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Publication Date

1999-07-01

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BRIE Working Paper 94
July, 1999**

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Research for this paper was supported in part by a generous grant from the Pew Charitable Trusts for BRIE work on trade and the environment, and generous support for production of the BRIE Working Papers Series was provided by the Alfred P. Sloan Foundation.

Introduction

This essay explores the contemporary political dynamics of the linkages between trade policy and environmental regulation – two policy areas that were formerly distinctive. Between the middle of 1991 and December of 1994, the relationship between trade liberalization and consumer and environmental protection became highly visible for the first time in the United States. The controversy surrounding the August 1991 ruling of a General Agreement on Tariffs and Trade dispute panel against an American embargo on imported tuna to protect dolphins, and the heated debates over the environmental dimensions of the North American Free Trade Agreement (NAFTA), and the impact of the proposed Uruguay Round agreement on American environmental and consumer regulation - all moved the policy linkages between trade and environment to a prominent place on the American political agenda.

However, political salience of trade and environment policy linkages in American domestic policies diminished after 1994. This is largely due the fact that the Clinton Administration neither negotiated nor proposed any new trade agreement since Congress approved the Uruguay Round agreement in December 1994. Nor did the administration propose any changes in the environmental provisions of existing trade agreements. Moreover, none of the rulings issued by trade dispute settlement panels created significant controversy in the United States.

Nonetheless, public reaction to the GATT tuna/dolphin decision and the debates over the regulatory terms and impact of both the Uruguay Round Agreement and NAFTA have permanently transformed the way trade policy is made and negotiated in the United States. Environmental and consumer lobbies have now joined business and labor as regular participants in the making of American trade policy. At the same time, the American business community has become increasingly concerned about the use of health, safety and environmental regulations as non-tariff barriers by America's trading partners. Most important, the issue of "linkage" -- the extent to which future trade agreements negotiated by the United States should include provisions requiring America's trading partners to adopt or maintain various environmental standards – has become an important part of the political agenda of trade policy in the United States.

This essay primarily explores the regulatory dimensions of the GATT/WTO and NAFTA. It examines how the environmental impact of each trade agreement became the focus of political

controversy in the United States, the impact of non-governmental organizations (NGOs) on the provisions of each trade agreement and the political status of trade-environment linkages since the conclusion of the Uruguay Round and the passage of NAFTA.

Trade and Environment and the GATT

Tuna/Dolphin

Beginning in the 1960s, American commercial fisherman abandoned traditional pole-and-line fishing and began to employ purse seines to catch tuna.¹ Purse seines are enormous nets approximately one mile long and 600 feet deep, which are placed under and around schools of tuna. They are then tightened, the water is gradually let out of them, and the tuna are brought on deck. By the early 1970s, the United States purse seine fleet numbered over 100 vessels, each costing between six and ten million dollars and capable of holding more than 1,000 tons of tuna. Because many dolphins drowned when the nets designed to trap the tuna swimming beneath them were tightened, the introduction of this new fishing technology had a catastrophic effect on dolphin mortality. By the end of the 1960s, tuna fishing boats in the eastern tropical Pacific (ETP)--nearly all of which were American-owned--were killing close to half-million dolphins each year.

Public outcry over the increase in dolphin deaths helped prompt passage of the Marine Mammal Protection Act (MMPA) in 1972. This legislation, which sought to protect all warm-blooded animals which swim in the oceans, established as a goal of American policy the reduction of the rate of dolphins killed or maimed to "insignificant levels." At Congressional hearings on the reauthorization of the MMPA in 1988, a broad coalition of twenty-eight national environmental organizations urged Congress to legislate a four-year phase out of all purse seine fishing. While Congress refused to do so, the 1988 Amendments to the MMPA did regulate foreign fishing practices. They specifically limited the number of dolphins that could be killed in the ETP by foreign tuna vessels to an incidental killing rate not to exceed 1.25 times the average of the U.S. fishing fleet. The Amendments also stated that, "unless the Secretary of Commerce

¹ Unless otherwise noted, this section is based on National Research Council, *Dolphins and the Tuna Industry* (Washington, D.C: National Academy Press, 1992) pp1-22, and Kerry L. Holland, "Exploitation on Porpoise: The Use of Purse Seine Nets By Commercial Tuna Fishermen in the Eastern Tropical Pacific Ocean," *Syracuse Journal of International Law and Commerce*, 17 (Spring 1991):267 – 279.

issued a finding that foreign tuna imports met standards comparable to those of the United States, these imports must be banned."²

In 1988, American officials began to express concern to the Mexican Government about the number of dolphins being killed by Mexican owned fishing vessels. The Mexican Government agreed to modify its tuna fishing regulations, and the number of dolphins killed by its fishing fleet declined significantly.³ Nonetheless, largely because the number of American dolphin kills had fallen even more dramatically, Mexican fishing fleets were still killing dolphins at a higher rate than their U.S. counterparts. In the fall of 1990, the Earth Island Institute, a California non-profit organization sued the Department of Commerce to enforce the Act's restrictions on tuna imports. In October 1990, a US District Court ordered the Secretary of Commerce to ban all tuna imports from Mexico, Venezuela, and the Pacific island of Vanatu.

For Mexico, which had joined the GATT in 1986, the American tuna embargo represented an effort by a developed nation to use environmental standards to protect domestic firms from competition from producers in developing nations. In February 1991, with the support of several other nations, Mexico filed a formal complaint with the GATT.

In August 1991, a GATT dispute panel found that the American trade embargo violated the "national treatment" provisions of the GATT. According to the panel, GATT rules do not permit signatory nations to restrict imported products on the basis of how they are produced outside their legal jurisdiction. Otherwise, the panel concluded, nations would only be assured of access to the markets of those countries whose regulations were similar to their own.

The GATT dispute panel ruling was the most visible -- and controversial -- in the trade agreement's forty-four year history. American environmental groups were outraged by it. David Phillips, the executive director of the Earth Island Institute, stated that the Mexicans "are kidding themselves if they think that GATT can force the U.S. to abandon laws to protect the global environment. In the 1990s, free trade and efforts to protect the environment are on a collision course."⁴ A spokesman for Congress Watch, a public interest lobbying group founded by Ralph Nader, characterized the GATT panel's decision as a "breathhtaking attack on the progress made

² Robert Housman and Durwood Zaelke, "The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision," *Environmental Law Reporter* (April 1992): 10271.

³ David Colson, "US Policy on Tuna-Dolphin Issues," U.S. Department of State Dispatch, (August 24, 1992): 668.

⁴ Brooke, "America," p. 7.

in the last 10 years."⁵ A policy analyst for the World Wildlife Fund depicted the decision as "a major setback because it totally disregards legislation designed to provide environmental protection for common resources."⁶

Congressional reaction was equally hostile. At a congressional hearing on the GATT ruling, Congressman Henry Waxman, (D-Ca) chairman of the House Subcommittee on Health and the Environment, stated: "This is a worst-case scenario come true -- repeal of a vital environmental law because of conflict with a trade agreement."⁷ A group of Congress members wrote a letter to the President which stated: "This inhumane ruling would run roughshod not only over these hard-fought dolphin protection measures, but over our fundamental right to engage in worldwide conservation measures."⁸ Sixty-four Senators and nearly a hundred Representatives wrote to President Bush stating that they would refuse to weaken the MMPA and demanded the GATT be changed to make it compatible with all American environmental laws.

Greening the GATT

The tuna/dolphin case served as a catalyst for putting environmental protection on the agenda of the domestic debate over the provisions of the Uruguay Round, which was being negotiated at this time. For many environmentalists, the dispute panel ruling in the tuna/dolphin case demonstrated the inadequacies of GATT rules to allow nations to address legitimate environmental concerns. Indeed, even before the panel had issued its ruling, a number of environmental organizations had begun urging that the GATT be amended to take into account the growing importance of environmental issues. Now the case for GATT reform had become even more compelling. As one activist put it, "If a 19-year old conservation law not generally perceived to be protectionist in intent, could be viewed by a GATT panel as a fundamental violation of world trade rules, then it became easy to explain to the public why such rules were in need of reform."⁹ At demonstrations in front of the American Capitol, environmentalists carried posters depicting a monstrous "GATTzilla," with a dolphin in one arm and a canister dripping

⁵ John Vidal, "Global conservation threatened as Gatt declares war," *The Guardian* September 6, 1991, p. 29.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Quoted in Ted McDorman, "The U.S. - Mexico GATT Panel Report On Tuna and Dolphin: Implications for Trade and Environmental Conflicts," *North Carolina Journal of International Law and Commercial Regulation*, 17 (1992):488.

⁹ Steve Charnowitz, "Environmental and Labor Standards in Trade," *The World Economy*, 15, no. 3 (May, 1992): 336.

DDT in the other, chanting GATT's new meaning: "Guaranteeing A Toxic Tomorrow."¹⁰ The Earth Island Institute claimed that "without substantial overhaul, GATT will pose a grave threat to environmental protection laws throughout the world."¹¹ A broad coalition of environmental organizations proposed a number of reforms in the GATT.¹² They included a provision permitting "pace-setting" governments which had enacted standards higher than the international norm to block imports from countries having lower environmental standards or employing harmful industrial processes. This would enable governments to keep out a product because of the way it was produced or harvested: "If GATT is not to be an impediment to the switch to clean production, the definition of 'like' product must be changed to take into account a product's impact on the environment."¹³

In addition, "a green GATT would also authorize trade barriers against governments failing to enforce their own environmental laws or violating existing environmental agreements."¹⁴ A related proposal would permit signatory nations to impose countervailing duties on imports produced under environmental standards lower than their own on the grounds that the failure to enact and enforce adequate pollution control laws or resource conservation standards constituted an unfair subsidy.

The Uruguay Round agreement which was reached in the spring of 1994 did not attempt to address any of the specific issues raised by the tuna/dolphin dispute, let alone the broader questions about the future relationship between trade and the environment. The trade negotiators in Geneva, preoccupied with other pressing issues, had neither the interest nor the capacity to address another issue. However, largely as a response to the criticism of the GATT by environmentalists, the agreement did explicitly acknowledge one principle which had formerly been implicit. The preamble to the Standards Agreement, which was incorporated into the

¹⁰ Ibid., p. 336.

¹¹ The material below is based on David Dodwell, "Game of give and take," Financial Times September 30, 1992, p. 12 and "A catalogue of grievances," Economist February 27, 1993, p. 26. see also Lori Wallach, "Hidden Dangers of GATT and NAFTA" in Ralph Nader et. al. The Case Against Free Trade (San Francisco: Earth Island Press, 1993), pp. 60-91.

¹² The material below is based on David Dodwell, "Game of give and take," Financial Times September 30, 1992, p. 12 and "A catalogue of grievances," Economist February 27, 1993, p. 26. see also Lori Wallach, "Hidden Dangers of GATT and NAFTA" in Ralph Nader et. al. The Case Against Free Trade (San Francisco: Earth Island Press, 1993), pp. 60-91.

¹³ Naomi Roht-Arriaza, "Precaution," p. 75.

¹⁴ Harold Gilliam, "The Real Price of Free Trade," San Francisco Examiner:This World, January 3, 1994, p. 14.

provisions of the WTO, marked the first mention of the word "environment" in the text of the international trade agreement

It affirmed the right of each country to "maintain standards and technical regulations for the protection of human, animal, and plant life and health and of the *environment*."¹⁵ (italics added). It also noted that a country should not be prevented from setting technical standards (which include environmental regulations) "at the levels it considers appropriate," a phrase meant to discourage nations from harmonizing standards in a downward direction.¹⁶ In addition, an Agreement on Subsidies and Countervailing Measures permitted governments to subsidize up to 20 percent of one-time capital investments to meet new environmental requirements, provided that its subsidies are "directly linked and proportionate" to environmental improvements.¹⁷

Most important, the trade negotiators formally agreed to address the relationship between trade and environment in their future negotiations. In an effort to diffuse criticisms from environmentalists, the GATT agreed to an American initiative to convene its Working Group on Environmental Measures and International Trade. This committee had been established in 1971 but had never met. At the GATT's April 1994 ministerial meeting in Marrakech which officially ratified the results of the Uruguay Round negotiations, a resolution was approved which committed the newly established World Trade Organization to undertake a systematic review of "trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members."¹⁸ A working group was charged with looking at the overall relationship between fair trade rules and environmental measures and with suggesting changes in WTO rules to make the trade agreement more compatible with environmental standards.

The Café Dispute

After the Uruguay Round negotiations were concluded, but before the Uruguay Round agreement was voted on by Congress, a GATT dispute panel issued a decision in a second trade dispute involving a challenge to an American environmental regulation. The European Union

¹⁵ Richard Steinberg, "The Uruguay Round: A Legal Analysis of the Final Act," *International Quarterly*, 6, no. 2 (April 1994): 35 (italics added).

¹⁶ *Ibid.*

¹⁷ Quoted in Daniel Esty, *Greening the GATT*, Washington D.C.: Institute for International Economics, 1994, p. 170.

¹⁸ "Decisions Adopted by Ministers in Marrakesh," *Focus: The GATT Newsletter*, May 1994, p. 9.

had requested the convening of a dispute panel to determine the GATT consistency of three American automobile regulations and taxes, namely corporate average fuel economy standards (CAFÉ), the so-called gas-guzzler tax, and a tax on luxury cars. The former two were environmental/conservation measures, while the third was a revenue one. The EU claimed that all three measures were discriminatory since their burdens fell disproportionately on European car exports to the United States. While vehicles manufactured in Europe accounted for only 4 percent of American car sales in 1991, they contributed 88 percent of the revenues collected by these measures.

Of the three regulations and taxes addressed in the EU's complaint, CAFÉ was the most politically important. Originally established in 1975 in the midst of the energy crisis, and subsequently tightened in 1980, CAFÉ standards are designed to promote fuel efficiency. They are based on the miles per gallon achieved by the sale-weighted average of all vehicles sold by each manufacturer. If a manufacturer's vehicles fall below this standard, they are subject to a substantial financial penalty. Although the penalty applies equally to all car makers doing business in the United States, it has been paid exclusively by European limit-line premium manufacturers. American and Japanese firms have been able to avoid CAFÉ penalties by averaging their smaller, more fuel-efficient vehicles with their larger, less fuel-efficient ones. However the European firms do not have this option since the luxury vehicles they export to the United States tend to be fuel-inefficient.

The Financial Times predicted that "should the United States lose this case, it would face as much outcry as the so-called 'tuna-dolphin decision.'"¹⁹ However, in October, 1994, a GATT dispute panel ruled in favor of the United States. It concluded that product regulations were GATT consistent as long as they did not explicitly discriminate on the basis of country of origin and were necessary to protect public health or the environment. This GATT panel decision helped diffuse environmental opposition to the Uruguay Round Agreement, which was approved by Congress two months later.

¹⁹ Quoted in "U.S. Auto Fuel-Efficiency Taxes to be Examined by GATT Panel," Trade and the Environment: News and Views from the GATT June 3, 1993, p. 4.

Food Safety Standards

The impact of GATT rules on environmental regulation was not the only aspect of the Uruguay Round negotiations that concerned American consumer and environmental groups. They also strongly opposed an American proposal to amend the GATT Standards Code to limit the use of food and agriculture safety and processing standards--technically known as Sanitary and Phytosanitary (S&P) measures--as nontariff barriers.

One of the world's leading agricultural exporters, the United States had long been frustrated by the inability of GATT's rules and dispute procedures to prevent its trading partners from using S&P regulations as nontariff barriers. The U.S. had been particularly upset by the 1989 decision of the European Union to ban the sale of all beef and beef products which contained growth-inducing hormones. According to the U.S., this regulation, which cut off nearly \$100 million worth of American beef exports to Europe, had no scientific justification. However, under existing GATT rules, the U.S. had no legal basis for challenging it.

Largely at the initiative of the United States, a limitation on the use of S&P regulations as trade barriers was incorporated into one of the later drafts of the Uruguay Round agreement. Commonly referred to as the "Dunkel draft," after GATT Secretary-General Arthur Dunkel, its purpose was to plug a major "loophole" in the 1979 Standards Code, namely its lack of an analytical framework for determining when a technical regulation that restricts trade is "necessary," or scientifically justified. The draft required nations to base their food safety and processing standards on international standards. If they chose to adopt stricter standards, they must be based on scientific evidence. The Dunkel draft was linked to a much more sweeping American policy objective, namely the phasing out of agricultural subsidies and import restrictions.

These American trade initiatives were strongly opposed by those segments of American agriculture which stood to lose from agricultural trade liberalization. To mobilize public support for their position, domestic producers began to stress the linkages between the maintenance of import restrictions, and public health and safety. The Farmers Union Milk Marketing Cooperative, which represented 9,800 midwestern dairy farmers who stood to suffer serious financial losses if barriers to milk imports were lifted or dairy subsidies reduced, urged Congress

to "reject any new international trade agreement which puts American consumers and farmers at increased risk from unsafe food imports."²⁰

Their position was echoed by many American consumer and environmental organizations who argued that the Dunkel proposal would "promote downward harmonization."²¹ An official of the Community Nutrition Institute stated in 1991: "The term 'reasonable scientific justification' offers a misleading sense of objectivity, suggesting that it is the one and only one scientifically reasonable response to food safety hazards. But food safety laws are not just scientific -- they also reflect the level of risk that society is willing to accept in its food supply. [The S&P proposed agreement is based] on the false proposition that decisions can be determined exclusively by experts on scientific grounds . . . We are concerned that . . . this language . . . could unduly restrict government action to protect the environment and consumer."²²

Opposition to agricultural trade liberalization was organized by a coalition called the "Fair Trade Campaign." Formed during the mid-1980s, shortly after the Uruguay Round of GATT negotiations began, it consisted of various local and national organizations representing the interests of family farmers, including the National Family Farm Coalition comprised of 42 grassroots farm and rural advocacy organizations in more than 30 states, and the National Toxics Campaign, a coalition of both local and national environmental and consumer groups. This alliance of family farmers, consumer and environmental organizations focused its opposition to the Uruguay Round on its domestic health and safety implications. They claimed that the "harmonization of national rules under the GATT would result in the weakening of hard-won environmental and consumer protections that have become part of U.S. law."²³

Their criticisms of the proposed S&P Agreement's effect on American regulatory standards were subsequently supported by a wide range of national consumer and environmental organizations. According to an attorney with the Natural Resources Defense Council, "The pesticide industry has lost the battle in Congress, in the courts, at the state level and in the court of public opinion. Now industry, with the administration's help, seeks to undermine state and

²⁰ Press Release, May 15, 1990.

²¹ Quoted in Ursula Kettlewell, "GATT: Will Liberalized Trade Aid Global Environmental Protection? *Denver Journal of International Law and Policy*, 21, no. 1 (1992): 67.

²² Quoted in *The Greening of World Trade* (Washington D.C: Government Printing Office, 1993), p. 187.

²³ Ardith Maney, "Business, Consumers and the Protective State," (paper prepared for delivery at the Annual Meeting of the American Political Science Association, Chicago, Illinois, September 3 - 6, 1992), p. 16.

federal pesticide regulations through the back door of international trade."²⁴ Ralph Nader added: "More than one giant multinational corporation is watering at the mouth over the opportunities presented by the forthcoming GATT Treaty."²⁵

In June 1990, Congressmen Henry Waxman (D - Ca.) and Richard Gephardt (D - Mo.) introduced a resolution expressing the "sense of Congress" that it "would not approve legislation to implement international free trade agreements if any such agreement jeopardizes United States health, safety, labor or environmental laws."²⁶ They characterized the harmonization clause of the proposed treaty as a "hidden . . . time bomb . . . with dangerous ramifications" for American regulatory standards.²⁷ The resolution was endorsed by more than fifty environmental, consumer, labor and agricultural organizations, and passed unanimously by the House in the summer of 1992.

The S&P Agreement was subsequently defended by Mickey Kantor, the Clinton Administration's Trade Representative. He expressed confidence in "our ability to maintain our food safety laws and regulations," and stated that he was "disappointed in the continuing misperceptions expressed by some of those who appear to be our vocal critics."²⁸ However, in response to the criticisms of American consumer and environmental organizations, Kantor did propose a number of modifications in the original Dunkel draft, most of which were incorporated in the final text of the Uruguay Round agreement. The purpose of these changes was to reduce the vulnerability of American food safety laws to WTO scrutiny by making it easier for a nation to justify standards which exceeded international ones. While these concessions were relatively modest, the fact that the Administration felt compelled to insist on them in the final days of the Uruguay Round negotiations did reflect the extent to which American NGOs had become participants in the making of American trade policy.

²⁴ Brian Ahlberg, "Administration Trade Proposal Endangers US Health, Food-safety Standards," Press release, National Family Farm Coalition, Washington, D.C.

²⁵ Ralph Nader, "GATT Could Get Us," National Forum, July 16-22, 1990, p. 1.

²⁶ "Sierra Club Letter on Waxman-Gephardt Resolution," Inside U.S. Trade, February 21, 1992, p. S-5.

²⁷ "Gephardt-Waxman Letter on GATT and the Environment," Inside U.S. Trade, February 28, 1992, p. S-12.

²⁸ Burros, "A debate" p. B4.

The WTO

Reformulated Gasoline

The fact that the first trade dispute adjudicated by the WTO involved the alleged use of an environmental regulation as a nontariff trade barrier suggests the continued importance of trade and environmental linkages. On October 17, 1996, a dispute panel ruled that American compliance standards for reformulated gasoline violated American obligations under the WTO.²⁹ The standard in dispute, issued by the Environmental Protection Agency under the 1990 Clean Air Act Amendments, required the sale of clean-burning gasoline in the nation's smoggiest cities beginning on January 1, 1995. To provide refiners with sufficient time to adjust their production, the EPA issued a five-year interim standard rather than a fixed one. Each year between 1995 and 1997, refiners were required to reduce the amount of olefins, a chemical that contributes to ground-level ozone concentration, by a certain percentage, with 1990 as the base year.

However, because the EPA believed that foreign data for 1990 was unreliable, this rule only applied to American refiners. Foreign producers of gasoline were required to use the 1990 American average as their baseline. This meant that the standards applied to imported gasoline would in some cases be stricter and in other cases more lax than those for domestic producers. Venezuela, one of the primary suppliers of gasoline to the United States, filed a formal complaint with the GATT. It argued that the American rule violated the trade agreement's national treatment clause, which requires that all "like" products be held to similar standards, regardless of their country of origin. The EPA responded by proposing a corrective rule that allowed foreign refiners to establish their own baseline if they could supply adequate documentation. Venezuela's national oil company was able to do and Venezuela withdrew its complaint.

This compromise upset both American environmentalists, who regarded it as weakening an American regulatory standard in order to appease a foreign producer, and the American domestic refinery industry, which, having been forced by the 1990 Clean Air Act to invest billions of dollars in new technologies for refining gasoline, wanted to maintain a federal rule which protected them from less expensive imported gasoline. A coalition of American oil companies and environmentalists persuaded Congress to require EPA to restate its original rule.

²⁹ For a more detailed discussion of this trade controversy and the background to it, see David Vogel, " Trouble for Us and Trouble for Them: Social Regulations as Trade Barriers,," in *Comparative Disadvantages? Social Regulations and the Global Economy* Pietro Niovola, ed. Washington DC: Brookings Institution, 1997, pp. 119-124.

Venezuela responded by resubmitting its complaint, first to the GATT and then to the newly established WTO. It was joined by Brazil, another gasoline exporter to the U.S.

The WTO ruled in favor of Venezuela on the grounds that the U.S. had treated gasoline produced by foreign refiners differently than domestic ones and that it had not demonstrated that this difference was necessary to protect American air quality. The U.S. appealed the decision to a WTO internal review board, which in April 1996 affirmed the panel's ruling. Two months later the Clinton Administration announced that it would propose changes in the application of clean air rules to bring the United States into compliance.

While roundly criticized by environmentalists, compared to the tuna/dolphin case, the political fallout from the Venezuelan gasoline case was relatively modest. Not only was it difficult for the public to become outraged over different methods for calculating the base-line standard for a relatively obscure pollutant, but even some environmentalists were prepared to admit that the American rule was motivated more by protectionism than environmental protection. A report issued by the International Institute for Sustainable Development noted:

The fact of the case speak against the United States: by all accounts, the measures Brazil and Venezuela complained against are discriminatory and statements by US officials exist indicating that they were aware of this. This was also the case in which the trade barriers erected by the United States provided little environmental benefit, except perhaps to ease the political difficulties in applying the law.³⁰

Shrimp/Turtle

No sooner had the reformulated gasoline dispute been resolved that another environmentally-related trade dispute emerged, one whose political ramifications are likely to be much more controversial. In 1989, Congress passed legislation requiring that American registered shrimp boats be fitted with a device to protect turtles from becoming entrapped. In 1995, this regulation was applied to foreign fishing vessels. As a result, shrimps and shrimp products caught by foreign nationals whose countries did not require turtle protection devices could no longer be imported into the United States. India, Malaysia, Pakistan and Thailand requested the formation of a WTO dispute panel in October 1996. The four countries, whose

³⁰ The World Trade Organization and Sustainable Development: An Independent Assessment Winnipeg, Manitoba: International Institute for Sustainable Development, 1996 p. 41.

complaint was supported by a number of other Pacific Rim nations including Australia, argued that WTO rules prohibit a nation from imposing its domestic environmental laws outside its borders. The U.S. countered that international trade rules permit nations to take measures that are necessary "to protect natural resources;" the Americans claimed that most of the turtle species being killed by shrimpers were endangered.

While Thailand did enact legislation mandating turtle exclusion devices (TEDs) on the shrimp-crawl nets used by its fisherman, and is therefore exempt from the American ban, it is supporting the case as a "matter of principle."³¹ For its part, the U.S. shrimp industry is divided. While firms that deal with imported shrimp have criticized the law as discriminatory, American shrimpers have endorsed the ban on the grounds that it creates a level playing field. Should the U.S. lose, as most observers have predicted it will, America could still, under WTO rules maintain the ban. But it would be required either to pay compensation or permit those nations which had brought the case to impose restrictions on American exports equivalent in value to the decline in their shrimp exports to the U.S.

From the perspective of GATT/WTO jurisprudence, this case appeared structurally similar to the tuna/dolphin dispute. In both cases, the United States had used access to its domestic market to affect the conservation practices of its trading partners. But from another perspective, the cases differed. For while dolphins were not endangered--the American decision to protect them was dictated more by emotional considerations than by an interest in conservation --most of the turtle species being killed by shrimpers were in fact endangered. Moreover, not only was the cost of installing turtle exclusion devices relatively modest, but the U.S. had indicated its willingness to pay the costs of installing them on foreign fishing vessels. A WTO dispute panel ruling against the U.S. is likely to significantly increase criticisms of the WTO by environmentalists and redouble their demands for a change in WTO rules. But it remains to be seen whether it will provoke the public outcry that greeted the tuna/dolphin decision.

³¹ Chana Schoenberger, "Shrimp Dispute Tests U.S. Use of Trade to Protect Environment," Wall Street Journal July 18, 1997, p. A 14.

Tuna/Dolphin: The Resolution

While the shrimp/turtle was pending before the WTO, the tuna/dolphin dispute was finally resolved. In May 1992, the United States, Mexico and eight other tuna-catching nations signed the first major international accord to protect dolphins. This agreement was endorsed by the Earth Island Institute and other American environmental organizations. In October, Congress approved the International Dolphin Conservation Act, which authorized the United States to pursue an international agreement to establish a global moratorium on the use of purse seine nets which encircle dolphins, and provides for an embargo of up to 40 percent of a nation's fish exports to enforce compliance. David Phillips, Executive Director of the Save the Dolphins Project at the Earth Island Institute, described the legislation as "a breakthrough proposal for dolphins."³²

Nevertheless, the U.S. tuna embargo remained in effect because a 1993 amendment to the MMPA had reduced the US quota of dolphin kills to 800 in 1993 and to zero after February 28, 1994. Thus even though the fifty Mexican boats fishing in the ETP were only killing, on average, less than one dolphin for every shoal of tuna they netted, they were still in violation of the MMPA's 1.25 kill ratio since the number of dolphins being killed by the handful of American flagged vessels still tuna fishing in the ETP was virtually zero. While American officials admitted that "there is no longer a viable environmental argument" to continuing to enforce the embargo, environmentalists and their allies in Congress appeared "determined to enforce the law to the letter."³³

After three years of intensive negotiations, a compromise was reached between the United States and the Latin American nations whose vessels fished in the ETP. In exchange for allowing their tuna to be sold in the U.S. Mexico and ten other countries pledged to cap their annual dolphin kill at 5,000 animals per year. This compromise bitterly divided the environmental community. A number of important environmental organizations including Greenpeace and the World Wildlife Fund supported the compromise on the grounds that opening U.S. markets was the best way to encourage more countries to fish in a dolphin-friendly manner. However, it was strongly opposed by eight-five environmental and animal rights groups, who viewed the compromise a trade treaty masquerading as environmental policy. After intensive

³² "Congress Considers New Bill To Save Dolphins," *Dolphin Alert* (Fall, 1992): 2.

³³ "Must try harder," *Economist*, August 21, 1993, p. 22.

lobbying by both the Mexican government and the Clinton Administration, a bill implementing the 1995 Declaration of Panama was passed by the Congress in the summer of 1997, thus finally ending the seven-year tuna embargo.

The Beef Hormone Ban

Ironically, for all the concerns raised by American consumer and environmental groups about the potential impact of WTO rules on the weakening of American regulatory standards, the most important regulatory-related case to come before the WTO has involved a complaint filed by the United States. Under the terms of the S&P agreement incorporated into the Uruguay Round, nations were required to base food safety standards that affected international trade on international standards, unless they could demonstrate that these standards provided their citizens with inadequate protection.

Accordingly, following the establishment of the WTO, the United States redoubled its efforts to persuade the Codex Commission, an international body established under the auspices of the UN which establishes food safety and processing standards, to issue a standard for hormone use. In July 1995, following extensive debate, the Codex Commission officially approved the use of growth-promoting hormones in meat production. The U.S. promptly filed a complaint with the WTO on the grounds that the EU's hormone ban lacked scientific justification. Two years later a WTO dispute panel ruled that the nine year EU beef hormone ban was illegal. American officials were delighted with the ruling. One observed that the WTO had struck a blow against, "a web of discriminatory practices . . . which are among the most pernicious barriers to trade in both the developed and developing world." ³⁴

The EU appealed the dispute panel ruling. The Europeans also indicated that if the hormone ban was ultimately ruled illegal, they would choose to pay compensation to the U.S. than comply with it. This, of course, upset the American cattle industry, since it meant that the EU's ban of their exports, which the American National Cattlemen's Beef Association has recently estimated at \$250 million per year, would continue. A ruling in favor of the U.S. is thus likely to anger both American cattle producers and the Europeans, though for different reasons.

³⁴ Bruce Clark, "US hails EU beef imports ruling by WTO," Financial Times May 10 - 11, 1997.

The WTO Committee on Trade and the Environment

In January, 1995, the WTO General Council officially established a Committee on Trade and the Environment. (CTE) This Committee, which is open to all WTO members, has meet six to seven times each year. It has debated a number of issues, including WTO rules governing the exports of domestically prohibited goods and the growing use of eco-labeling by developed countries. The latter issue has proven extremely contentious. Those nations, primarily in northern Europe, which have made widespread use of eco-labels have defended them as a valuable source of information to consumers. Many of their trading partners, however, have expressed concern that the criteria used to award labels are biased in favor of domestically produced goods. A similar controversy has arisen over the compatibility of national packaging requirements with fair trade rules.

The most important issue addressed by the CTE concerns the relationship between multi-national environmental agreements (MEAs) and WTO rules. A number of international environmental agreements contain provisions obligating their signatories to restrict the import of goods which are either proscribed or which are produced in ways that are environmentally harmful. For example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) restricts or prohibits trade in endangered species while the Montreal Protocol both restricts trade in ozone depleting chemicals as well as in products made using proscribed chemicals. If a nation is a signatory to both an MEA and the WTO, the two compliment one another. But a potential problem can arise if a nation is a member of the WTO, but not a signatory to an MEA since, under current WTO rules, the former's exports to another WTO signatory cannot be restricted.

The EU, which maintains that "trade measures can be necessary to achieve the environmental objectives of these [environmental] agreements" has urged the CTE to support a change in the WTO agreement that would exempt trade restrictions that are sanctioned by MEAs from WTO challenges.³⁵ Such a rule change would affect approximately 180 agreements. The EU's proposal has been strongly opposed by developing nations, who fear that it could be used to coerce them into adopting the environmental policies and priorities of their "greener" trading partners.

³⁵ quoted in William Lasch III, "Green Showdown at the WTO," Contemporary Issues Series #85, Center for the Study of American Business, March 1997, p.12.

The Committee had hoped to resolve at least some of the issues on its agenda by the WTO ministerial meeting in Singapore in June 1996. But it was unable to do so. This impasse is in part due to the strong opposition of developing countries to any change in WTO rules that would weaken the WTO's current strictures against trade restrictions on environmental grounds. In fact, several developing countries would like the CTE to be abolished and its work turned over to the WTO's Standing Committee on Trade and Development on the grounds that the latter body would be more sympathetic to the interests of the WTO's poorer members in economic development.

But an equally important reason has been the lack of leadership by the United States. While the U.S. was the main supporter of the creation of the CTE, the Clinton Administration has shown little interest in proposing "greener" trade rules; indeed the Advisory Committee on Trade and Environment of the United States Office of Trade Representative has yet to meet. As one official in Geneva observed, "The US is proposing nothing and systematically trashing everyone's else's proposals. It is a major obstacle to getting anything done."³⁶ As a result, the only decision relevant to trade and environment made by the WTO Ministerial conference in Singapore was to make the CTE a permanent body of the WTO. This outcome was very frustrating to environmentalists who had looked forward to changes in WTO rules that would make the trade agreement more environmentally friendly following the conclusion of the Uruguay Round. A number have concluded that the environmental community should abandon any effort to "green" the WTO.

While the Committee remains stalemated, the issues with which it was formed to grapple are becoming increasingly important. For example, the United States has strongly criticized the EU's eco-labeling criteria, claiming that the European decision to base eco-labels on the life-cycle of a product has a "potential for discrimination against U.S. firms whose production processes and methods differ from those used in the EU while having comparable environmental impacts." The Office of the USTR has listed the EU's eco-labeling scheme in its annual report to Congress under "Super 301" as a topic of continuing concern."³⁷ Yet the use of eco-labels is rapidly proliferating: there are now more than twenty-five regional and national eco-labeling

³⁶ Frances Williams, "US holding up green trade," *Financial Times* July 26, 1996, p. 3.

³⁷ Venna Jha and Simonetta Zarelli, "Eco-Labeling Initiatives as Potential Barriers to Trade," in *Life-Cycle Management and Trade* Paris: OECD 1994, p. 64.

programs, each with its own criteria. According to the U.S. Council on International Business, "Environmental labeling programs have an undeniable impact on trade and have posed special obstacles to U.S. companies doing business internationally. . . . in their current form, eco-labels will continue to disadvantage U.S. companies."³⁸

Of even greater significance is the relationship between WTO rules and a future treaty on global climate change. Many of the provisions of such a treaty could conflict with WTO rules. For example, a global climate change treaty might include an agreement to tax products based on the amount of carbon emitted by their production. Yet WTO rules prohibit a nation from taxing an imported product on the basis of how it was produced outside its legal jurisdiction. Thus a signatory to a global climate change treaty could only apply the tax to goods within its borders, leaving domestic producers disadvantaged. By highlighting the tension between international trade rules and global environmental initiatives, a global climate change treaty might break the deadlock in the CTE over proposals to reform WTO rules to make them more environmentally friendly. At the same time, it would force the Clinton Administration to play a more constructive role in the deliberations of the CTE.

Trade and Environment and NAFTA

For all the visibility surrounding the impact of the GATT and the proposed Uruguay Round Agreement on environmental and consumer standards, American environmental and consumer organizations played a relatively modest role in both the politics of ratification and the terms of the final agreement. By contrast, their impact on both the nature of the debate over Congressional approval of the North American Free Trade Agreement and the provisions of the agreement itself was much more central. It is NAFTA which was critical in placing trade policy on the agenda of the American environmental movement.

Environmental Opposition

Opposition to NAFTA was spearheaded by citrus and vegetable growers, the American textile industry, and the AFL-CIO, all of whom feared competition from Mexican producers and their vast pool of cheap labor. But from the outset much of the criticism of NAFTA focused on the proposed treaty's impact on environmental and consumer protection in the two countries.

³⁸ quoted in Lasch, p. 9.

Alternatively playing the roles of unrelenting opponent and constructive participant, the debate over NAFTA marks the coming of age of the American environmental movement in the politics of trade policy in the United States.

One of the main concerns of American consumer and environmental organizations focused on the impact of Mexico's maquiladora factories, which, due to the lax enforcement of Mexico's environmental laws, were generating substantial amounts of toxic waste and pollution. The National Toxics Campaign reported that many maquiladoras were disposing their hazardous wastes illegally, contaminating rivers and streams.³⁹ Environmentalists pointed out that contamination levels in the Rio Grande were many times greater than those considered safe for recreational use.⁴⁰

Nor were the effects of this pollution confined to Mexico; the border regions of the United States were also affected by Mexican environmental practices. Raw sewage dumped into the New River in northern Mexico had been carried across the border to California, while Tijuana's lack of adequate waste-disposal had polluted beaches in San Diego. A public health official from El Paso, Texas, already faced with rates of hepatitis, dysentery and tuberculosis substantially above the US average, warned that "unless the government marries free trade and the environment, we will be totally burnt. We cannot cope with more growth."⁴¹ One American environmental writer predicted that, "If Bush gets his version of free trade between the United States and Mexico, this systematic poisoning of an entire region . . . could prove impossible to stop."⁴² Craig Merrilees, co-director of a grass-roots anti-NAFTA organization, stated: "We think the experience across the border is the best predictor of what will happen under a broader agreement. It's a wild-West, dump-and-run kind of situation that has turned the 2,000 mile border into one big Love Canal."⁴³

Environmentalists also feared that investment liberalization, in the context of Mexico's laxer pollution enforcement, would encourage American producers to re-locate to Mexico. This would not only exacerbate Mexico's pollution problems; but it would also cost American jobs. A third concern revolved around the trade agreement's impact on American regulatory standards.

³⁹ Eva Regnier, "Trade Policy and the Environment: U.S.-Mexico Free Trade, *Journal of the IES*, 35, no. 2 (March/April 1992): 83.

⁴⁰ Pastor, "NAFTA as the Center. . .," p. 182.

⁴¹ Damian Fraser, "Environment Hit by too much Free Trade," *Financial Times* July 2, 1992, p. 4.

⁴² William Burke, "The Toxic Price of Free Trade in Mexico," *In These Times* May 22-28, 1991, p. 2.

⁴³ Jonathan Marshall, "How Ecology Is Tied to Mexico Trade Pact," *San Francisco Chronicle*, February 25, 1992, p. A8.

Echoing the fears of downward harmonization that they had also voiced in connection with the S&P Uruguay Round Agreement, consumer groups predicted that increased exports of Mexican produce to the U.S. would expose the American public health to a growing "circle of poison," since many pesticides prohibited or suspended by EPA were still being used by Mexican farmers. "Fruit and vegetables imported from Mexico have DDT and other pesticide residues that have been banned in the US. If a free trade agreement further liberalizes agricultural commerce, years of US environmental reform could be undone."⁴⁴

In July 1990, Friends of the Earth became one of the first American environmental groups to issue a statement on NAFTA. In a document submitted to the International Trade Commission, the organization contended that the negative environmental impact of the FTA with Canada indicated the need to extend the scope of U.S.-Mexico negotiations to include environmental issues. Subsequently, twenty-four Canadian, Mexican and American environmental groups issued a declaration calling for the inclusion of environmental issues in the negotiations over NAFTA.⁴⁵

U.S. and Mexican negotiators initially dismissed these challenges out of hand; they insisted that NAFTA would be limited to liberalizing trade in goods and services. Herminio Blanco, Mexico's chief negotiator, stated that Mexico had no intention of changing its environmental laws, while the US Trade Representative Robert Fisher explicitly rejected any widening of the scope of the negotiations.⁴⁶ Four months later, representatives of seventeen American labor, environmental, agricultural, consumer and religious organizations held a press conference in Washington to demand that Congress not extend fast track negotiating authority for NAFTA.⁴⁷ Their position was supported by produce growers from Florida, who urged that their fruit and vegetables be excluded from the agreement because lower wages and weaker environmental regulations in Mexico amounted to unfair competition.

For American environmental groups, often frustrated by their inability to have a greater impact on environmental policy outside the United States, the political opportunity offered by NAFTA was unprecedented. The debate over the treaty in the United States provided them a vehicle for influencing the environmental policies of a developing country. As Stewart Hudson

⁴⁴ Richard Rothstein, "Exporting Jobs and Pollution to Mexico," *New Perspectives Quarterly*, 8, no. 1, (Winter, 1991): 23.

⁴⁵ *Ibid.*, p. 20.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, pp. 18-19.

of the National Wildlife Federation put it, "We have to take a stand here and set a correct model."⁴⁸ The participation of environmental groups in the anti-fast track coalition helped legitimate Congressional opposition to the extension of Presidential fast-track negotiating authority, since "opposing fast-track on environmental grounds was easier than arguing the concerns of labor with the attendant risk of being accused of being in the pocket of `special interests."⁴⁹

The environment quickly became a "lightning rod for legislators who have many reasons to be obstreperous on free trade."⁵⁰ House Majority leader Richard Gephardt, long an opponent of trade liberalization, stated in a public letter to the President that his willingness to support NAFTA depended not only on provisions to protect American jobs, but also on the inclusion of strict environmental safeguards. He argued that "neither Mexico nor Canada nor America is benefited by a system that benignly looks upon massive air pollution, poisonous pesticides and child labor as `comparative advantages," adding that American farmers "can not and should not have to compete against farmers who use pesticides that fail to meet U.S. standards."⁵¹

As the debate over NAFTA heated up in the spring of 1991, President Bush belatedly recognized that the environmental critique of the agreement threatened NAFTA's approval in Congress. Fearful of an anti-NAFTA alliance between labor and environmental groups, the Bush Administration began to reach out to environmental organizations. Bush agreed to the request of Senator Bentsen (D. -Texas) and Representative Rostenkowski (D- Il.) that the USTR appoint five representatives from environmental NGOs to its top level NAFTA advisory committees and the White House pledged to conduct parallel negotiations to develop an environmental side agreement.

The United States and Mexico subsequently released a draft plan committing both countries to cooperate to improve environmental quality along the border.⁵² EPA Administrator William Reilly stated that the plan was intended to "reassure those who have concern about the

⁴⁸ Roberto Suro, "In Search of a Trade Pact With the Environment in Mind," New York Times April 14, 1991, p. E4.

⁴⁹ Ibid, p. 20.

⁵⁰ Ibid, p. 4.

⁵¹ Letter to President George Bush from Congressmen Richard Gephardt, March 27, 1991.

⁵² Keith Bradsher, "U.S. and Mexico Draft Plan to Fight Border Pollution," New York Times, April 2, 1991, p. C1, C6.

environmental consequences of free trade."⁵³ It called for additional investment in wastewater treatment plants, increased restriction on cross-border shipments of hazardous wastes, and the hiring of more officials to enforce environmental laws in Mexico. The following month, U.S. Trade Representative Carla Hills assured environmentalists that NAFTA would not be rushed through until proper safeguards were in place. She promised that the United States was "not going to bend environmental and safety commitments," adding that "we've no intention of letting pesticides come in from Mexico as we wouldn't from Italy or France."⁵⁴

Two months later, both governments announced a highly publicized plan to clean up the American-Mexican border. It committed both countries to spend one billion dollars over three years, about two thirds of which would come from Mexico, to provide water treatment plants, better roads and solid waste disposal sites along the border. The plan represented the first large-scale attempt to integrate the planning and environmental strategies of the two governments and represented an explicit recognition of the linkages between natural resources and trade.

Nonetheless, environmental opposition to NAFTA became increasingly influential. "With organized labor unable to make its traditional protectionist arguments stick, environmental objections to the treaty . . . emerged as a focus of national debate."⁵⁵ David Ortman of Friends of the Earth observed that he was "astounded at the number of members of Congress " who supported the demands of the environmental movement that the trade agreement and environmental regulation be explicitly linked. Congressman Bill Richardson of New Mexico, a supporter of free trade, predicted that, "what will decide the free trade agreement will not be the commercial side . . . but the environmental issue."⁵⁶

The Greening of NAFTA

Although NAFTA was officially signed by the heads of state of all three nations shortly after the 1992 US Presidential elections, newly elected President Bill Clinton declined to submit the trade agreement to Congress. Instead, the new administration began to negotiate a number of changes in the agreement, including the addition of a supplementary environmental agreement. A

⁵³ Ibid, p. C6.

⁵⁴ Jane Kay, "Environmentalists Urge Tough Mexico Trade Law." San Francisco Examiner, September 9, 1991.

⁵⁵ Jonathan Marshall, "How Ecology Is Tied To Mexico Trade Pact," San Francisco Chronicle, February 25, 1992, p. A8.

⁵⁶ Fraser, "Mexico's Environment," p.4.

new agreement was announced in the summer of 1993, when the Administration submitted the treaty, along with an environmental side agreement, to Congress.

The side agreement prohibits any country from lowering its environmental standards to attract investment and explicitly permits each country to impose stringent environmental standards on new investments, provided they apply equally to foreign and domestic investors. It also requires all three countries to cooperate on improving the level of environmental protection and encourages, but does not require, the upward harmonization of regulatory standards. Furthermore, as the direct response to environmental concerns over the GATT's decision in the tuna-dolphin case, the agreement specifically states that the provisions of international agreements on ozone levels, hazardous wastes and endangered species take precedence over NAFTA.

The trade agreement also addressed the thorny issue of standards harmonization. While "NAFTA in no way attempts to reduce national standards to a lowest common denominator . . . it does seek to limit the ability of signatories to use such regulations as surreptitious protectionist devices."⁵⁷ A Committee on Standards-Related Measures was made responsible for developing common criteria for assessing the environmental hazards of products as well as methodologies for risk-assessment while a Committee on S&P Measures will seek to harmonize these standards "to the greatest extent practicable" and to minimize their negative trade effects.⁵⁸ If one party questions another's standards, the burden of proof is on the complaining country to show that a regulatory measure was inconsistent with the agreement, in contrast to the WTO which places the burden of proof on the country which enacted the regulation.

The agreement's most innovative feature (though formally separate from NAFTA) is the Supplemental Agreement on the Environment. Negotiated by the Clinton Administration with considerable input from American environmental organizations, it establishes a Commission on Environmental Cooperation, headed by a Secretariat and a Council composed of the senior environmental official from each country, advised by representatives of environmental organizations. The CEC has authority in a number of areas. It is empowered to consider trade-environment-data, assess the environmental impact of projects that are likely to have trans-

⁵⁷ Roberto Salinas-Leon, "Green Herrings," *Regulation*, (Winter 1993): 31.

⁵⁸ *Ibid.*

boundary effects and explore ways of improving the compatibility of environmental regulations and technical standards in the three countries.

While the side agreement does not require any of the three signatories to enact new environmental laws, it does authorize the use of fines as well as trade sanctions for the non-enforcement of existing ones (though only the former can be applied against Canada). It also extends to citizens the right to make submissions to the commission on any environmental issue, requires the Secretariat to report its response and may require that its reports be made public. In fact, these provisions provide more opportunity for non-business participation than current American trade law, which only permits aggrieved producers to file complaints with or sue the ITC. Although the Commission is empowered to address any environmental or natural resource issue, the range of issues subject to dispute settlement panels is limited to the enforcement of those environmental laws which are related to trade or competition among the parties.

The debate over NAFTA sharply divided the environmental community, as it did the business community. A number of NGOs, including Friends of the Earth, Public Citizen and the Sierra Club, continued to strongly oppose NAFTA. They argued that the agreement was both too weak and too powerful: it would both be ineffective in making Mexico enforce its environmental laws and strong enough to undermine U.S. regulatory standards. Other environmental groups, however, chose a different strategy: they were willing to support the agreement in exchange for participation in shaping its terms. As a result, these groups were able to exercise "greater influence over the tone and content of the environmental demands for NAFTA than enjoyed by adversarial organizations."⁵⁹ In the end, six major national environmental organizations, including the Natural Resources Defense Council, the Audubon Society, the Environmental Defense Fund, and the World Wildlife Federation, endorsed the agreement. They concluded that the provisions of the supplementary environmental agreement on which they had insisted and helped the Clinton Administration negotiate offered adequate regulatory safeguards.⁶⁰

NAFTA thus marked a new level of environmentalist participation in the making of American trade policies. Previous debates over trade agreements negotiated by the United States had been dominated by interest-groups whose primary concern was their economic impact. Now,

⁵⁹ Audley, "Environmental Interests . . ." p. 343.

⁶⁰ For criticisms of the environmental provisions of both NAFTA and the side agreement, see Gary Hufbauer and Jeffrey Scott, *NAFTA: An Assessment*, revised edition, (Washington D.C: Institute for International Economics, 1993), pp. 92-97.

for the first time, the regulatory dimensions of a trade agreement had become politically salient. "The principal legacy of the NAFTA process . . . is the mobilization of environmental groups in the trade policy arena. For the first time environmentalist groups have made a serious run at shaping international trade policy."⁶¹ Literally hundreds of meetings took place between executives of large environmental groups and Administration officials. And the support of environmentalists was, in turn, critical to the agreement's Congressional passage.

Trade and Environment after NAFTA

NAFTA and Environmental Regulation

Since the passage of NAFTA, the participation of American environmental organizations in the trade-environmental dialogue has declined.⁶² One reason is limited resources. Even those organizations appointed to advisory boards through NAFTA have lacked the resources to maintain a high level of participation. In addition, the environmental political agenda is large and highly dynamic. Since NAFTA, other concerns, such as the defending environmental laws and regulations from the Republican controlled Congress elected in 1994, or supporting EPA's efforts to issue strict air pollution standards under the 1990 Clean Air Act Amendments, have become more pressing. To the extent that while many environmental groups are interested in global issues, their attention has been focused more on problems such as global warming and biodiversity rather than on trade-environment rules or disputes.

For all the controversy surrounding the environmental provisions of both NAFTA and the Side Agreement, the actual impact of both on regulatory standards and their enforcement has been relatively modest. The CEC has established an office in Montreal with thirty employees. To date it has received four petitions by environmental organizations. Two of the complaints, which were brought by American NGOs alleging the failure of the United States to enforce its own environmental laws, were rejected on the grounds that the actions about which they complained were actually legislative changes in national law rather than the lack of enforcement of existing laws.

⁶¹ Stephen Mumme, "Environmentalists, NAFTA, and North American Environmental Management, *Journal of Environment and Development*, 2, no. 1 (Winter 1993): 215.

⁶² John Audley, *Green Politics and Global Trade: NAFTA and the Future of Environmental Politics* Washington DC: Georgetown University Press, 1997 p.131-2.

A third petition requested the CEC Secretariat to prepare a factual record explaining the death of forty thousand migratory birds in the Silva Reservoir, located two hundred miles northwest of Mexico City. It did not allege an enforcement failure by Mexico but instead requested information. The petition was accepted and the Mexican government cooperated with an extensive investigation by a trinational scientific panel. The panel concluded that the deaths were caused by botulism, probably attributable to untreated urban and industrial sewage emptying into the reservoir. The CEC proposed that a sewage treatment facility be constructed with some of the costs shared by the three NAFTA signatories.

In August 1996, the CEC agreed to prepare a factual record based on a petition by Mexican environmental NGOs which alleged that the Mexican Government had failed to follow its own environmental laws when it authorized the construction of a five-hundred meter pier and cruise ship terminal that threatened an important coral reef at Cozumel. This marked the first time that the CEC secretariat had acted on a complaint under Article 14 of the environmental side accord which permits any person or organization to file a petition alleging the lack of enforcement of environmental laws by any of the three NAFTA countries.

The Mexican government reluctantly agreed to the preparation of report by the CEC but sharply dissented from its finding that it has violated its own environmental laws by permitting construction of the pier and terminal. It claimed that approval for the project predated NADRA and therefore the CEC lacked jurisdiction. Construction of the pier and terminal, which Mexico claims is needed to handle increased tourism that is a major source of revenue in this very impoverished region, had continued to go ahead. Under the provisions of the side agreement, either the U.S. or Canada can petition for the imposition of trade sanctions or fines against Mexico, but to date neither has done so.

The CEC does have some accomplishments. For example, it has established a North American environmental research program, begun development on a North American Pollutant Release Inventory to monitor air quality and has initiated a plan to protect various threatened and endangered species. Most importantly, the three NAFTA signatories have agreed to phase out or reduce the use of a number of dangerous chemicals and pesticides. "Taken together, these actions suggest that the CEC may be developing into an institution that could have significant

effect on some environmental issues in North America."⁶³ However, NAFTA and the negotiations associated with it have had very little impact on the most pressing environmental issue associated with Mexican-American relations, namely the reduction of transboundary pollution. While funds have been earmarked for pollution abatement in the border region, to date only a few projects have been funded.

The Future of Trade/Environmental Linkages

NAFTA has significantly affected the politics surrounding the possible extension of NAFTA to include Chile. From the onset of negotiations between the U.S. and Chile, it was clear that the latter's environmental record would be an important issue. As the Financial Times noted in May, 1994, "the environment is likely to prove the biggest sticking point. Chile's mining, fishing forestry and fruit industries--backbone of the export sector-- have been criticized on environmental grounds."⁶⁴ For its part, Chile began to make a number of efforts to improve its environmental performance. It has also indicated its willingness to include environmental provisions in a trade agreement with the U.S., provided American demands did not damage the competitiveness of its economy. In December 1995, Chile and Canada announced their intention to negotiate an Agreement on Environmental Cooperation as part of a free trade agreement between the two countries. Based on the North American Agreement on Environmental Cooperation, these agreement reflected the strong and growing public interest in Chile in environmental issues and was intended to facilitate the eventual inclusion of Chile into NAFTA. Chile has since entered into free trade agreements with both Canada and Mexico.

But in the U.S., the place of trade-environment linkages in any future trade agreement has proved much more contentious. On balance, political developments since the approval of the Uruguay Round Agreement in December 1994, have made the American environmental community increasingly critical of the role of trade agreements in improving or even protecting environmental quality. While their fears that NAFTA and the WTO would weaken American environmental and consumer laws have not been realized, they have been disappointed by the apparent inability of trade liberalization to strengthen environmental standards. No progress has been made in changing WTO rules to make them more compatible with stricter national and

⁶³ Richard Steinberg, "Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development," *American Journal of International Law* Vol. 91, 1997, p. 250-1.

⁶⁴ David Pilling, "NAFTA accord back on Chile's agenda," *Financial Times* May 27, 1994, p. 7.

global regulatory standards, including the promotion of sustainable development. They are equally disappointed with the environmental impact of NAFTA. As a specialist on trade policy for the Sierra Club put it, "the side agreements really haven't delivered on commitments made by the Clinton Administration in 1993."⁶⁵ Even those environmental organizations which supported the passage of NAFTA now insist that the environment become a priority "on the par with other negotiating objectives" in trade talks rather than be included in a side agreement as it was under NAFTA.⁶⁶ Not surprisingly, those environmental groups that did oppose NAFTA are equally opposed a free trade agreement with Chile and other Latin American nations.

A number of Congressional Democrats, led by Richard Gephardt, the Democratic House leader, expressed their opposition to any reauthorization of fast-track unless both workers' rights and environmental protection were built into any new trade agreement itself, rather than in a side accord as was done with Mexico. According to Gephardt, NAFTA has proven a failure: along the Mexican border "each day the environment dies another death."⁶⁷ Gephardt's position reflects the extent to which both trade unions and many environmental organizations have seized upon the issue of labor and environmental standards as a way of challenging future trade agreements. Clearly, the stricter or the more extensive the labor and environmental requirements of any new trade agreement negotiated by the United States, the more disadvantageous it will be for America's trading partners, and thus the more difficult it will be to negotiate.

The debate over the renewal of the reauthorization of fast-track issue in the fall of 1997 revealed the extent to which the issue of trade/environmental linkages has become highly polarized. Congressional Republicans strongly opposed including either labor or environmental standards in the provisions of any new trade agreement. Their position was endorsed by a group of more than fifty American international economists who claim that American insistence on uniform standards in the face of large international differences in regulatory requirements would hurt poor countries and "slow down or even possibly halt the opening up of world markets through trade-liberalizing negotiations. Unions and environmental groups were equally insistent that fast track reauthorization mandate negotiations on environmental and labor standards.

⁶⁵ Anthony DePalma, "Nafta Environmental Lags May Delay Free Trade Expansion," New York Times, May 21, 1997, p. A4.

⁶⁶ Nancy Dunne, "Chile's Nafta hopes fade as trade pacts lose US favor," Financial Times October 2, 1997, p. 6

⁶⁷ David Sanger, "Republicans Say The Trade Bill Is In Big Trouble," New York Times October 1, 1997, p. A14

The Clinton Administration, under increasing pressure from business to secure reauthorization of fast-track not only to extend NAFTA to Chile and other Latin American nations but also to write new WTO rules for services and the protection of intellectual property rights, decided to back the Republican position.⁶⁸ Abandoning an earlier promise to make American's trading partners adopt labor and environmental standards as a part any future trade agreement, the Administration announced that it would not seek to include such standards as part of an agreement's core provisions. However, in an effort to appease Congressional Democrats, the Administration did promise both to negotiate separate environmental and labor side-agreements when appropriate and to seek to work through international organizations to strengthen both labor and environmental standards on a global basis.

Nonetheless, the Administration was unable to secure Congressional approval of fast-track reauthorization, though this had more to do with the strong and effective opposition of organized labor than with the influence of American environmental community. Still the fact that the former relied so heavily on the latter's arguments about downward harmonization reveals the extent to which trade/environmental linkages have become a permanent part of the political agenda of trade policy in the United States.

⁶⁸ Amy Borrus, "Business Is In a Hurry For Fast-Track," Business Week September 15, 1997, p. 38-9.