The Convergence of Trade and Environmental Law

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The international community in recent years has committed to increasingly stringent and far-reaching accords on environmental protection. These commitments include global conventions to control chemicals that damage the earth's stratospheric ozone layer, the transportation and disposal of hazardous wastes, "greenhouse" gas emissions that may lead to global warming, and measures to preserve biological diversity and endangered species. At the same time, many countries are adopting and enforcing sweeping domestic environmental measures. These international and national measures regulate manufacturing processes, waste treatment and disposal methods, and increasingly, consumer and industrial products. Much of this regulatory activity is now taking place under the rubric of "sustainable development." This concept is often interpreted as an approach to development that seeks to satisfy the needs of present generations without compromising the ability of future generations to meet their own needs.

Because environmental law is largely concerned with imposing restrictions (on the production of goods) while trade law is chiefly interested in achieving liberalizations (on the sale of goods), the world faces difficult questions about the compatibility of pervasive environmental regulations with entrenched rules to combat trade protectionism. Trade and environment issues have arisen most prominently under the trade rules embodied in the General Agreement on Tariffs and Trade (GATT), *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187. While there are other trade agreements, of course, none has GATT's scope or impact on the world economy.

The increasing reliance in international environmental conventions on trade sanctions and incentives to encourage broader participation in such agreements raises questions about whether such agreements are consistent with the obligations of parties to GATT. In addition, GATT's success in lowering tariff barriers has prompted resourceful countries to enact nontariff barriers, some of which masquerade as legitimate efforts to protect the environment, health or safety of their citizens. Moreover, growing political demands for environmental protection in many countries increase the risk that certain measures may go beyond reasonable environmental concerns and act as "green barriers" to free trade. Governments are also increasingly pressed by environmental advocates to respond unilaterally to environmental concerns outside national borders. On the other hand, domestic industries advocate unilateral trade measures in response to lower standards of environmental protection in other countries. These calls for action in response to extraterritorial concerns have forced GATT parties to consider whether and to what extent GATT allows the use of trade measures in response to extraterritorial environmental and environmentally related competitive concerns.

The international community's treatment of trade and environment issues under GATT and other accords will have a number of impacts on American business. The resolution of these trade and environment issues will change or clarify the trading rules and environmental controls governing industries in the United States and elsewhere, which will likely have the indirect effect of determining whether certain industries are able to compete in domestic and global markets over the long term.

Briefly examined are certain trade and environment issues that have arisen under current GATT rules, and highlighted are a number of other key related issues. GATT's perceived "insensitivity" to environmental concerns has greatly influenced the denouement of the North American Free Trade Agreement (NAFTA). This "greener" trade accord will undoubtedly serve as at least a starting point, if not a model, for future rounds of trade negotiations under GATT. Finally, the roles of international organizations, standard-setting bodies, and nongovernmental organizations in the trade and environment field are highlighted.

The General Agreement on Tariffs and Trade

GATT is a multilateral treaty which has provided a framework of rules governing most of the world's trade since 1948. Presently, more than 100 countries are contracting parties to GATT. One of the fundamental objectives of GATT is to raise living standards throughout the world by liberalizing international trade. Under the theory

Editor's Note: Public Citizen v. U.S. Trade Representtive, *was decided by the D.C. Circuit on September 24, 1993. The court ruled that the U.S. Trade Representative is not required under NEPA to prepare an EIS on the negotiation and signing of NAFTA.*

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of comparative advantage, liberalized trade should benefit all parties to GATT by allowing each country to specialize in those economic activities it performs best.

Article I of GATT obligates parties to conduct trade with other GATT parties on terms no less favorable than that party affords to any other trading partner (the most favored nation (MFN) principle). Article II requires parties to adhere to specific tariff limits on certain products ("bound tariffs"). Article III of GATT provides "national treatment" for imported products by prohibiting parties from treating imports differently (through regulation of sales, distribution or taxation) from "like products" produced domestically. Article XI obligates parties to use only taxes or duties in restricting trade, and generally prohibits the use of quotas, import bans or similar quantitative import restrictions.

GATT's only references to environmental protection are found in two limited exceptions provided to the trade liberalization rules. Article XX(b) provides that parties may adopt and enforce measures "necessary to protect human, animal or plant life or health." Article XX(g) allows parties to adopt and enforce measures for the conservation of exhaustible natural resources provided that such measures also apply to domestic production or consumption.

Some parties to GATT have also adopted supplementary agreements, known as codes, that only apply to the signatories to such agreements. One such code, the Agreement on Technical Barriers to Trade (or Standards Code), addresses the trade impacts of domestic technical codes and regulations. The GATT Standards Code is intended to discipline the use of product-related standards including technical or design requirements. The Code's goal is to avoid "unnecessary obstacles to international trade." Signatories are encouraged to rely on international standards in developing their own standards.

Under GATT, trade disputes that cannot be resolved through consultation between the parties may be referred to a three-member panel of experts appointed by the GATT Council. Panel decisions are not considered official GATT decisions until adopted by the GATT Council.

GATT Panel Decisions Concerning the Environment

GATT panels have ruled on a number of disputes involving environmental measures affecting trade. The GATT panel decisions discussed below illustrate general GATT rules and establish the context for the current trade and environment debate.

In 1982, a GATT panel, convened at the request of Canada, found a United States tuna import ban to be in violation of GATT. United States: Prohibition of Imports of Tuna and Tuna Products from Canada, Report of the Panel, GATT Doc. No. L/5198, BISD 29 Supp. 91 (1982). The United States had banned the import of tuna and tuna products in 1979 under the Fishery Conservation and Management Act. The ban followed Canada's seizure of nineteen United States fishing vessels for fishing in Canada's Exclusive Economic Zone (the boundary of which was, at the time, disputed by the United States). The Fishery Conservation and Management Act directed the Secretary of the Treasury to prohibit the import of fish or fish products from countries that seize United States vessels for fishing within jurisdictional waters in instances where the United States does not recognize the jurisdictional claim.

Canada argued that the United States ban violated Article I (MFN), Article XI (general prohibition on quantitative restrictions) and Article XIII (obligation not to impose discriminatory quantitative restrictions). The United States argued that its ban on imports of tuna and tuna products was permissible under Article XX(g) because tuna was an exhaustible resource. The GATT Panel concluded that the United States action violated GATT and was not within the exception of Article XX(g) because the United States had not restricted its own production (harvest) of tuna.

In an action brought in 1987, Canada and the European Community (EC) requested a GATT panel to consider whether certain taxes levied by the United States on petroleum imports pursuant to the Superfund Amendments and Reauthorization Act of 1986 (SARA) violated GATT. United States: Taxes on Petroleum and Certain Imported Substances, Report of the Panel, GATT Doc. L/6175, BISD 34 Supp. 136 (1987). The taxes collected were to finance the "Superfund" for hazardous waste cleanups. The panel found that SARA imposed a higher tax on imported petroleum products (11.7 cents per barrel) than was levied on petroleum products produced domestically (8.2 cents per barrel). On this basis, the panel found that the United States had violated the national treatment requirements of Article III by taxing imports at a higher rate than "like products" produced domestically. Following the adverse GATT ruling, the United States equalized the taxes at 9.7 cents per barrel.

The United States in 1990 requested a GATT panel to review cigarette import restrictions and cigarette taxes adopted by Thailand allegedly in furtherance of its public health policy. Thailand: Restrictions on Interpretation of and International Taxes on Cigarettes, Report of the Panel, GATT Doc. DS10/R, BISD 37 Supp. 200 (1990). Under a 1966 law, Thailand required a license for the im-

port or export of tobacco, including cigarettes. Only one Thai tobacco company had been given such a license. Thailand also imposed a higher excise tax on imported cigarettes than on cigarettes produced domestically.

The United States challenged the Thai restrictions and tax scheme, arguing that the virtual import ban was a quantitative restriction prohibited under Article XI. The United States also argued that the higher taxes on imports (if they were allowed) violated the national treatment obligations for products under Article III. In response, Thailand asserted that the virtual prohibition on imports was permitted under Article XX(b) because the restrictions were part of a public health policy aimed at reducing tobacco consumption.

The panel interpreted the Article XX(b) exception narrowly, concluding that the word "necessary" in Article XX(b) required Thailand to take steps to fulfill its public health policies that were the least inconsistent with GATT obligations. The panel found that because Thailand had a number of options for fulfilling its public health goals that did not violate Article XI, its de facto prohibition on imported cigarettes was not "necessary" under Article XX(b).

In 1991, Mexico requested a GATT panel to consider whether the United States had violated GATT rules by imposing a ban on the import of commercial yellowfin tuna and yellowfin tuna products from Mexico pursuant to the Marine Mammal Protection Act (MMPA). United States: Restrictions on Imports of Tuna, Report of the Panel, GATT Doc. DS21/R *reprinted in* 30 I.L.M. 1594 (1991) (Tuna/Dolphin decision). This panel decision brought the trade and environment debate to the forefront of international trade and environmental policy in part because it involved measures to save dolphins.

The MMPA, among other things, seeks to reduce the incidental "take" (i.e., killing, harming or capturing) of marine mammals by commercial fishing operations. The MMPA and its implementing regulations set limits for the number of dolphins that can be taken by United States fishermen in the Eastern Tropical Pacific (ETP). MMPA regulations also impose harvesting (production process) rules on the United States fleet.

In the ETP, dolphins are often found on the surface of the water above schools of tuna. This association between tuna and dolphin allows fishermen to "set on dolphins" with purse-seine nets to capture the tuna, often resulting in death or injury to dolphins.

The MMPA requires the United States to ban the import of yellowfin tuna or yellowfin tuna products caught in the ETP by vessels registered in other countries if the exporting country cannot demonstrate that its regulatory regime regarding the taking of marine mammals is comparable to that of the United States. The MMPA also requires that ninety days after a direct import embargo is imposed, the import of such products from any "intermediary nation" (i.e., any nation that imports tuna from an embargoed country and exports the tuna to the United States) is also prohibited unless the intermediary nation has itself acted to prohibit tuna imports from the country subject to the direct embargo.

Mexico argued that the embargo was a quantitative restriction prohibited under Article XI of GATT. The United States argued that the measures imposed were internal regulations imposed at the border ("point of importation restrictions") permissible under Article III. The United States also argued that even if the embargo were inconsistent with Article III, the measures were within the scope of the exceptions in Article XX(b) (necessary to protect animal life or health) and Article XX(g) (relating to the conservation of exhaustible natural resources).

The GATT panel concluded that the ban on imports of certain tuna products from Mexico and other "intermediary nations" was a quantitative restriction contrary to Article XI. The panel found that the embargo was not an internal regulation applied at the point of import (permitted under Article III) because the MMPA did not apply to the product (tuna) but was directed instead to a production method (tuna harvesting). More significantly, the panel concluded that the Article XX(b) and Article XX(g) exceptions do not apply "extrajurisdictionally" to concerns or resources outside the jurisdiction of a contracting party. The panel reasoned that to allow extrajurisdictional application of the Article XX exceptions would allow each party to unilaterally determine the conservation policies from which other parties could not deviate without jeopardizing their rights under GATT. Such an approach, the panel concluded, would jeopardize the multilateral framework of GATT. This decision has not yet been adopted by the GATT Council.

In 1992, the United States enacted the International Dolphin Conservation Act (IDCA) and the High Seas Driftnet Fisheries Enforcement Act which together established certain exemptions from the intermediary embargo provisions of the MMPA. The IDCA allows countries to avoid the prohibition on imports by certifying that tuna from a direct embargo country had not been imported in the preceding six months (previously, countries were required to prohibit such imports to avoid the secondary embargo). Despite the modification, the EC has requested a GATT panel to determine whether the United States embargo on certain tuna and tuna products from intermediary nations is consistent with GATT. The panel has not yet ruled on the EC challenge.

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Although the Tuna/Dolphin decision has not yet been adopted by the GATT contracting parties, delegates to the 1992 United Nations Conference on Environment and Development adopted the Rio Declaration which supports the principle that countries should avoid using unilateral actions in response to environmental concerns outside their jurisdiction. The principles endorsed in the Rio Declaration are nonbinding; however, the Declaration casts further doubt on the appropriateness under GATT of a country imposing unilateral trade restrictions in response to extrajurisdictional environmental concerns. In June 1993, the Organization for Economic Cooperation and Development (OECD) also issued a communique suggesting that member countries should avoid environmental measures that disrupt the multilateral system.

More recently, the EC in May 1993 took issue with other United States taxes aimed primarily at environmental concerns. In the new case filed with GATT, the EC claims that United States taxes on "gas guzzler" automobiles, together with the tax on luxury automobiles and the requirement for "corporate average fuel economy" standards, have a disproportionate impact on European imports. According to the EC, cars imported from Europe amount to about 4 percent of the United States market while they are responsible for approximately 88 percent of the new taxes. The EC case has not yet been adjudicated by a GATT panel.

Impact of GATT Rules on Environmental Measures

The worldwide implementation of environmental protection measures and recent GATT panel decisions have given rise to questions about the extent to which GATT rules conflict with domestic and international efforts to protect the environment.

Perhaps the most significant question raised by GATT rules and certain panel decisions is whether domestic environmental laws can be vulnerable to challenges under GATT. The Tuna/Dolphin decision, which limits Article XX exceptions to only those environmental concerns within the jurisdictional limits of a party, calls into question laws that restrict trade based on the environmental impacts of foreign production methods. For example, EPA recently adopted rules that require imported products manufactured with a process using certain ozone-depleting substances to be labeled, even though the product entering the United States contains no ozone-depleting substances itself. 58 Fed. Reg. 8136 (Feb. 11, 1993). An argument can be made that the use of chemicals that deplete the ozone layer in manufacturing processes abroad also has environmental effects in the United States given the global nature of the ozone-depletion problem. Nevertheless, the rule clearly imposes mandatory requirements limiting market access based on concerns with manufacturing and production processes that occur outside the jurisdiction of the United States. On this basis (under the reasoning of the Tuna/Dolphin decision) the rule is arguably inconsistent with GATT.

A second significant question raised by the clash of trade and environment rules is whether environmental agreements that make use of trade restrictions are themselves inconsistent with GATT. While the use of trade restrictions in multilateral environmental agreements is not new (*see, e.g.*, Convention Relative to the Preservation of Fauna and Flora in their Natural State, adopted in 1933, regulating the import and export of trophies), the use of trade provisions in environmental agreements is increasing and the impact of such provisions on international trade is becoming more significant. Trade provisions in international environmental agreements generally provide the carrots and sticks that encourage countries to participate in the environmental accords.

For example, the Montreal Protocol on Substances That Deplete the Ozone Layer, which was negotiated under the auspices of the United Nations Environment Programme in 1987 and which was amended in 1990 and 1992, seeks to eliminate the production and use of CFCs and other ozone-depleting chemicals. The Protocol prohibits parties to the agreement from exporting or importing controlled substances to or from countries not party to the agreement. The Protocol also requires parties that have agreed to certain amendments to ban the import of products containing controlled substances from nonparties.

Similarly, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal provides a framework for the regulation of transboundary shipments of hazardous and certain other wastes. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *adopted and opened for signature* Mar. 22, 1989 (entered into force May 5, 1992), *reprinted in* 57 Fed. Reg. 20,602 (May 13, 1992). Among other things, the Basel Convention prohibits parties to the convention from trading in regulated wastes with nonparties.

Currently, it is not clear whether domestic laws enacting trade restrictions pursuant to these and other international environmental agreements are consistent with a country's obligations under GATT. Thus, it is unclear whether a country that is a party to both GATT and either the Montreal Protocol or the Basel Convention violates GATT by refusing to trade in regulated sub-

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stances or covered wastes with a country that is a GATT contracting party but not a party to the particular environmental accord. Under such circumstances, the trade prohibitions required under the Montreal Protocol and the Basel Convention arguably violate GATT's prohibition on quantitative restrictions. The agreements also provide preferential treatment for parties to the environmental accords that may run afoul of GATT's MFN principle.

The Tuna/Dolphin decision, if adopted, would not only limit the ability of countries to act unilaterally to protect resources on the global commons, but would also call into question certain provisions in existing international environmental agreements. For example, the Basel Convention prohibits a country from exporting certain wastes to another country if the exporting country has reason to believe the waste will not be managed in an "environmentally sound manner." Because the Basel Convention requires the imposition of a trade restriction based on extrajurisdictional environmental concerns, it appears to conflict with the interpretation of GATT rules set out in the Tuna/Dolphin decision.

Similar extrajurisdictional questions arise under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) which requires import and export permits for trade in certain endangered species. Convention on International Trade in Endangered Species of Wild Fauna and Flora *adopted and opened for signature*, Mar. 3, 1973 (entered into force July 1, 1975), 27 U.S.T. 1087, T.I.A.S. No. 8349. CITES requires parties to control and restrict trade in listed species even where a particular species does not naturally occur in the country's jurisdiction thereby requiring a trade restriction based on an extrajurisdictional environmental concern.

The Tuna/Dolphin decision also suggested that the United States ban on certain tuna imports from Mexico was not necessary in part because the United States had not pursued an international agreement to protect dolphins on the high seas. Similarly, the Rio Declaration states that countries should address transboundary or global environmental concerns through international consensus rather than take unilateral action. Although the Tuna/Dolphin decision and the Rio Declaration suggest that a country can restrict trade for environmental purposes based on an international accord or consensus without violating GATT, it remains unclear when such a consensus can be said to exist. The Basel Convention, for example, is the only global environmental accord concerning the transboundary shipment of hazardous and other wastes. Nevertheless, only forty-seven of the world's countries have ratified the agreement. To date, neither GATT nor other international agreements have provided the necessary guidance for determining the level of participation in an environmental agreement that would allow a country to enact trade restrictions in accordance with such agreements without violating GATT obligations.

Subsidies

A third and increasingly difficult question raised by the sudden clash of trade and environment rules is whether countries can impose trade restrictions or tariffs in response to distortions in trade attributed to a particular country's failure to adopt or enforce certain standards of environmental protection. Less stringent environmental standards in a particular country may provide an implicit subsidy to certain industries, placing similar industries in other countries with tougher environmental controls at a disadvantage in international or domestic markets.

In 1972, the OECD adopted guiding principles which in part provided that countries should not impose subsidies on exports or additional taxes on imports in response to competitive advantages that might arise from differing environmental standards. However, prohibiting countries from imposing countervailing duties based on another country's failure to adopt or enforce environmental standards may encourage the establishment of pollution havens as certain countries seek to attract polluting industries. Accordingly, unless environmental standards and regulatory programs can be sufficiently harmonized, a country's ability to challenge implicit subsidies arising from lax environmental rules or enforcement may be relevant to the competitiveness of certain industries.

At present, it is not clear whether a country may properly consider lax environmental regulation as a subsidy for which a countervailing duty can be assessed under GATT. GATT parties are unlikely to approve countervailing duties in such cases, however, because many national policies involving labor, health and safety, consumer protection, and other such issues will affect relative competitiveness for industries in particular countries. To do so would open up a myriad of possible protectionist actions taken in the name of "leveling the playing field."

In the United States, congressional leaders have hinted at their support for legislation that would allow the United States to apply trade sanctions against countries that unfairly subsidize

their own industries by applying weaker environmental provisions than are required in the United States. This approach has been dubbed "Green 301" by way of analogy to the existing provision of United States trade law—section 301—that authorizes the United States Trade Representative to eliminate, unilaterally, foreign practices that either violate existing trade agreements or are "unjustifiable and burden[ ] or restrict[ ] United States commerce." 19 U.S.C. § 2411(a)(1)(B) (ii). Since environmental protection may be a relatively lower priority for some other countries, Green 301 may come across as a substantial infringement on other governments' ability to set their own domestic policies.

Reconciling Trade and Environment Goals

The conflict between international trade rules and the growing body of international and domestic environmental laws has resulted in a number of initiatives among countries and within international organizations to resolve the tensions between trade and the environment. Perhaps the most important effort to reconcile the goals of free trade and environmental protection has occurred under NAFTA.

In order to get an extension of his "fast track" negotiating authority, in May 1991, President George Bush committed to Congress that environmental and labor issues would receive extraordinary consideration in the NAFTA process. This led to the inclusion of a considerable number of "green" provisions in the text of NAFTA, which was signed on December 17, 1992. President Bill Clinton has since reaffirmed United States support for the main text of NAFTA, subject to additional treatment of the environmental issues in a recently completed side agreement.

The text of NAFTA states that world trade should be expanded "in a manner consistent with environmental protection and conservation" and that the agreement should "strengthen the development and enforcement of environmental laws and regulations." Under NAFTA, each party maintains the right to establish the level of protection it considers appropriate to protect human, animal, or plant life. The parties may prohibit the entry of goods not meeting its *own* standards and may adopt standards that are more stringent than those adopted by international bodies. Each party may prohibit imports until its own domestic approval process is completed for that import. These provisions are elaborated on in NAFTA sections dealing with "technical barriers to trade" (relating to health, safety, environmental or consumer protection standards for general products) and "sanitary and phytosanitary measures" (relating to food safety for human consumption, and protection of animal or plant life or health from pests or disease).

While NAFTA's terms are more protective of environmental measures than GATT's, and they do not incorporate GATT's requirement that a party adopt a measure that is "least trade restrictive," environmental measures are still subject to discipline under NAFTA. National environmental measures must be science-based and nondiscriminatory. Such measures must not create unnecessary obstacles to trade and must not be disguised trade barriers. States, provinces and municipalities, however, are able to enact even tougher standards than national or international standards (e.g., California's Proposition 65).

NAFTA also specifically provides for "upward" harmonization of the parties' standards. It expressly states that it would be inappropriate for parties to lower environmental standards as a means of inducing investment (i.e., no "pollution havens"). Moreover, parties are permitted to impose stringent environmental standards on new investment as long as they apply equally to domestic and foreign investors.

NAFTA expressly defers to certain international environmental agreements in the event of a conflict. The following current list of specified agreements may be supplemented by agreement of the parties: Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES); Basel Convention on Control of Transboundary Wastes and Their Disposal; and Montreal Protocol on Substances that Deplete the Ozone Layer.

Significantly, NAFTA shifts the burden of proof to the party that challenges another party's environmental measures; under GATT, the "environmental" exception is only an affirmative defense that must be proven by the responding party. In addition, where an environmental measure has been challenged, the responding party may choose the forum (i.e., if the case is filed with a GATT panel, the respondent may "remove" it to a NAFTA panel, which is more likely to sustain environmental measures).

As noted above, President Clinton has conditioned his support for NAFTA on the negotiation of an environmental side agreement. In August, negotiators announced that the environmental side agreement had been concluded. As of this writing, however, the text of the side accord has not been made public. Discussions between Mexico, the United States, and Canada have focused on what investigative, reporting, and enforcement powers as well as the degree of independence should be afforded to a "North American Commission on the Environment." The issue of whether private groups and citizens should be able to file complaints directly with the commission is also being negotiated. Negotiators are also

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considering whether trade sanctions should be applied against parties that repeatedly flout commission recommendations. Finally, sources of funding are also being reviewed for cleanup in the United States–Mexico border area.

In June, a United States district court judge ruled that the National Environmental Policy Act (NEPA) applied to the negotiation and completion of NAFTA. *Public Citizen v. Office of the United States Trade Representative*, slip. op. No. 92-2102 (CRR) (D.C. June 30, 1993). The court ordered the U.S. Trade Representative to prepare an environmental impact statement (EIS) to determine the environmental impacts arising from NAFTA. The administration has sought and obtained an expedited appeal of the decision. A decision in the case by the D.C. Court of Appeals is expected in early October. If not reversed, the decision could significantly delay congressional approval pending the preparation of an EIS and perhaps provide some political cover for opponents of the agreement. Beyond NAFTA, if the decision is not reversed, significant trade agreements, including the Uruguay Round of GATT negotiations, will likely be subject to the NEPA review process. Such a result would add a new dimension to the trade and environment issue and greatly complicate the negotiation and approval of future trade accords.

Critical Issues for the Future of Trade and Environment

There is a clear trend toward "internationalization" of environmental policy. New international conventions are in many cases driving the adoption of national environmental regulations. Increasing internationalization could complicate environmental compliance responsibilities for businesses involved in global trade or manufacture. Multiple environmental regimes may give rise to potential conflicts between national and international requirements. Moreover, internationalization means that the domestic political process could yield considerable influence in environmental policy and enforcement practices to international experts and civil servants.

Both NAFTA and the current draft text for GATT's Uruguay Round contain sections on "technical barriers to trade" and on "sanitary and phytosanitary measures." Inevitably, the principles embodied in these sections encourage technical experts in different countries to seek to harmonize or reconcile national standards on the basis of shared scientific premises. Efforts will be made among countries to ensure that their respective standards are "equivalent" even if not identical or fully harmonized. In fact, numerous international standard-setting bodies already exist to establish common technical standards. These harmonization activities will conflict with the desire of certain subnational governments, like California, to set higher standards than the national and international communities. With the NAFTA debate as a precedent, it is foreseeable that the environmental community may seek to ensure that international environmental bodies are "independent" from national governments, and inclined to set relatively high common standards.

Public participation and open processes is another key issue for the trade and environment field. Environmental groups have criticized the international trade regime for not being sufficiently "transparent" or accessible to the public. The environmental community is pressing hard for a role in international trade/environment disputes; at present, only governments formally participate in the dispute resolution process. Briefs and even panel decisions typically remain confidential during the course of an international trade dispute. Again, using NAFTA as a model suggests that there will continue to be pressure on our trading partners toward greater public participation in their administrative decisionmaking, as well as establishing legal avenues for citizen suits, private causes of action and challenges to agency actions.

The next great debate in both international and national regimes for environmental protection will concern how far into private production and processing methods (PPM) a government's regulations may intrude. On the international level, the tuna/dolphin dispute suggests that it is not permissible under GATT for one country to restrict trade on the basis of dissatisfaction with the environmental consequences of another country's production methods (assuming those methods do not affect the character of the imported product). The PPM issue is not clearly resolved in NAFTA or even likely to be resolved in NAFTA's recently completed environmental side agreement. The environmental community has taken the position that PPM negotiations should be undertaken separately by the NAFTA parties within six months after NAFTA's implementation; in the meantime, they propose that the parties declare a moratorium on any party bringing a trade action to challenge another party's conservation laws.

To address these issues, numerous international and national organizations have joined in the trade and environment debate. Significantly, environmental issues are now high on the agenda of trade and economic negotiations. For example, GATT has responded to the trade and environment debate by resurrecting a GATT Working Party on Environmental Measures and International Trade. This group, established in 1971 in anticipation of the Stockholm Convention on the Human Environment, did not hold its first meet-

ing until November 1991 largely in response to the controversy surrounding the Tuna/Dolphin decision. The Working Group is currently addressing three trade and environment issues: (1) the relationship between GATT and international environmental agreements; (2) the transparency of environmentally related trade measures; and (3) the effect of packaging and labeling requirements on trade. The Working Group may eventually provide a forum for clarifying or interpreting certain provisions of GATT, such as the scope of Article XX exceptions. In addition, many scholars and some GATT parties have proposed a so-called "green round" of GATT negotiations once the current Uruguay Round is concluded. The Trade as well as the Environment Directorates of the OECD are also working on trade and environment issues.

The work of a number of international organizations and standard-setting bodies aimed at harmonizing environmental standards has also taken on greater importance given the trade frictions that often accompany differing environmental standards. For example, the Codex Alimentarius Commission, established jointly by the Food and Agriculture Organization and World Health Organization of the United Nations, has numerous committees responsible for developing international standards and guidelines for hygiene, food additives, pesticide residues and contaminants, labeling, and test methods. Under a recently proposed five-year plan, the commission is to focus on developing international standards and the harmonization of standards. Specific elements of the five-year plan include an emphasis on the harmonization of health and nutritional claims, the harmonization of import and export inspection systems, and the establishment of food contaminant limits.

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Similarly, the International Standards Organization, comprised of various national standards bodies, is increasingly involved with the development of environmentally related standards, particularly with regard to environmental labeling and environmental management systems for industry. The work of these bodies may reduce trade and environment frictions in the future. Finally, nongovernmental organizations, particularly national environmental groups in the United States, are becoming powerful advocates for the environment in the international trade and environment debate.

The New Trade and Environment Field

Internationally, a fundamental tension exists between the concepts of "sustainable development," on the one hand and the "sovereignty" of individual countries to set their own environmental policies and standards, on the other. Until the time when all countries share the same environmental values, and possess the same means to enforce those values, the trade and environment fields will be contentious.

In the battle between constituencies that favor trade liberalization and those that favor trade protection, the contenders all speak the language of economics. When "environment" is added to the mix, issues regarding fair trade and the measure of economic growth become even more complex. A new, sophisticated and highly vocal constituency joins the debate and seeks to promote goals that go beyond the bread and butter issues of trade. The arguments of this group, however, are not primarily in the language of economics. As a consequence, the trade policymakers in this country and abroad face daunting new dilemmas in dealing with the concerns of both environmentalists and advocates of open trade.

In the wake of the 1992 Rio Conference, and after the impact of the environment issue on NAFTA, it is clear that international trade policy will be more complex than ever. Environmental constituencies will have a seat at all future trade tables. The extent to which NAFTA will be a model for GATT, however, will depend on how much developing and, in some cases, developed countries are willing—and able—to converge with United States environmental standards. If they decide they cannot, or do not wish to, accept those standards, GATT's early successes in broadly liberalizing world trade may suffer. Such a result would be unfortunate for the world community since prosperity, perhaps more than anything, brings the desire and means to protect and enhance the environment.

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