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IX. INTERNATIONAL ECONOMY AND THE ENVIRONMENT

1. INTERNATIONAL TRADE RULES, WORLD MARKET CONDITIONS, AND ENVIRONMENTAL EFFECTS

There was activity across a broad range of legal and policy fronts with respect to trade and environment-related matters in 1995. To a large extent, 1995 was a transition year at the World Trade Organization, and developments in that forum were somewhat limited in comparison to recent years. However, there were quite a few interesting developments in other multi-lateral fora and at the regional level.

(1) The World Trade Organization (WTO)

On January 1, 1995, the WTO was established through the coming into force of the WTO Agreement. The WTO takes the place of the less formally constituted General Agreement on Tariffs and Trade (GATT) as the international organization principally responsible for the oversight of multilateral trading rules, and as the forum for the negotiation for new rules. Details of new WTO rules with implications for the environment have been described in previous editions of this report. It is worth emphasizing, however, that members of the WTO, in the preamble of the WTO Agreement, have incorporated sustainable development as a guiding principle of the multilateral trading system.

Largely as a consequence of transition from the old GATT dispute settlement mechanism to the new WTO Dispute Settlement Understanding (DSU), there were no dispute settlement panel reports relating to the environment (or otherwise) completed during 1995. A complaint filed by Venezuela and Brazil against the United States with respect to certain provisions of the US Clean Air Act was the subject of panel proceedings during 1995, and a panel report on this dispute was expected in early 1996.

The WTO Committee on Trade and Environment (CTE), succeeding the GATT Subcommittee on Trade and Environment, held its first meeting on February 16. Several additional meetings of the CTE were held during the year. The results of these meetings are reported in WTO Trade and Environment Bulletins that are made available on the WTO Internet site. Publication of WTO documents on the Internet has significantly enhanced public access to the organization.

Much of the CTE's time in 1995 was devoted to clarification of its work program. There continues to be considerable difference of opinion among

members as to the appropriate scope and direction of the CTE's work. The view remains firm among a number of developing countries that the focus of the CTE's work should be on assuring that environmental measures do not act as market access barriers.

Matters that occupied the attention of the CTE on a substantive level included attempting to define the relationship between WTO rules and rules of multilateral environmental agreements (MEAs), including the relationship between dispute settlement in the WTO and dispute settlement in other fora. A number of issues were raised by members with respect to whether the WTO is the appropriate forum for resolving environment-related disputes (e.g., whether its panels will obtain adequate expert advice), whether the WTO DSU should be altered to better accommodate such disputes, and whether dispute settlement procedures available under MEAs should be exhausted prior to initiation of proceedings in the WTO. A continuing subject of concern among developing-country members was whether they might be subject to the imposition of trade-restrictive measures pursuant to MEAs to which they are not party, and whether the WTO would approve or tolerate the imposition of such sanctions. None of these issues were resolved during 1995. It is informally understood that a number of members are considering proposals, directed toward the Singapore Ministerial Conference in 1996, that may include an amendment to GATT Article XX that would define in greater detail the relationship between WTO rules and MEA rules. It is not clear that sufficient consensus exists to move such a proposal forward.

Other subjects that occupied the CTE's attention included questions with respect to the imposition of environment-related border tax adjustments, exports of domestically prohibited goods, transparency requirements with respect to environmental measures affecting trade, and the potential trade effects of ecolabeling rules. Discussion in each of these areas carried forward inconclusive work of the GATT Subcommittee on Trade and Environment. The CTE added to its agenda a study of rules of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that may affect the environment (particularly in the areas of access to environmentally sound technologies and the relationship of the TRIPS Agreement to the Biodiversity Convention). It also added study of rules of the General Agreement on Trade in Services and their potential environmental impact.

Although a number of non-governmental organizations (NGOs) have been granted observer status at CTE meetings, the CTE deferred the issue of NGO observer status for consideration at the WTO General Council level.

(2) Organisation for Economic Cooperation and Development (OECD)

In 1995, the Joint Session of Trade and Environment Experts of the OECD issued a Report on Trade and Environment to the OECD Council at the

Ministerial Level. The Report reviews analytical work carried out (and in most cases previously published) by the Joint Session during the prior two years, and summarizes key conclusions, recommendations, and directions for further work. Since OECD governments and proposals often play a leading role in the WTO, this Report may provide insight into future activities at the WTO.

The Report notes that special attention must be paid by OECD governments to the problems that developing countries face in addressing environmental issues. The overall conclusion of the Report is that trade liberalization furthers the goal of environmental protection by promoting the efficient allocation of resources, economic growth, and increased general welfare, provided that "effective environmental policies are implemented." The Report suggests that trade-related economic growth could provide resources for developing countries and economies in transition to enable them to address environmental concerns.

The Report urges OECD governments to reject "green countervailing duties" to compensate for real or perceived negative competitiveness effects of environmental policies. It stresses that multilaterally agreed environmental measures are the best and most effective way of addressing global environmental problems, and urges that governments refrain from using unilateral measures to force other governments to change their policies and practices. The Report also rejects the use of unilateral trade measures to influence production processes and methods that are not physically incorporated in imported products. The Report calls for further examination of potential trade restrictions involving production processes and methods that may be based on MEAs.

The OECD Report notes that attention must be paid to the potential trade impact of "life-cycle approaches" to environmental protection (including ecolabeling programs applying life-cycle approaches). It urges transparency, adequate notification, and that special attention should be paid to problems that developing-country exporters may encounter in attempting to comply with life-cycle policies. The Report further urges that options for the convergence of environmental requirements be explored, and that efforts be made to harmonize testing methods and practices.

Finally, the Report notes the importance of integrating trade and environmental policies so that disputes are minimized. It suggests that the new WTO DSU is adequately open to consideration of relevant environmental and scientific expertise, and it suggests that the work of the WTO CTE will be important in defining the relationship between WTO rules and MEAs. The Report encourages greater transparency of the WTO system through increased access to documentation. The Report suggests that governments may avoid trade and environment conflicts by assuring clarity in the

provisions of MEAs, and that MEAs should incorporate appropriate dispute-settlement mechanisms.

(3) *The North American Free Trade Agreement (NAFTA) and North American Agreement on Environmental Cooperation (NAAEC)*

There were a number of important legal trade and environment-related developments in NAFTA in 1995, principally relating to the North American Commission for Environmental Cooperation (CEC) and its Secretariat.

Pursuant to Art. 14 of the NAAEC, private parties are entitled to make submissions to the CEC Secretariat alleging that a country party is failing to effectively enforce its environmental laws. If the Secretariat determines that the submission, in light of any response provided by the party, warrants development of "a factual record," it may recommend to the Council that such a record be prepared. Upon a favorable two-thirds vote of the Council, the Secretariat will prepare a factual record, and by a two-thirds vote the Council will make it public. In 1995, the CEC released *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*. These guidelines, and other information and documentation concerning the CEC, are available at a CEC Internet site.

The first two submissions requesting the preparation of factual records were made to the Secretariat in 1995. In both cases, the Secretariat responded with an opinion letter advising the submitter that the Secretariat would not proceed to recommend that a factual record be prepared. The facts in the two submissions were similar, and the reasoning of the Secretariat in rejecting both petitions was substantially the same.

One submission, made by the Sierra Club and other NGOs, concerned federal legislation (a "Logging Rider") that effectively suspended the enforcement of existing environmental laws that protect old-growth forests against logging. The legislation provided that any environmental analysis done by the federal agency responsible for regulating such logging would be deemed to satisfy all applicable environmental legislation, it eliminated agency or judicial review of agency action, and it directed the responsible agency to expeditiously award timber contracts on previously protected forests. The Sierra Club alleged that the Logging Rider constituted a failure by the United States to effectively enforce its environmental law. In response, the Secretariat noted:

the enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes a part of the greater body of laws and statutes on the books. This is true even if pre-existing law is not amended or rescinded and the new legislation is limited in time. The Secretariat therefore cannot characterize the application of a new legal regime as a failure to enforce an old one.

Of course, environmental NGOs were disappointed with the outcome of their first two submissions. Yet it has been apparent since the NAFTA texts were finalized and congressional debates were held in the United States that the US Congress did not perceive itself as submitting to the will of NAFTA institutions, particularly as such will might relate to the environmental concerns. From a pragmatic political standpoint, the Secretariat might only have hastened the demise of the CEC and other relatively progressive NAFTA institutions by a direct assault on an already hostile Congress. This is the same year in which the Congress has refused to extend fast-track negotiating authority for accession of Chile to the NAFTA because of the President's insistence that the NAAEC be extended to Chile. The Secretariat has instead focused its attention on building a work program.

In June 1995, the National Audubon Society, the Grupo de los Cien Internacional, and the Centro Mexicano de Derecho Ambiental requested the Secretariat to prepare a report pursuant to NAAEC Art. 13 on a widely publicized mass death of migratory birds at Mexico's Silva Reservoir. The Secretariat created a panel of experts composed of scientists from the three NAFTA parties to investigate, report, and make recommendations on the matter. The International Silva Reservoir Scientific Panel concluded that the bird kill was largely the result of botulism poisoning at the reservoir, and that such poisoning may have resulted from the presence of untreated sewage (including industrial pollutants) in the water. The Panel observed that from an historical standpoint the Silva Reservoir bird kill was not an isolated incident, but that bird kills of similar magnitude had occurred with relative frequency in North America. It recommended that Mexico take action to implement a program for wildlife conservation, and improve its practices and programs with respect to water (including waste water) management.

The CEC adopted and implemented ambitious work programs for 1995 and 1996. These programs include ecosystem mapping of North America, studying NAFTA environmental effects, facilitating cooperation in environmental law enforcement, encouraging the protection of biodiversity, and enhancing public education and participation in environmental protection.

(4) The European Union (EU)

Developments in the EU are reported elsewhere in this volume. It is important to note, however, that the 1995 Report of the Reflection Group appointed by the European Council to make recommendations for the 1996 Intergovernmental Conference (IGC) on revision of the Maastricht Treaty emphasizes the importance of the EU's role in environmental protection. A number of proposals were made within the group for possible environment-related changes to the Maastricht Treaty. Some members believed that the EU should concentrate its attention on implementing and enforcing

existing member-state environmental laws. While the Report reflects no consensus on specific environmental proposals, attention should be drawn to potential developments at the 1996 IGC.

(5) Asia-Pacific Economic Cooperation Group (APEC)

Although APEC is not a formally constituted customs or free trade union such as the EU or NAFTA, its cooperative structure is assuming increasing importance in the international economic field. In this regard, documents emerging from the Osaka conference in November 1995 are of considerable interest. The APEC Economic Leaders' Declaration for Action includes the following statement:

The Asia-Pacific region's fast-expanding population and rapid economic growth are forecast to sharply increase the demand for food and energy and pressures on the environment. We are agreed on the need to put these inter-related, wide-ranging issues on our long-term agenda and consult further on ways to initiate joint action so as to ensure the region's economic prosperity is sustainable.

In addition to this general statement, the Osaka Action Agenda (implementing the Bogor Declaration) lists several goals and action items with respect to environmental protection. These goals include, for example, developing technologies that will contribute to sustainable development, improving environmental management of energy resources, implementing environmental sustainability in tourism, and encouraging environmentally sound management of fishery and agricultural resources.

(6) Conclusion

The year 1995 presents some evidence that regional integration arrangements may provide more effective fora for the negotiation and implementation of progressive environmental programs than do broader multilateral integration arrangements. At the same time, experience in the United States suggests that a regressive national legislature may threaten sound environmental practices in disregard of regional and international efforts.

Frederick M. Abbott

2. MULTILATERAL LENDING ACTIVITIES

During 1995, international financial institutions faced continued pressure to reshape their operational practices in order to increase transparency and embrace the goals of sustainable development. Among the most important developments were the successful invocations of the World Bank Inspection Panel and the development of similar inspection mechanisms at other banks.