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IX. INTERNATIONAL ECONOMY AND THE ENVIRONMENT

1 INTERNATIONAL TRADE RULES, WORLD MARKET CONDITIONS AND ENVIRONMENTAL EFFECTS

In 1993, the trade and environment agenda included legislative approval of the North American Free Trade Agreement (NAFTA) and conclusion of the (→) North American Agreement on Environmental Cooperation; the adoption of the GATT Uruguay Round Final Act and a (→) Decision on Trade and Environment in connection therewith, as well as a variety of other GATT-related activities; the first session of the UN Commission on Sustainable Development (CSD); adoption of a report by the United Nations Conference on Trade and Development (UNCTAD) on implementation of the United Nations Conference on Environment and Development (UNCED)'s Agenda 21; and other activities by and within the United Nations Environment Programme (UNEP) and the Organisation for Economic Co-operation and Development (OECD).

I NAFTA AND THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

In 1993, NAFTA was approved by legislative bodies in Canada, Mexico, and the United States, and the executives of the three state parties exchanged the requisite notifications to bring the agreement into force on 1 January, 1994. Approval by the United States Congress followed exhaustive public debate on the merits of NAFTA, including its environment-related provisions.

In 1993, the state parties also concluded the North American Agreement on Environmental Cooperation (NAAEC). This supplemental agreement was negotiated as part of a 1992 presidential campaign commitment by President Clinton to negotiate for the creation of a trilateral environmental commission as a prerequisite to his pursuit of NAFTA. The NAAEC is described in some detail and commented upon in an

article by this author appearing in this volume of the *Yearbook*. A brief summary is provided in the following paragraphs.

The NAAEC imposes upon the parties obligations to maintain high levels of environmental protection and to implement and enforce their environmental laws. Such implementation and enforcement will include the use of a variety of measures, will permit private access to courts and administrative proceedings in order to compel compliance with environmental law, will provide private parties with remedies, and will be transparent. Private parties, including interest groups, will have the right to initiate proceedings before the Secretariat of the NAAEC Commission for Environmental Cooperation alleging that a party is failing to effectively enforce its environmental law. Upon approval by two-thirds vote of the NAAEC Council, the Secretariat will prepare a factual record regarding the matter at issue. By two-thirds vote, the Council may make the factual record public. A principal role of the NAAEC Commission will be to oversee the conduct of arbitration proceedings brought by one or more party(ies) against another, seeking to remedy "a persistent pattern of failure by the party complained against to effectively enforce its environmental law".

A panel will make findings of fact and a determination as to whether or not there has been a persistent pattern of failure to enforce environmental laws, plus recommendations "which normally shall be that the party complained against adopt and implement an action plan sufficient to remedy the pattern of non-enforcement". The final reports of panels are to be made public. If the parties are unable to agree on an action plan, and if the panel finds that the losing party's proposed plan is inadequate, a plan may be imposed by the panel. If a party is found by a panel to have failed to implement the approved action plan, then the panel shall impose a monetary penalty against that party. The procedure outlined in the NAAEC may well take up to two years before a panel finally assesses a monetary penalty. The maximum amount of the potential monetary penalty is $20 million in the first year after the date of NAFTA's entry into force, and thereafter 0.007% of the total trade between the parties during the most recent year for which data is available. Except as against Canada, the complaining party(ies) may collect the assessment by suspending trade benefits under the NAFTA. The monetary penalty may be assessed annually if failure to implement the action plan continues. A penalty against Canada may only be collected by Canadian court enforcement (albeit automatic). The amount of the monetary penalty is to be paid into a fund "to be expended at the direction of the NAAEC Council to improve or enhance the environment or environmental law enforcement in the party complained against, consistent with its law".

The past two annual reports in the *Yearbook* on this subject followed the progress of litigation by several environmental interest groups (Public Citizen, Sierra Club, and Friends of the Earth) alleging that the United States Trade Representative (USTR) was obligated by the National Environmental Policy Act to prepare an environmental impact statement (EIS) on NAFTA before it could be submitted to Congress for approval. The first such suit was dismissed in 1992 because, according to the Court of Appeals, the interest groups had failed to identify final agency action under the terms of the Administrative Procedure Act (APA). In an attempt to cure this deficiency, the suit was refiled subsequent to the signing of NAFTA by the President. In this second round of litigation, the Federal District Court for the District of Columbia ruled in favor of the interest groups on the grounds, *inter alia*, that NAFTA constituted a final agency action on the part of the USTR within the meaning of the APA because it was a final legislative proposal which would not be amended before its submission to Congress. The District Court ordered the USTR to prepare an EIS. The Court of Appeals for the District of Columbia Circuit reversed the decision, holding that submission of NAFTA to Congress and the form of the submission were at the discretion of the President, and not the USTR, and that the President's action did not constitute final agency action within the meaning of the APA. This removed the legal basis for the challenge and, in the words of the Court of Appeals, "NAFTA's fate now rests in the hands of the political branches".

2 THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The Final Act Embodying the Results of the Uruguay Round of Trade Negotiations (Final Act) was adopted by the Trade Negotiations Committee (TNC), including the governments of the GATT contracting parties and the European Communities, on 15 December, 1993. In connection with adoption of the Final Act, the TNC adopted a (→) Decision on Trade and Environment. This Decision was taken to reflect the view that, while the GATT parties had not fully incorporated issues concerning the relationship between trade and environment into the Uruguay Round negotiations, they understood the need to seriously address this subject as a follow-up to the Round. The TNC decided that a "programme of work" bearing on the interface of trade and environment would be drawn up no later than the forthcoming Ministerial meeting of April 1994.

As reported last year, the Uruguay Round agreement that is perhaps of greatest interest from an environmental perspective is the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). Two

subtle but important changes were made to the prior Dunkel Draft SPS Agreement in the Final Act. First, an interpretive footnote was added in respect to para. 11, which permits members to introduce, based on scientific justification or risk assessment procedures, higher levels of SPS protection than would be achieved by application of international standards. It provides:

> For purposes of paragraph 11, there is scientific justification if, on the basis of examination and evaluation of available scientific information in accordance with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve *its appropriate level of protection.* [emphasis added]

The highlighted language appears intended to clarify that each member is entitled to make a unilateral determination regarding the appropriate level of protection, and that the question of scientific justification is aimed only at whether specific measures are justifiable in achieving this level of protection.

The second important change in the SPS Agreement is to para. 21, which in the Dunkel Draft provided that parties would adopt measures that were the "least restrictive to trade". The Final Act states instead that "[m]embers shall ensure that such measures are *not more trade restrictive than required* to achieve their appropriate level of protection" [emphasis added]. An interpretive footnote is also added to para. 21, providing:

> For purposes of paragraph 21, a measure is not more trade restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of protection and is significantly less restrictive to trade.

Of course, there are many other parts of the Final Act with environmental implications, since the underlying purpose of the Final Act is to liberalize global trade and thereby shift patterns of production and distribution. The Agreement on Agriculture, for example, expressly takes into account environmental considerations by permitting the continuation of domestic subsidies under environmental programs.

The GATT Group on Environmental Measures and International Trade (EMIT) was active during 1993, holding its last meeting of the year on 5–6 October. The Committee on Trade and Development (CTD) met twice in 1993 to discuss matters relating to trade and the environment. A GATT Council meeting scheduled for November to follow up on the results of UNCED, however, was postponed until late January 1994 in order not to detract from the negotiations to conclude the Uruguay Round.

The working agenda of EMIT is of particular interest, and includes discussions concerning trade provisions of multilateral environmental

agreements (MEAs), transparency, environmental packaging and labelling requirements, as well as follow-up to UNCED. A number of approaches are under discussion with respect to resolving conflicts between national measures adopted in pursuit of MEAs and GATT constraints on such measures. These include a case-by-case waiver approach and the adoption of interpretations to or revisions of GATT Article XX. Developing countries, such as Brazil, are expressing considerable concern over the potential adverse consequences of eco-labelling requirements on their export industries. The work of the CTD suggests that translation of the concept of sustainable development into concrete action will require considerable work on clarifying the meaning and implications of the concept.

3 UNCED FOLLOW-UP: CSD, UNCTAD, UNEP AND THE OECD

The first session of the Commission on Sustainable Development was largely devoted to creating a structure for follow-up by national governments and international organizations to the results of UNCED, as well as to the adoption of a program of work for implementation of Agenda 21. Background documents prepared by the Secretariat suggest that the GATT will be expected to provide substantial input to the 1994 session of the Commission regarding the relationship between trade and the environment. The Ministerial statements addressing trade at the session were general in nature, principally calling for a successful conclusion of the Uruguay Round.

In March 1993, UNCTAD's Trade and Development Board adopted a report on its specific plans for implementation of Agenda 21. The six sectoral work programs proposed in the report included Agenda 21 and trade, Agenda 21 and commodities, and Agenda 21 and services. The UNCTAD Board as whole will deal with the subject of trade, and the other five sectoral programs will be undertaken by the Board's subsidiary bodies.

At the seventeenth session of the UNEP Governing Council, approval was given to strengthening work in the field of environment and economics. This will include work on environmental economics, natural resource accounting, environmental impact assessment, and the valuation of environmental and natural resources.

The Joint Session of Trade and Environment Experts of OECD continued its work in 1993 on defining the structure and content of guidelines on trade and the environment. Areas being analyzed include the effects of trade liberalization on the environment, processes and production methods, and the harmonization of environmental standards.

Frederick M. Abbott