 2001, ICTSD 2001). The Committee on Trade and the Environment (CTE), as part of the Trade Negotiation Committee

(TNC), has responsibility for these negotiations with the mandate given in paragraph 31 (WTO 2001):

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 limitations 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.

Thus, the charge to the CTE is specific, but circumscribed. Although the CTE continues to meet, the negotiations have generally not been fruitful. Member countries submit papers with their views as well as participating in the discussions. For example, the European Union (EU), the primary group demanding that environmental issues should be included in Doha negotiations (see EU 2001), distributed a controversial paper with its thoughts on these issues (ICTSD 2002a). Their presentation implied that non-signatories of a MEA might still be subjected to the negotiated environmental provisions. This was objected to by the other participants who felt that the EU proposal goes beyond the scope of the Doha mandate to the CTE, which had been crafted to define and limit the scope of the negotiations, and the CTE has agreed that they should not apply to non-signers. Resolving conflicts between the WTO and MEAs is complex and poses numerous problems and issues that need to be resolved (see, e.g., Kerr 2002, see, also, WTO 2003).

In addition to the relationships of the WTO and MEAs rules, under (ii) the CTE is to consider information exchanges with the MEAs and observer status for nonmembers; both of these have been contentious (ICTSD 2002b). Issues included which of the MEAs to

include—there are a large number of international and regional agreements. There also was disagreement of the role of the CTE in determining observer status vis-à-vis the TNC and higher level parts of the WTO which also are considering observer status issues. Some members wanted to grant observer status immediately (a number of organizations have applied), while others want to leave the decision to the other negotiating bodies. While these have been resolved on an *ad hoc* basis, there has not been a permanent solution.

Finally, under (iii) the CTE is determining just what is included in environmental goods with some members, e.g., the EU, wishing to include those produced in environmentally friendly ways or that are environmentally sound (recyclable). Other members are not supportive of including this approach, which they believe to relate to production processes. The various parties want to have either a general definition or lists of specific products. The negotiators have moved toward developing lists of specific environmental goods based on OECD and ASEAN lists.

Relatively little attention was paid to environmental issues at the December 2005 WTO Ministerial meeting in Hong Kong. Little was accomplished at that meeting although it was agreed to work toward specific modalities in the first months of 2006 (ICTSD 2006a). Resolving agricultural issues was the main obstacle to reaching an accord with strong positions being taken by both industrialized and developing countries. A meeting of the CTE was held in February 2006 to try to resolve issues in the environmental negotiations for the Doha Round with the focus on the provisions for freeing trade in environmental goods (ICTSD 2006b). However, while some progress on the lists of goods was made, disagreements remained due, primarily, to developing country objections because many of the goods on the lists have dual uses and might be imported for uses other than environmental improvements. India, for example, has proposed

a project approach that would allow free imports of listed goods for specific projects but not for other uses. Thus, while making some progress there was no consensus on how to handle the freeing of environmental goods.

6. Conclusions and Implications

Environmental and trade issues are interrelated with important implications and effects within the global economy. Historically they were dealt with through separate international treaties and agreements, trade issues under GATT (now the WTO) plus a multitude of regional and bilateral agreements, while environmental issues were handled under several multilateral environmental agreements. Both types have implications for the other and each have provisions that affect the other, although these have tended to be relatively minor. However, the effect of a GATT trade dispute settlement panel in the tuna-dolphin case led to widespread protests and hastily improvised responses in the Uruguay Round and NAFTA negotiations, including the NAFTA environmental side agreement and the creation of the Committee on Trade and the Environment by the WTO. Subsequently these concerns, together with uneasiness about the effects of globalization, resulted in the protests at Seattle that delayed the start of the next round of WTO trade negotiations. Thus, when the Doha Round of negotiations was initiated in November 2001, environmental issues were specifically recognized and integrated into the negotiation process, although to a relatively limited extent. These negotiations are contentious due, in part, to the very different views of the EU and developing countries with respect to the role to the environment in the international trade arena. However, while environmental protection is not apt to receive the support that most environmentalists would like to see in the WTO, it will continue to be an important part of the process with the WTO involved in more

coordination with international environmental agreements, which will continue to be the more important venue for handling and resolving environmental issues.

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