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Environmental provisions in trade agreements

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That environment is a global public concern, is not in question. Whether trade agreements are suitable for addressing these concerns, is a different issue altogether. A background paper prepared by the WTO Secretariat in 1997 observed that trade instruments are **not** the first-best policy for addressing environmental problems.¹

Environmental problems have, till recently, been addressed in standalone multilateral environmental agreements (MEAs), under the aegis of the United Nations. Notable MEAs include the United Nations Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity, the Vienna Convention on protection of the Ozone Layer, the Convention on International Trade in Endangered Species (CITES), etc. Such a specialized approach to “environment” encompasses the elaboration of obligations for countries with respect to the environment, and the means to achieve it through concrete steps. Agreements such as the UNFCCC’s Kyoto Protocol and the Vienna Convention’s Montreal Protocol also embody differential approaches to the obligations for developed and developing countries, taking into account their respective role in contributing to the environmental problem in the first place, as well as the need for different transitional periods, capacity building, technical and financial assistance for developing countries.

The traditional approach under trade agreements has been to deal with only trade related issues. Under the framework of the General Agreement on Tariffs and Trade, 1947 (GATT), environment is addressed in a limited manner, as an “*exception*” to trade obligations. This approach preserves for member countries the right to take environmental action that is *inconsistent* with trade obligations, in a very specific and limited set of circumstances. This approach has been continued in the WTO, with exceptions on environment finding reflection under the General Agreement on Trade in Services (GATS) as well. Additionally, the WTO’s Agreement on Technical Barriers to Trade (‘TBT Agreement’) and Agreement on Sanitary and Phytosanitary Measures (‘SPS Agreement’), recognize the rights of members to adopt TBT and SPS measures respectively, on grounds of environmental concerns, and subject to a wide variety of criteria, most important of which is that such actions will ensure that they do not constitute arbitrary or discriminatory actions. The TBT Agreement emphasizes the ‘necessity’ approach which requires that any TBT regulation or standard is not *more trade restrictive than necessary* to achieve an environmental objective. The SPS Agreement puts its emphasis on ‘risk assessment’ prior to taking any action, except in very limited circumstances of lack of scientific evidence.



Addressing Environment in Trade Agreements

The first trade agreement to integrate a 'side agreement' on the environment, was the NAFTA, entered into between the U.S., Canada and Mexico. The apparent motivation for this approach, was to assuage concerns that the entry into the trade agreement would not lead to the relocation of polluting industries from the U.S. to Mexico, where the costs of compliance with environmental norms would be cheaper.

Proponents of the trade and environment linkage primarily use this "pollution haven" hypothesis, as the reason why environment should be addressed within trade agreements. This hypothesis is essentially that firms whose main concern is to maximize profits, may be inclined to move their operations to developing countries, where pollution control is inexpensive and lax.² The validity of this assumption, however, has been questioned in several studies which have demonstrated that lower environmental regulations do not necessarily lead to a race to the bottom and that environmental regulations are not the only factors that guide investment decisions.³

The trade and environment linkage is questioned by economists such as Professor Jagdish Bhagwati who argue that free trade would eventually lead to economic growth and better income levels, which would translate into investment in higher environmental standards.⁴ He also points out that trade should not be used as a tool to impose environmental standards, as the welfare implications of free trade are independent of environmental standards.⁵

The questions on the trade-environment linkage, notwithstanding, 'environment' has been making a rapid transition from an 'exception' to a trade agreement, to a core obligation of a trade agreement. Since the NAFTA, not only FTAs entered into by the U.S., but those entered into by Canada and New Zealand, also incorporate environmental obligations. The EU's approach in FTAs in the early 21st century, was to include provisions on "sustainable development", as a recognition of the interplay of economic, environmental and social concerns. EU's more recent approaches reflect a move towards the U.S. approach. This stands in stark contrast to the approach of developing countries. Regional economic groups of several developing economies such as the MERCOSUR, ANDEAN Community, ASEAN, SAARC, CARICOM, and the SADC, recognize 'environmental issues' as an important aspect which countries need to collectively address. However, environmental issues are dealt by these groups in separate agreements or understandings, and not as part of the FTA.



TPP's Environment Chapter

The recently concluded, but yet to be enforced, mega FTA- the Trans-Pacific Partnership (TPP) Agreement mirrors the U.S. approach to environmental provisions. With the TPP Agreement, the position of U.S., Canada, Australia, Japan, and New Zealand, as well as the developing country members such as Vietnam, Malaysia and Brunei Darussalam, have now all been aligned to the U.S. approach.

Chapter 20 of the TPP Agreement makes adherence to certain environment obligations mandatory. This signifies the evolution of a 'trade agreement' from dealing exclusively with 'trade issues' to non-trade concerns, such as how a country should manage its internal environmental regulations. The other important non-trade concern addressed by the TPP is 'labour'; but that is the subject matter for a different assessment.

Trade agreements such as the TPP do not follow the nuanced phased approach of a MEA, to obligations of developed and developing countries, and instead provide for a flat approach, i.e. all countries have to follow the same set of environmental norms.

Chapter 20 recognises the sovereign right of each Party to establish its "own levels of environmental protection", but while doing so, Parties are mandated to strive to ensure that their environmental laws and policies provide for high levels of environmental protection. The term 'environmental laws' is defined to include both domestic laws, as well as a Party's obligations under multilateral environmental agreements.

The most significant implication of the TPP Agreement is the enforcement of environmental obligations (both under international and domestic law). Instead of being the subject matter of assessment of a multilateral environmental body, the implementation of a country's domestic and international environmental law obligations, are sought to be implemented through the potential use of trade sanctions.

The TPP also mandates all its member countries to provide opportunities for public input in implementation of the Environment chapter, including through public submissions and public sessions of the Environment Committee that has been established to oversee the implementation of the chapter. This implies that



implementation of environmental law and decision making would need to be opened up to public scrutiny, not only to interested parties within a territory, but from private interests across all TPP member countries. This could act as a significant pressure point on implementation of not only domestic environmental laws, but also, in respect of implementation of the Environment chapter. The chapter allows private persons from other parties to participate in the Environment Committee meetings. Such a provision could lead to higher presence of non-governmental actors in questioning the country's environmental processes. Whether the underlying interests in such a process is rooted in genuine environmental concerns or protectionism, will be hard to discern.

TPP's Approach: Challenges for developing countries

A recent concept paper by Norway for a WTO mini-ministerial meeting held on October 21-22, highlighted the need for WTO members to explore the extent to which they can harvest, as much as possible, the issues of regional trade agreements, within the WTO. Such an approach is likely to result in increasing demands for such issues to be addressed within the WTO.

Careful deliberations on several issues are desirable before any final positions are taken. Questions for consideration include:

- Do trade agreements need to address environmental issues? Or should environmental issues be left to standalone environmental agreements?
- Will improved trade and economic liberalization lead to better environmental protection? Are trade sanctions required to achieve this?
- What is the practical implication of using environmental provisions in trade agreements? How can protectionist measures in the garb of environmental activism, be eliminated?
- If environment and trade are addressed in the same agreement, is there any role for multilateral environmental agreements?
- If environment and trade are addressed in the same agreement, should such agreements then have more nuanced environmental provisions, encompassing differential responsibilities for developed and developing countries, and elements for technical and financial assistance?



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- ¹ WTO Secretariat, "Environmental Benefits of Removing Trade Restrictions and Distortions", WT/CTE/W/67, 7 November 1997. *Also see*, WTO, Trade and Environment at the WTO: Background Document (2004).
 - ² See, for example, Herman Daly, "Problems with Free Trade: Neoclassical and Steady State Perspectives." In *Trade and the Environment: Law, Economics, and Policy*, ed. Durwood Zaelke, Paul Orbuch, and Robert F. Housman. Washington, DC (1993): Island Press.
 - ³ See, for example, Joseph Friedman, Daniel A. Gerlowski, and Johnathan Silberman, "What Attracts Foreign Multinational Corporations? Evidence from Branch Plant Location in the United States." *Journal of Regional Science* 32 (4, November): 403–18 (1992)
 - ⁴ Jagdish Bhagwati, "The Case for Free Trade", in "Debate: Does Free Trade Harm the Environment?" *Scientific American* (November, 1993) 41-57.
 - ⁵ Jagdish N. Bhagwati & T.N. Srinivasan, *Trade and Environment: Does Environmental Diversity Detract from the Case for Free Trade?*, in Jagdish N. Bhagwati, Robert E. Hudec(eds.), *Fair Trade and Harmonization: Economic Analysis* (1996).