

Chapter 5

Trade and Environment Decisionmaking

Trade and Environment Decisionmaking

Until recently, both the United States and international institutions dealt with trade and environment policies separately, with little attention to their interactions. Environmental considerations have been largely absent in the trade regime regulated by the General Agreement on Tariffs and Trade (GATT). Similarly, national environmental policies sometimes have been devised with little concern for possible trade effects.

Several international forums are now examining trade/environment interactions, as are various U.S. Government agencies through the interagency working group coordinated by the U.S. Trade Representative (USTR) (see ch. 2). This chapter discusses the possible need for trade/environment guidelines to facilitate better coordination of trade and environmental policies at all levels. It also reviews possible changes to GATT, such as special recognition of multilateral environmental measures and modification of dispute resolution procedures. The chapter further examines the U.S. environment/trade policymaking process as it relates to domestic competitiveness issues and development of U.S. positions in international forums.

GUIDELINES AND TRADE/ ENVIRONMENT INTERACTIONS

It might be easier to resolve trade and environmental disputes if broadly accepted guidelines were developed. Better coordination between trade/environment policy could ameliorate the potential for conflict. To have widespread credibility, a process for developing guidelines on trade/environment interactions ideally would need several features. Both developing and developed countries would need to participate. In some cases, the guidelines would have to consider the special needs of developing countries. The process would also need to involve both trade and environment agencies of participating governments and to safeguard both trade and environment objectives. Making the process open to public participation might give it more

credibility with nongovernmental organizations (N G O s) and other interests.

In addition to GATT, other international institutions might contribute to the process. The most thorough discussion of trade/environment interactions to date has been at the Organisation of Economic Co-operation and Development (OECD). Because both trade and environment agencies are involved, OECD discussions may produce guidelines for addressing trade and environment questions in an integrated fashion. OECD members are working to revise the 1972 "Guiding Principles Concerning the International Economic Aspects of Environmental Policies" (see ch. 2). But OECD has no power to set policy for nonmembers. Moreover, developing countries are not OECD members and might not accept OECD's findings. Hence, further discussion and action in forums with broader membership will probably be required.

Various United Nations agencies might contribute. As discussed in box 5-A, the final preparatory meeting before the upcoming United Nations Conference on Environment and Development (UNCED) produced draft language on trade/environment matters, including some possible principles. Some of the UNCED discussion drew on provisional findings from a recent session of the United Nations Conference on Trade and Development (UNCTAD) which, among other things, considered several trade and environment issues within the context of sustainable developmental

New UN arrangements for coordinating environment/development issues may also emerge. Several alternatives were discussed in UNCED's preparatory meetings. One possibility would be to use the existing United Nations Economic and Social Council (ECOSOC) as a governing body to deal with environment/development connections. Another option would be to establish a new high-level multilateral coordinating mechanism. A third possibility could be to set up regionally or nationally focused mechanisms.

¹ Possible roles for UNCTAD in encouraging sustainable development and in addressing environment/trade issues were discussed by delegations to UNCTAD's eighth session meeting in Cartagena de Indias, Columbia, in February 1992. See, United Nations Conference on Trade and Development *A New Partnership for Development: The Cartagena Commitment*, Feb. 27, 1992, n.p.

Box 5-A—Trade/Environment and Sustainable Development: The UNCED Perspective

Trade and environment concerns will be considered cross-cutting issues, relevant to several agenda items, at the June 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro. Delegates at the final UNCED preparatory meeting (in March 1992) included several trade/environment principles in a draft text on international cooperation for providing a supportive climate to help developing countries accelerate sustainable developmental

The text calls on governments, through the General Agreement on Tariffs and Trade (GATT), the United Nations Conference on Trade and Development (UNCTAD), and other multilateral forums, to “make international trade and environment policies mutually supportive in favor of sustainable development”; to clarify the role of GATT, UNCTAD, and other international organizations, including in conciliation or dispute resolution; and to encourage a constructive industry role in dealing with environment and development issues.

In a section on activities for “developing an environment/trade and development agenda,” the draft text calls on governments to encourage GATT, UNCTAD, and other relevant international and regional economic institutions to consider examining several propositions and principles. To paraphrase a few of these, the draft calls on these institutions to consider ways to:

- . Avoid unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country. Instead, environmental measures addressing transborder or global environmental problems should be based on international consensus.
- Deal with root causes of environment and development problems so as to avoid adoption of environmental measures that unjustifiably restrict trade.
- Ensure that environment-related regulations or standards (including health and safety standards) do not become a disguised restriction on trade.

Many of the provisions relate especially and explicitly to developing countries. For example, the draft calls on relevant institutions to:

- . Encourage participation of developing countries in multilateral agreements through such mechanisms as transitional rules.
- . Keep in mind the special factors affecting environment and trade policies in developing countries. It notes that environmental standards valid for developed countries may have unwarranted social and economic costs in developing countries.
- . Encourage an open, multilateral trading system, supported by the adoption of sound environmental policies, that would have a positive impact on the environment and contribute to economic development.

The draft statement recognizes that trade provisions in multilateral environmental agreements in some cases have played a role in tackling global environmental challenges. It suggests several specific activities as steps toward improving the process of addressing environment/trade issues. These include:

- . Conducting more studies to understand relationships between trade and environment for the promotion of sustainable development;
- . Promoting dialogue among trade, developmental, and environmental communities;
- . Clarifying the relationship between GATT provisions and multilateral environmental measures; and
- Ensuring public input in the formation, negotiation, and implementation of trade policies.

The suggested actions focus on trade and development needs. Less attention is focused on meeting environmental protection goals.

¹ Preparatory Committee for the United Nations Conference on Environment and Development, *International Cooperation To Accelerate Sustainable Development in Developing Countries, and Related Domestic Policies* (text submitted by the Chairman on the basis of negotiations held on document A/CONF.151/PC/100Add.3, Mar. 31, 1992). The statement will be printed in section 1, chapter 1 of Agenda 21. The draft identified four key items: 1) promoting sustainable development through trade liberalization; 2) making trade and environment mutually supportive; 3) providing adequate financial resources to developing countries and for dealing with international debt; and 4) encouraging macroeconomic policies conducive to environment and development.

The draft text adopted some language from the eighth session of the United Nations Conference on Trade and Development held in February 1992 in Cartagena de Indias, Columbia.

Whatever its specific form, such a coordinating institution might work with GATT (which is autonomous, but affiliated with the United Nations) and/or OECD to further develop some procedural and substantive guiding principles on trade and environment questions. To this end, participation by other international organizations (such as UNCTAD and the United Nations Environment Program) might be encouraged. Existing international environmental and scientific institutions could work with GATT to the same end. A few areas in which guidelines could be useful are identified below. (See also ch. 3.)

Some national environmental regulations might impede imports more than necessary (see, for example, the discussion of the Danish bottles case in ch. 4 and app. A). Application of existing GATT and OECD principles (such as national treatment and nondiscrimination, see chapter 2) have helped limit circumstances in which trade conflicts might arise. In addition, guidelines for balancing trade and environmental concerns would be helpful (see ch. 4)

Guidelines also might help identify appropriate and inappropriate circumstances for application of trade restrictions aimed at influencing environmental conduct by other countries. As discussed in chapter 3, many factors could be considered in evaluating whether such measures are appropriate—for example, the importance of the environmental problem, the domestic efforts made by the country or countries in question to address that problem, the efforts made to reach an agreement that would make trade measures unnecessary, and the financial or other impacts of the trade measures.

In particular, there might be a presumption in favor of multilateral action. To some, multilateralism confers more political legitimacy than unilateral measures. Unilateral measures often do not take

foreign interests into account. As a result, laws and regulations can disadvantage foreign firms. This happened with a U.S. tax to pay for Superfund cleanup, in which the United States taxed imported petroleum at a higher rate than domestically produced petroleum (see app. A), and in the ban on certain tuna imports taken pursuant to the U.S. Marine Mammal Protection Act. In the latter case, U.S. tuna fishermen were given a freed limit of dolphin kills each year but their foreign counterparts did not know their limits for a particular year until the year ended.²

In the absence of effective international environmental agreements, some countries may view unilateral trade measures as playing a useful environmental role at times. In some cases, these measures or threat of their use may have induced countries to change their behavior more quickly than they otherwise might.³ This may have happened with several threatened unilateral U.S. trade measures directed at conserving fish and wildlife. U.S. threats to employ Pelly Amendment sanctions⁴ led to a commitment by Japan to phase out imports of hawksbill turtle shells.⁵ Similarly, U.S. negotiations (backed up by possible use of import restrictions) have been effective in obtaining commitments from 14 targeted countries to change their shrimp catching practices to protect sea turtles.⁶

The justification for unilateral measures to regulate conduct abroad seems stronger when the environmental impacts extend beyond the targeted country. When the effect of the behavior abroad appears localized, trade measures may be harder to justify. However, it is by no means unprecedented for one country to seek change in another country's policies, even when those policies have only internal effects. For example, the United States has in some

² 16 U.S.C. 1371(a)(2); "United States Restrictions on Imports of 'ha,'" Report of the Panel, Sept. 3, 1991, GATT Document DS21/R, paragraphs 5.2, 5.28. This case is discussed in more detail in chs. 2 and 3.

³ AS pointed out in a recent report by the U.S. General Accounting Office, it can be difficult to monitor countries' compliance with international agreements. U.S. Congress, General Accounting Office, *International Environment: International Agreements Are Not Well Monitored*, GAO/RCED-92-43 (Gaithersburg, MD: U.S. Government Printing Office, January 1992).

⁴ The Pelly Amendment is a 1971 amendment to the Fisherman's Protective Act of 1967. (Public Law 92-219, adding section 8 to the Fisherman's Protective Act of 1967, codified at 22 U.S.C. 1978.) It gives the President discretion to restrict imports of fish products or wildlife products from countries that engage in practices that diminish the effectiveness of international fishery conservation programs or international programs for endangered species, respectively. While the amendment restricts the President's discretion to measures sanctioned by GATT, what GATT permits is often not known for sure. Trade restrictions under the Pelly Amendment have never actually been imposed. If they are imposed in the future, it is possible that they would be found to violate GATT's rules.

⁵ S.S. Lieberman, "Japan Agrees To Phase Out Trade in Endangered Sea Turtles," *Endangered Species Technical Bulletin*, vol. XVI, No. 7-8, 1991.

⁶ Report of the Secretary of State to the Congress of the United States on the Status of Efforts for the Conservation and Protection of Sea Turtles Pursuant to Section 609 of P.L. 101-162, "The Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1990" (transmitted to Congress Feb. 5, 1991), p. 5.

cases made aid and trade relations contingent on a foreign country's human rights record; GATT itself permits members to ban imports of goods made with prison labor.⁷

Guidelines for national regulations with trade effects might also take into account the need to foster the development of environmental technology. Environmental regulations are sometimes an important driver of environmental technology. For example, national regulations pursuant to the Montreal Protocol, signed in 1987, prompted technology development enabling phaseouts of some categories of ozone-depleting chemicals at a faster pace than most thought possible. When an environmental regulation appears likely to accelerate technology development, that factor might weigh in its favor. Governments can further encourage the development of environmental technology by other means such as research and development (R&D) support and tax incentives. Trade rules might be adjusted to encourage such government action, as recognized in OECD's 1972 Guiding Principles and in the Uruguay Round proposal to exempt certain R&D subsidies from countervailing duties (see ch. 4).

ADDRESSING TRADE/ ENVIRONMENT ISSUES IN GATT

While helpful, guidelines on trade/environment issues will not necessarily resolve conflicts that could arise within GATT. Mechanisms might still be needed for GATT members to finally adopt, agree to, or tap into such accommodations.

International environmental agreements might have a special claim in GATT; indeed, GATT's Secretariat has urged multilateral action with respect to the environment as a way of reducing the potential for conflict. GATT contracting parties could approve resulting trade measures in several ways, including:

- Formal amendment under Article XXX (in some cases requiring unanimous consent and in others two-thirds of all members);
- A waiver under Article XXV, paragraph 5; and
- Separate agreements (like GATT's current Codes).

None are fully satisfactory mechanisms.⁸ In the short term the waiver is perhaps most promising. It could, for example, suspend application of GATT requirements for trade measures under specified environmental agreements for a certain number of years. Two-thirds of those voting and a majority of the total GATT members must vote for a waiver. It is easier to accomplish than formal amendments under Article XXX. However, it is not guaranteed that all signatories of a particular environmental agreement that are also members of GATT would vote to approve a waiver for measures taken under that agreement. If some members of the environmental agreement signed reluctantly, perhaps out of fear of trade consequences if they did not, they might ask for compensation in exchange for their vote for a waiver.

GATT also could be amended to automatically approve trade measures under agreements meeting certain criteria. This approach could be modeled on GATT Article XX(h), which permits an exception to GATT's rules for measures:

... undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the [GATT members] and not disapproved by them or which is itself so submitted and not so disapproved.

While Article X.X(h) has never been invoked, and the criteria to be used have never been established, one could in principle amend GATT to provide a similar mechanism for environmental agreements. However, an amendment to GATT's text is quite difficult to achieve. Also, thought would have to be given to the criteria for evaluating the trade provisions of particular agreements. These criteria might, for example, include the number of signatories, the openness of the negotiating process, and the relative roles of trade and nontrade measures.

Finally, some members of GATT could decide to develop a separate code or treaty for environment/trade matters. Such agreements only bind those who accept it. However, its signatories could agree to apply guidelines or other trade/environment rules among themselves.

⁷ Article XX(e).

⁸ John H. Jackson, Hessel E. Yntema Professor of Law, University of Michigan School of Law, memorandum of Nov. 7, 1991, regarding "Changing GATT Rules" (prepared for the Trade and Environment Committee of The Environmental Protection Agency's National Advisory Council for Environmental Policy and Technology).

Dispute Resolution Procedures

GATT's dispute resolution process was not setup to weigh the merits of competing environmental and trade claims. Yet such a weighing is likely to be needed in the future. Such weighing would first require understanding the limits of an often ambiguous body of scientific evidence. Members of a dispute resolution panel could not be expected to articulate a consensus in cases where the scientific community is divided. Scientific evidence is only one aspect to be weighed. Environmental disputes usually have societal dimensions that require judgments about how to balance environmental, economic, and other concerns, while GATT panels are intended to focus on a single dimension, trade law.⁹ A GATT panel could more effectively make these judgments if it worked closely with international organizations with expertise in science, environment, and economic development. Requiring some panel members to possess scientific, environmental, and economic development expertise, as well as trade expertise, could help enable panels to be more effective in weighing interests.

GATT's process for resolving disputes is normally closed. Only governments have the right to make presentations to the panels. Public access to GATT panel proceedings is not allowed, and panel reports normally are not made public until adopted by the GATT Council.

A closed process might make it more likely that parties will settle their dispute without a formal ruling. However, the environment-related disputes brought to GATT are of interest to more than just the governments that are parties to the dispute; a more open process would better inform the panel and help countries weigh competing concerns. Public awareness can be especially important for environmental concerns, because it allows those concerns to be heard by governments.

GATT's dispute resolution process might be better able to address environmental issues if non-governmental organizations (NGOs) were provided opportunities to present evidence and argument, and if there was prompt public disclosure of both

submissions to a dispute resolution panel and the panel's report. NGOs (which could include business groups as well as environmental organizations) often have important information and perspectives; governments might not always present that information, either out of ignorance or for political reasons. Without this input, panels might be poorly informed about some dimensions of the dispute.

U.S. INSTITUTIONS

Closer coordination of trade and environmental policies would be useful. The United States also needs to develop positions as contributions to international forums such as OECD. This is one purpose of the interagency task force on trade and environment.

Policy coordination requires some agreement about goals. Given the different perspectives on trade and environment issues, developing agreement on goals may be difficult. Indeed, given the many agencies involved in the interagency discussions, differences in opinions about trade and environment matters, and how they should be addressed, no doubt will continue to exist.

Guidance from Congress might make the USTR-led interagency work group more effective and better able to resolve differences among agencies. Congressional oversight on the interagency process could be needed to ensure that U.S. negotiators have adequate policy guidance. It might help for Congress to encourage continuing coordination on trade and environment policy, so that coordination would persist despite changes of political party and policy-makers.

At some point negotiations (and preparations for negotiations) must be conducted in confidence. However, while U.S. negotiators are still in the early stages of formulating positions, public involvement can contribute to effective policymaking by assuring that all views are considered. International discussions pertinent to trade and environment are progressing in GATT, OECD, and the United Nations. U.S. statements (or lack of statements) can even at this early stage affect the debate. In theory, this

⁹ Under current practice, at least in principle, the adoption of the panel's report by the GATT Council is a step at which tradeoffs of different interests could be considered and a political consensus formed. However, under revised procedures proposed in the Dunkel draft, the Council would lose that function since the Council's adoption of the panel decision (or the decision of an appellate body) would be virtually assured (see annex to ch. 2).

might lock in U.S. positions before the public has much input into the process.¹⁰

Although some steps have been taken to broaden access to environment/trade policy discussions, public involvement in the interagency process has been limited. As mentioned in chapter 2, the U.S. delegation to some of the OECD trade/environment discussions has included one representative from an environmental organization and one representative from industry. These representatives have attended some interagency meetings. However, the group meetings are generally not accessible to the public; drafts of background and position papers have been slow to issue forth; and the Administration does not routinely keep the public abreast of developments in international forums or make available copies of public documents issued by those forums.

One issue of longstanding interest to Congress is the effect of environmental regulations on trade and competitiveness. Congress has expressed concern that strict U.S. regulations could harm U.S. firms. Even if regulations are agreed to internationally, the ability to monitor compliance is often doubtful,¹¹ so that U.S. firms could still be at a disadvantage. Attempts to understand these effects have been hampered by problems with methodology and data (see app. E). Congress might consider calling for assessment of trade and competitiveness impacts when it enacts major new environmental laws, as it did under the 1990 Clean Air Act Amendments (see app. E). If Congress were to establish one agency as the overall leader on competitiveness issues, an option examined in a previous OTA report,¹² that agency might be able to conduct such assessments more easily than any existing agency.

¹⁰ This may have already happened with the Dunkel draft. After the Dunkel draft was promulgated, the GATT Secretariat seemed quite surprised by the extent of opposition among U.S. environmental groups. This suggests that the GATT Secretariat had not been made sufficiently aware of U.S. environmental groups' opinion as it was putting the draft together. Now that the draft has been circulated, it is much harder to change.

¹¹ U.S. Congress, General Accounting office, *International Environment: International Agreements Are Not Well Monitored*, RCED-92-43 (Gaithersburg, MD: U.S. General Accounting office, Jan. 27, 1992).

¹² U.S. Congress, Office of Technology Assessment, *Competing Economies: America, Europe, and Pacific Rim*, op. cit., pp. 60-78.