

# Trade and the Environment

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This paper provides background on six key aspects of the "trade and environment" debate.

## **1. How Trade Affects the Environment**

Trade can be good for the environment. Or it can be bad. Every serious study has reached the conclusion that determining the effects of trade requires environmental analysis.

A recent report by the World Trade Organization (WTO) Secretariat pointed out several ways that trade might improve the environment. For example, trade can promote the dissemination of pollution control technology. Trade can also boost economic growth which then provides more resources for countries to use for environmental protection and clean-up. The same WTO report pointed out ways that trade might worsen the environment. Trade can increase the scale of production and put pressure on renewable natural resources. For example, international wildlife trade exceeds \$5 billion annually. The WTO report also points out that economic growth tends to increase certain kinds of emissions, such as carbon dioxide. Perhaps the most important conclusion in the WTO study is that trade will worsen the environment only when government environmental policies are inadequate. Thus, the optimal way to address any negative environmental effects of trade will be to improve environmental policies at the national level.

Because the environmental effects of trade are variable, it is important that governments

conduct environmental assessments of trade agreements. The idea of environmental assessments got off to a rocky start during the NAFTA debate when a U.S. District Court sought to require the formal environmental impact process for NAFTA. That decision was quickly overturned. Six years later, in November 1999, the Clinton Administration issued an Executive Order to direct the U.S. Trade Representative to conduct "Environmental Reviews" of trade agreements. The Executive Order states that the focus of these reviews will be impacts in the United States. While welcoming this procedural commitment, environmental groups lodged two criticisms. First, a lot of the potential impact of trade agreements are global or occur in other countries and therefore might be missed by a US-oriented assessment. Second, many analysts wonder whether USTR is the right agency to oversee an environmental assessment.

## **2. How Trade Rules Affect the Environment and Public Health**

For over 50 years, governments have sponsored international trade rules to reduce and manage the use of protectionist and discriminatory trade policies. During the Uruguay Round of trade negotiations (1986-1994), the traditional rules in the General Agreement on Tariffs and Trade (GATT) were supplemented by 15 new agreements that comprise the WTO. Among these new WTO agreements are the SPS

Agreement regarding food safety and animal health and the TBT Agreement regarding product standards.<sup>1</sup> Critics claim that these agreements reduce national autonomy and thus can undermine environment and health standards. Defenders of these agreements counter that governments retain ample discretion to address *true* health or environmental risks.

The record of adjudication under the GATT and the WTO shows that when a defendant government raises an environmental or health defense to a measure being challenged, the defendant government has always lost. That was the result in the seven environmental cases and four health cases to come before GATT or WTO panels. But these numbers alone give a misleading picture because it is only questionable measures that get challenged in trade dispute resolution. Moreover, if one looks closely at the actual decisions in the most recent disputes—for example, the Shrimp/Turtle case or the Gasoline cases—it is hard to deny that the U.S. trade measures being employed were faulty in some respects even though the environmental objectives were well motivated.<sup>2</sup>

Nevertheless, some criticism of WTO dispute resolution is justified.

There is broad agreement in the Clinton Administration, the U.S. business community, and NGOs that WTO dispute settlement should be made more transparent. More (if not all) of the litigation process should be open to public scrutiny in real time. There should be greater opportunities for *amicus curiae* briefs from responsible sources. Unfortunately, these prospective reforms are being resisted by most other countries that have less experience with such administrative procedures. The WTO Seattle Ministerial reached no agreement on the need for such changes.

There is less consensus in the United States about whether WTO law achieves the proper balance between trade and environmental/health objectives. Some groups say that WTO panels are too trade-centric and apply high hurdles of proof that must be overcome for the environmental side to prevail. Others

say that the WTO would never rule against any true environmental or health law and that the WTO should tighten up against “junk science” justifications for trade bans.

A similar schism exists regarding the use of trade measures in multilateral environmental treaties such as the Basel Convention on the Movement of Hazardous Wastes. Some groups would like to see the WTO forego the application of trade rules to environmental treaties. Others assert that these treaties are overusing trade measures and no green light should be given to such treaty provisions. There are over 20 environmental treaties that employ trade measures. The first multilateral environmental treaty to use a trade measure was in 1911 (the Fur Seals Convention).

There are also sharp disagreements about the impact of WTO intellectual property rules (e.g., patents) on public health, nutrition and food security, and indigenous communities. This medley of issues regarding the supervision of national environmental and health laws will come before the Congress this year in the mandated review of U.S. participation in the WTO (Uruguay Round Agreements Act, §125). The Congress will face a vote, under expedited procedures, on whether to withdraw its approval for the WTO.

### 3. How Environmental Measures Affect Trade

There are two distinct issues regarding the impact of environmental regulation of trade. First is the claim that environmental measures are sometimes used as disguised trade barriers. This is called “ecoprotectionism.” The other claim is that governments fail to deploy the proper environmental measures out of a fear that it will undermine national competitiveness. This is called “regulatory chill.”

Ecoprotectionism is a potential problem. Often when designing environmental policy, governments will choose a means that will be more convenient to domestic producers than to foreign producers. This practice also occurs in the private and non-profit sectors in the selection of voluntary standards and in

the establishment of eco-labeling systems. Ecoprotectionism is something that big countries do to smaller ones. Thus, the United States is more often the perpetrator than the victim. In the WTO Gasoline case, the Appellate Body found that the U.S. Clean Air Act regulation violated the GATT for several reasons, including that EPA had not taken sufficient account of the costs to foreigners. Inattention to the costs being imposed on foreigners is probably pervasive in U.S. administrative decisionmaking. But if the United States is to avoid intended or inadvertent ecoprotectionism, there will need to be more consideration of how to achieve greater fairness for trading partners and foreign economic actors.

Regulatory chill is also a serious problem. Very often when the Congress considers new regulations or taxes, opponents allege that such measures will put American exporters at a disadvantage in world trade. For example, these concerns have been raised in the U.S. debate over the Kyoto Protocol on climate change. Fears of losing competitiveness are frequently raised in developing countries in response to suggestions for upgrading their environmental standards. Economists have offered two responses to competitiveness fears. First, it is argued that if environmental policies are well designed, they are unlikely to be costly to the economy. Second, greater international cooperation will mitigate any onerous effects on those countries that step up to environmental leadership.

#### **4. How Subsidies Hurt the Environment and the Economy**

It is often said that international trade and environmental protection should be mutually supportive. But during the past several years, governments have found it difficult to agree on policies to achieve both these objectives. After considerable prompting by environmental groups, the Clinton Administration launched a new initiative in March 1999 to address fishing subsidies that are costly economically and that lead to fisheries depletion. The Administration

carried out a skillful campaign to get foreign support for this and was close to achieving an agreement that would have become part of the Seattle Ministerial Declaration.

In addition to fishing subsidies, environmentalists have pointed to other subsidies that can be bad for the environment and bad for trade. For example, agriculture, mining, energy, and water subsidies. Reformists say that addressing these subsidies would be “win, win”—that is good for the environment and good for the economy. Making such reforms the centerpiece of a trade and environment initiative is perceived as a good strategy to gain developing country support because eliminating such subsidies in industrial countries could promote developing country exports.

#### **5. How to “Democratize” Trade Policymaking**

The environmentalists and other NGOs have taught the trade regime an unforgettable lesson. The traditional, technocratic, insular approach to trade policymaking had to be changed. And indeed U.S. and international trade policymaking has changed a lot over the past several years. In Washington, the USTR, the Commerce Department, and the State Department have become far more open to listening to different views. In Geneva, the WTO has set up a highly informative website which has actively sought to debunk some of the erroneous criticisms of the institution. The current and recent Directors-General have made many more speeches than their predecessors and tried to explain the WTO to the public. The Appellate Body has stretched its mandate to give some victories to environmentalists—for example, by permitting panels to accept unsolicited *amicus curiae* briefs.

And despite all that, Seattle! The average listener on television or surfer on the web would get a terrible, distorted picture of the WTO and international trade from listening to the criticisms voiced in Seattle. It was enough to make trade proponents wonder whether the transparency, participation, openness, etc., is such a good idea after all.

Of course, there is no going back. Advocates of trade-led economic growth and of a rule-based trading system have no choice but to seek and obtain greater public support for new trade negotiations and for the WTO. Yet this will require more compromise on issues such as the negotiating agenda, WTO coordination with other international agencies, and the role of civil society.

In the aftermath of Seattle, many commentators have sought to argue that the goal of democratizing the WTO is misconceived. It is said that governments need to be democratic at the national level and open to citizen input, but at the international level the only relevant "citizens" are States. Thus, NGOs should channel all of their good ideas (or bad ones) to their own governments at home, not try to lobby for them in Geneva.

This perspective is surely wrong. It ignores the historical record of constructive transnational activism of groups like the Red Cross, the International Chamber of Commerce, and World Wildlife Fund. It assumes that international technocrats and bureaucrats have all the answers. It overlooks the fact that in a globalized economy, increasingly important decisions are made at the international level.

Beneath the clouds of Seattle, many participants and commentators missed an important development. Following the leadership of Senator Roth, parliamentarians from many countries who were in Seattle met to convene a Legislators Assembly and agreed to continue the group. While no one foresees giving this Assembly any power (along the lines of the European Parliament), such an informal Assembly has enormous potential as a way of democratizing the WTO and of overseeing progress on key WTO issues such as trade and the environment. Although there has been an Inter-Parliamentary Union for over a century, the WTO Assembly may be the first such institution within a functional international organization. To his credit, WTO Director-General Mike Moore welcomed this new Assembly which will surely make his job more challenging.

## 6. How to Improve International Environmental Policymaking

During the 1990s, high level attention to trade and environment exposed many problems in the way that the trading system dealt with the environment and environmentalists. But the debate has also exposed other government failures. In the hundreds of meetings held in the Organization for Economic Cooperation and Development, the WTO Committee on Trade and Environment, and other institutions, it was recognized that one big problem is a lack of coordination at the national level between trade and environment ministries. Sometimes attendees from the U.S. government met their counterparts from other agencies for the first time in Geneva or Paris. U.S. agencies have gotten better at coordination in recent years. But it still remains a problem. The traditional way of addressing this problem is to establish inter-agency coordinating committees. This sometimes works. But Congress can probably do more to encourage cooperation between agencies.

Another byproduct of the trade and environment debate has been to change the mix of interest groups most active on trade. Business and labor groups have always been active. But today, witness tables at legislative hearings on trade also include: environmentalists, food safety specialists, labor rights advocates, etc. Current political processes give these groups incentives to distinguish themselves from other groups and little incentive to seek common ground. The need for promoting more business-environmentalist cooperation is perhaps greater now after Seattle. Many of the small but active NGOs in Seattle espoused a very hard anti-business, anti-corporate line.

Better coordination is also needed in international agencies. The WTO and the UN Environment Programme ought to be working together but so far they have not. In 1995, the WTO established a Committee on Trade and Environment which has operated five years and accomplished nothing. One reason for this may be that trade bureaucrats are being asked to address environmental problems and don't

know how to do it. This is not to suggest that a joint WTO-UNEP committee would necessarily work better. But the difficult agenda on trade and environment and the debacle in Seattle show that better institutional mechanisms are needed for governments to sort through the key issues and design balanced packages of solutions.

The trade and environment debate has also exposed some deficiencies of the environment regime, in comparison to the WTO. For example, the WTO has a robust dispute settlement system which environmental treaties often lack. Renato Ruggiero, the former WTO Director-General, raised the question in several of his speeches of whether a World Environment Organization should be created. This is a complex issue, that goes far beyond trade and environment.

### Conclusion

The trade and environment debate began in the Bush Administration and will continue into the next Administration. The Clinton Administration may have raised environmentalist expectations a bit, but one can be sure that the environmental critics of trade will not fade out come 2001. Moving ahead with good international economic and environmental policies will require a lot more coordination in the future than was ever needed in the past.

### Endnotes

1. SPS is the Agreement on the Application of Sanitary and Phytosanitary Measures. TBT is the Agreement on Technical Barriers to Trade.
2. The Shrimp-Turtle case involved a challenge to 1989 appropriations legislation that bans the import of shrimp from countries that do not have a regulatory program to safeguard sea turtles comparable to the U.S. program. The WTO ruled that this U.S. import ban violates trade rules because it was arbitrary or unjustifiable discrimination. One key finding was that the U.S. government had not sought to negotiate a cooperative agreement with Asian countries when it

had done so with Latin American countries. The Gasoline case involved a challenge to U.S. Clean Air Act regulations that discriminated against foreign reformulated gasoline.

### For further reading on trade and environment, see:

*Trade, Environment, and the Millennium* (United Nations University Press, 1999). This is an edited volume that contains 11 chapters that cover most of the major trade and environment issues.

*Whose Trade Organization?* (Public Citizen, 1999). This 229-page book is listed here not for the truth of the matters asserted, but as a leading compilation of criticisms about the WTO. It was written by Lori Wallach and Michelle Sforza.

*Trade Measures in Multilateral Environmental Agreements* (OECD, 1999). This book provides a good economic and environmental analysis as to why trade measures are used in environmental treaties. It discusses CITES, the Montreal Protocol, and the Basel Convention.

*Trade and Environment* (World Trade Organization, 1999). A survey of the key economic issues regarding trade and environment. Contains mini-case studies of several sectors such as agriculture.

Steve Charnovitz, "Labor and Environmental Issues," in *Restarting Fast Track* (Institute for International Economics, 1998). This essay examines the relationship between trade fast track and labor and environmental issues.

Steve Charnovitz, "Environment and Health under WTO Dispute Settlement," *International Lawyer*, Fall 1998. This article reviews all the WTO caselaw on environment and health and explains the changing adjudication from the GATT era.

Daniel C. Esty, "Toward Optimal Environmental Governance," *New York University Law Review*, December 1999. This article presents a theory of optimal environmental governance and discusses potential improvements in national and international environmental policymaking.

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