

## Chapter 9

The WTO, International Trade, and Environmental Protection:

European and American Perspectives

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### Introduction

This essay explores areas of agreement and disagreement between the US and the EU concerning the role of the World Trade Organization (WTO) in linking trade liberalization and environmental protection. It begins by tracing the background of the responses of the General Agreement on Tariffs and Trade (GATT) and the WTO to criticisms from environmentalists. After exploring the common interests of the EU and the US, it then explains the evolution of the American position with respect to trade and environmental linkages over the last decade. The main part of the paper examines the increasingly significant divergence between American and European perspectives and preferences on trade and environmental issues. On a number of critical issues, the US now favors the status quo: it believes that the current system of WTO trade and environmental rules allows it to challenge other state's NTBs (non-tariff barriers), but does not place its own rules in jeopardy. By contrast, the EU favors a renegotiation of WTO trade and environment provisions since they appear to

make a number of its own standards vulnerable to challenges by the US and its other trading partners.

### The Uruguay Round and the Creation of the CTE

In 1991 an international trade dispute settlement panel found that an American law banning imports of tuna caught in ways that harmed dolphins violated American obligations under the GATT, the predecessor organization to the WTO. The environmental community in both the US and the EU was outraged by the panel decision. They urged that the GATT be changed so as to give governments wider latitude to maintain environmental regulations that restricted the imports of products produced in environmentally harmful ways. This highly controversial tuna-dolphin decision launched a decade-long, often heated debate over the compatibility of international trade rules (and their interpretation by dispute settlement panels) with environmental protection at the national, regional and international levels.<sup>1</sup>

In marked contrast to the North American Free Trade Agreement, whose approval by Congress in November 1993 incorporated a number of provisions favored by environmental organizations, the Uruguay Round agreement which concluded in 1994 addressed few of the principal concerns of the environmental community. However, responding to pressures from consumer activists, the United States did successfully demand a modification of the Standards Code. While an earlier draft had required that standards be “the least trade restrictive

available,” the final version imposed a less formidable hurdle. It stated that they may “not be more trade-restrictive than necessary to fulfill a legitimate objective, taking into account the risks nonfulfillment would create.”<sup>2</sup> In addition, the Agreement on Subsidies and Countervailing Measures permitted governments to subsidize up to twenty percent of one-time capital investments to meet new environmental requirements, provided that subsidies were “directly linked and proportionate” to environmental improvements. This provision provided a partial exemption for environmental subsidies from the WTO’s broader restrictions on government subsidies of business.

Most importantly, at the initiative of the European Free Trade Association (EFTA), the WTO agreed to formally place the relationship between trade and environment on its own agenda. Following the tuna/dolphin decision, EFTA members had requested “a rule-based analytical discussion of the interrelationship between trade and environment . . . to ensure that the GATT system was well equipped to meet the challenges of environmental issues and to prevent disputes by . . . interpret(ing) or amend(ing) . . . certain provisions of the General Agreement.”<sup>3</sup> Their request was strongly supported by both the United States and the EU. United States Trade Representative (USTR) Mickey Kantor expressed his support for “engag(ing) the GATT” with a “post-Uruguay Round work program on the environment.”<sup>4</sup> For the EU, such a program was urgently needed in order to examine the relationship between WTO rules and multilateral environmental agreements (MEAs).

At the GATT's April 1994 ministerial meeting at which the Uruguay Round was formally ratified, and the WTO established, agreement was reached to undertake a systematic review of "trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members."<sup>5</sup> A Committee on Trade and Environment (CTE) was formed to undertake this task. While the CTE has played a useful role in raising awareness of and promoting discussion of trade/environmental linkages, and has strengthened ties between the WTO and the secretariats responsible for administering international environmental treaties, it has been unable to agree on policy recommendations to submit to the WTO's membership. This is due to sharp differences among its members.

The principal points of conflict on trade and environmental linkages within the WTO are between the EU and the US on one hand, and developing nations on the other.<sup>6</sup> The former favor both a flexible interpretation of Article XX, which lists the grounds on which trade restrictions are permissible, as well as making the WTO dispute settlement process more transparent. Both positions are opposed by developing countries that face little or no pressure from domestic NGOs to make the WTO more responsive to environmental concerns and that fear protectionist abuses of any new environmental provisions. The latter's trade policy preferences vis-à-vis the developed world are largely driven by domestic producers who want increased access to developed country markets--access which they see as threatened by rich country environmentalists who favor linkages between trade and environmental policies. Support for changing or clarifying

WTO rules that govern environmental regulations that restrict trade has emerged primarily from the US and the EU. The positions of the EU and the US are complex: they both want a more open world economy, yet they also want to protect their own relatively strict environmental standards from being challenged as trade barriers.

#### Common EU and US Positions

As both major exporters and the political architects of the global trading system, the US and the EU favor a more open world economy, which in turn requires rules that restrict non-tariff trade barriers. Indeed both the Standards Code and the Agreement on Sanitary and Phytosanitary Measures (SPS) were included in the Uruguay Round Agreement largely at the insistence of the United States. Many American exporters felt they had been disadvantaged by the unfair application of technical, food and agricultural standards and they wanted such standards to be subject to WTO scrutiny. For its part, the EU has had extensive experience in dealing with the role of regulations and standards as non-tariff barriers (NTBs) in the context of its efforts to establish a single internal market. It has also favored rules that restrict discriminatory NTBs at the international level.

Yet both the US and the EU also have an extensive array of health, safety and environmental regulations which they want to be able to protect from challenges through the WTO. Many of these regulations also command strong support from politically influential NGOs. The need to protect such regulations has, if anything, become more important in recent years. Due to the increasing

criticism of globalization in general and the role of the WTO in particular by activists and their supporters on both sides of the Atlantic, a successful legal challenge or even the threat of a successful legal challenge to a politically salient protective regulation would undermine public support for trade liberalization and the legal principles on which it is based.

Moreover, not all European and American producers benefit from liberal trade policies. In many cases, domestic producers want to maintain protective regulations that restrict or disadvantage imports. Alternatively, some environmental regulations impose a competitive disadvantage on domestic producers, which then gives the latter an interest in making their foreign competitors comply with them as well. This, for example, occurred in the case of American restrictions on CFCs. Once their use was banned in the United States, major American producers supported an international agreement to phase out their worldwide use. The “export” of American or European environmental standards is often also strongly supported by domestic NGOs both because it reduces business opposition to the imposition of stricter domestic regulatory requirements and serves to strengthen environmental standards in other countries. Health, safety and environmental regulations backed by coalitions of NGOs and producers--so-called Baptist-bootlegger coalitions--are a common feature of trade politics in the US and Europe.<sup>7</sup>

Trade and Environment in American Politics

*Congressional and Presidential Politics*

While political support for reforming WTO rules to strike a “greener” balance between free trade and environmental protection is now much stronger in Europe than in the US, this was not always the case. The North American Free Trade Agreement (NAFTA) approved by Congress in 1993, included, at the insistence of President Clinton, a Supplementary Agreement on the Environment (SAE) as well a set of environmental provisions in the trade agreement itself negotiated by the Bush Administration. Widely considered to be the “greenest” trade agreement ever negotiated, NAFTA appeared to represent a model for how to liberalize trade while at the same time safeguarding, even improving, environmental quality. Building upon its precedent, U. S. Trade Representative (USTR) Mickey Kantor proposed to Congress in mid-1994 that the American legislation implementing the Uruguay Round WTO agreement include, along with an extension of fast-track negotiating authority for the administration, a commitment to making “trade and the environment” one of seven “principal negotiating objectives” for the US in any future trade agreement. <sup>8</sup>

However, several congressional Republicans whose support had been critical to congressional approval of NAFTA strongly opposed this formulation. They had agreed to the SAE as a necessary price for the passage of NAFTA, but now the Administration was proposing to elevate the status of the environment to a core provision in any future trade agreement negotiated by the US. To some of them, this went too far. They were particularly upset because the side agreement negotiated by Kantor had included provisions for trade sanctions in the event of

non-compliance with some of its environmental provisions, which they regarded as a dangerous precedent. Accordingly, a number of congressional Republicans, along with important segments of the business community, insisted that fast-track legislation explicitly exclude any agreement on either labor or environmental standards. The Clinton Administration backed down: when it finally submitted legislation authorizing the renewal of fast-track in the fall of 2000, environmental concerns were muted. But this in turn outraged many environmentalists and their congressional Democratic allies. Accordingly, when fast-track renewal finally came to a vote in the House of Representatives, it received virtually no support from Democratic Representatives and was resoundingly defeated.

The failure of the American Congress to renew fast-track negotiating authority during the remainder of the Clinton Administration had several causes, including the growing strength of protectionist forces within the Democratic Party and the reluctance of many Congressional Republicans to hand President Clinton a political victory. But prominent among them was the impasse over trade and environment linkages within the Congress. Many Republicans, whose party controlled both Houses of Congress after 1994, strongly opposed any such linkage, particularly if it provided for trade sanctions for environmental non-performance. They worried that environmental “safeguards” are really disguised forms of protectionism and that incorporating them would obviate the purpose of trade liberalization and represent a backdoor way to advance the green agenda. But many congressional Democrats continued to insist on effective linkages, including provisions for sanctions.



The Bush Administration, while publicly acknowledging that trade policies should also improve environmental quality, initially opposed any formal linkages between the two. USTR Robert Zoellick cautioned that, “while there are many ways to support international environmental . . . objectives, you have to be very careful to do so in a way that doesn’t become a form of protectionism,” adding that he shared the concern of developing countries that “this is a new way to slow their growth.”<sup>9</sup> He also explicitly characterized the trade and environmental agenda as protectionist. However, in an attempt at compromise, the fast-track authorization narrowly approved by the House of Representatives in December 2001 did state that one American trade negotiating objective would be to make trade and environmental objectives mutually supportive. When Congress finally approved the granting of Trade Promotion Authority in August 2002, eight years after it had expired, Congressional Republicans agreed to include a provision instructing American trade negotiators to regard labor and environmental goals as “principal negotiating objectives,” though it did not bind the US to achieve any particular objectives.<sup>10</sup>

### *American International Initiatives*

Sharp domestic political differences on trade and environmental linkages have made it difficult for the US to take a leadership position with respect to trade and environmental issues before the WTO. Many American proposals to the CTE have tended to emphasize procedural rather than substantive issues.

In a communication from the US on “Trade and Sustainable Development” issued as part of preparations for the 1999 Ministerial Conference in Singapore, the US proposed that the CTE conduct ongoing reviews of the links between the WTO’s “negotiating agenda and the environment and public health.”<sup>11</sup> These reviews “would identify and discuss issues, but not try to reach conclusions or negotiate these issues in the CTE itself.” The US has also encouraged all WTO members to conduct reviews of the potential environmental effects of any trade proposals. Shortly before he left office, President Clinton issued Executive Order 13141 requiring written environmental reviews of major trade agreements. This order institutionalized a practice which had begun with the first Bush Administration’s review of the environmental impact of NAFTA and President George W. Bush reaffirmed it in April 2001.

The United States has also taken a leadership role within the WTO, especially at the Ministerial meetings in Seattle, in attempting to promote increased transparency and openness. In a Declaration of Principles on Trade and Environment, the US noted that it “has been a staunch advocate for WTO reforms, including greater interaction and exchange of information with the public through the creation of consultative mechanisms,” adding that “transparency and openness are vital to ensuring public understanding of and support for the WTO and all international institutions.”<sup>12</sup>

The WTO has responded to a number of these suggestions. It has invited NGOs to participate in a number of conferences and seminars and has issued a steady stream of studies on the environmental impacts of trade liberalization. The

dispute settlement process has also become more public, largely through the Internet, which now provides considerably more information on the progress of dispute settlement proceedings. In the shrimp/turtle case, the appellate panel did invite the views of experts in marine biology and it also permitted representations by NGOs, though these were formally required to be part of the American legal brief. These initiatives have been supported by the EU as well, though it has placed less priority on them than has the US.

The most important American policy initiative relating to trade and the environment has to do with the highly controversial area of subsidies, specifically in the areas of fisheries and agriculture. The US has long sought to restrict the EU's extensive agricultural subsidies, particularly its export subsidies, as well as its subsidies for its fishing fleets. Both sets of subsidies adversely affect American producers and American efforts to restrict them long predate the emergence of environmental concerns over international trade. But with the growth of concern about the environmental impact of trade liberalization, the American position is now that these subsidies are environmentally harmful--a position which is supported by a number of WTO studies and reports.<sup>13</sup>

The US argues that by reducing such trade distorting subsidies, "trade liberalization can promote competition and more efficient resource use, as well as contribute to higher living standards and a cleaner environment."<sup>14</sup> In a related proposal, the United States supports what it describes as another "win-win" opportunity: the elimination of tariffs on environmental goods, such as pollution control technologies, and the liberalization of trade in environmental services. In

short, for the Americans, the most constructive way to “green” the WTO is not to expand the grounds on which a nation can restrict trade to prevent environmental harms, but rather for the WTO to encourage governments to reduce their financial support for environmentally harmful economic activities.

## EU – US Differences

### *Multilateral Environmental Agreements (MEAs)*

From the very outset of trade and environmental discussions within the WTO, the EU urged the CTE to recommend that trade restrictions sanctioned by MEAs be protected from challenges through the WTO. (Of the approximately 200 multilateral environmental agreements, 20 contain trade provisions.) The EU has been concerned about the possibility that, under current trade law, a country which belonged to the WTO but had not signed an international environmental agreement could legally challenge trade restrictions that were permitted or mandated by an MEA. This would not only “undermine international efforts to tackle environmental problems (but) it would also fuel the arguments of those opposed to the WTO.”<sup>15</sup> While acknowledging that no trade measure taken pursuant to an MEA has yet been challenged in the WTO by a non-party, the EU believes that “the legal ambiguity surrounding the possibilities of such a challenge causes uncertainty and doubt over the effectiveness and legal status of such measures and thus weakens MEAs.” Accordingly, the EU wants the WTO to

“clarify that . . . multilateral environmental agreements and associated trade measures are also respected by trade law.”<sup>16</sup>

The American position is that no such clarification is necessary because “the WTO broadly accommodates trade measures in MEAs.”<sup>17</sup> The US has expressed confidence the WTO would not sustain a challenge to an MEA--a position that it believed to be confirmed by the Appellate Body ruling in the shrimp-turtle case. This case did not technically concern an MEA, since at issue was the US embargo on shrimp caught in ways that killed sea turtles. The most relevant MEA, CITES, prohibits trade in sea turtles, not in shrimp. Nor does it provide for trade restrictions of related products as a means of enforcing its provisions. Nonetheless the fact that the American trade restriction was intended to protect a species that officially protected by a MEA was explicitly noted by the panel.

Underlying these trans-Atlantic differences is the changing position of the US and the EU with respect to MEAs. Historically, MEAs have reflected a broad international consensus, one that has included both the US and the EU, with the former frequently playing a leadership role. But more recently, such agreements have reflected sharp differences between the two. An important example is the Montreal Protocol on Biodiversity.<sup>18</sup> The EU supported an international treaty that was consistent with its domestic restrictions on the planting, sale and labeling of genetically modified foods and seeds. For its part, the US, as a major exporter of such crops, wanted to limit the basis on which trade in genetically modified foods and seeds could be restricted. The two parties specifically differed as to the

application of the precautionary principle to import bans and labeling requirements, whether or not the protocol should include bulk commodities intended for consumption, i.e., crops, or be limited to seeds, and the relationship between the Protocol and WTO rules.

The result was a compromise: on the critical point of the relationship between the Protocol and WTO, the former is deliberately ambiguous. However, if the US were to bring a claim before the WTO over an EU restriction on genetically modified organisms (GMOs) the Biosafety Protocol, which has been ratified by more than 130 countries, could be invoked by the EU as evidence of a strong international consensus. (The EU was unable to cite any such international consensus in its defense in the beef hormone case.) Whether this would enable the EU to prevail remains unclear, but it certainly would make its case stronger. In this context, it is not surprising that the EU urgently wants the WTO to “clarify” the legal relationship between MEAs and the WTO in a way that specifies the circumstances under which the former are subject to the latter. The US officially claims that no such clarification is needed because no nation has filed a challenge to a trade restriction sanctioned by an MEA. But clearly the US also wants to avoid having the WTO defer to an MEA that it does not support--a category which is steadily expanding.

Specifically, both the Basal Convention on the Export of Hazardous Wastes and the Kyoto Protocol have been ratified by the EU, but not by the US. Accordingly, the EU would like assurances that any trade restrictions which

flowed from these agreement would withstand WTO scrutiny, a concern which the US does not share.

### *Precautionary Principle*

Within the EU, the precautionary principle has emerged as an important basis for the adoption of a wide range of risk-adverse health, safety and environmental policies, including restrictions on genetically modified foods and seeds (see Chapter 3). It has been an explicit component of EU environmental policy since 1992 and is defined as one of the key principles of EU environmental law in both the Maastricht and Amsterdam Treaties. In order to better defend its regulations from possible legal challenges from the US, and other WTO members, the EU wants the precautionary principle to be incorporated into international trade law. One way to accomplish this objective is to include this principle in as many international environmental agreements as possible and then to have these agreements accorded some kind of legal status by the WTO. For its part, the US wants to maintain the legal supremacy of the SPS Agreement, whose more demanding scientific standards for trade-restrictive regulatory policies enabled the US to prevail in its dispute over the EU's ban on beef hormones.

Not surprisingly, there were sharp differences between the EU and the US over whether the precautionary principle should be included in the Montreal Protocol on Biodiversity. As a compromise, Article 10 of the Protocol incorporates the precautionary principle though without explicitly mentioning it: a country is permitted to reject the importation of a "living modified organism for

intentional introduction into the environment” where there is “lack of scientific consensus” regarding the extent of its potential adverse effects on either human health or biodiversity. Most observers believe that this language reduces the amount of scientific evidence that would be needed to justify an important ban.

The EU and the US are also divided about the legal status of the precautionary principle in international trade law. During the Uruguay Round negotiations in the early 1990s, it was the United States which had insisted on changes in the SPS Agreement to make it easier for relatively risk-adverse regulatory standards to pass the scrutiny of WTO dispute panels. This position reflected the relative stringency of many American health, safety and environmental standards when compared to the rest of the world, including the EU. But over the last decade, the EU has adopted a number of standards that are stricter or broader than their American counterparts. Accordingly, it is now the EU that is insisting that WTO rules be modified so that they can more easily defend their regulatory standards from trade challenges, including from the US.

One such modification would be for the WTO to accord legal recognition to the precautionary principle--in effect harmonizing EU and WTO approaches to regulatory policy formation in the face of scientific uncertainty. While the European Commission believes that measures based on the precautionary principle are *a priori* compatible with WTO rules, it nonetheless wishes to “clarify this relationship” and, in addition, “to promote the international acceptance of the precautionary principle.” According to the EU, “this will help ensure that measures based on a legitimate resort to the precautionary principle,



including those that are necessary to promote sustainable development, can be taken without the risk of trade disputes.”<sup>19</sup> In this context, it is worth recalling that the EC did invoke the precautionary principle in the beef hormone case, only to have the Appellate Body decide that “the precautionary principle cannot override our finding. . .namely that the EU import ban . . .is not based on risk assessment” as required by the SPS Agreement.<sup>20</sup> Clearly, the EU would prefer that any trade dispute regarding genetically modified agriculture be decided on a different basis.

Once again, the US does not consider a change in WTO rules to be necessary. According to the Americans, not only is a “precautionary element. . .fully consistent with WTO rules, (but) it is an essential element of the US regulatory system.”<sup>21</sup> However the US cautions that “precaution must be exercised as part of a science-based approach to regulation, not a substitute for such an approach.” While this is not inconsistent with the way the precautionary principle has been interpreted within the EU, the US remains concerned that, as applied by the EU, there is a danger that the precautionary principle will become a “guise for protectionist measures.” The US is satisfied with provisions of the SPS Agreement which permit a country to set high standards even when the scientific evidence on risk is uncertain, with the stipulation that such standards be regarded as provisional and thus subject to modification as more evidence becomes available. But the US is concerned that “explicitly embedding a precautionary principle in the SPS or TBT sections of the WTO framework would . . . allow countries to block imports on environmental or health grounds in the absence of any scientific evidence of significant risk.”<sup>22</sup>

*Process and Production Methods (PPMs)*

Historically, the most important source of trade conflict between the US and its trading partners, including the EU, has stemmed from American efforts to unilaterally employ trade restrictions to impose its domestic environmental policies on other countries. This was the essence of the dispute in both the tuna/dolphin and the shrimp/turtle cases. But while the US lost both cases, including a second tuna/dolphin case, which was brought by the EU, the political significance of the two marine protection cases was substantially different.

In the shrimp/turtle case, the WTO's appellate body, in an opinion that sharply contrasted with the dispute panel decision in the tuna/dolphin cases, agreed that the US *could* limit imports on the basis of how a product was produced outside its borders in order to pursue legitimate environmental objectives--provided certain conditions were met. The WTO did not object to the goal of American policy but rather the means the US had employed to achieve it. This meant that only minor changes were required to make US turtle protection regulations consistent with the WTO. Following these changes, the American regulations were subsequently upheld by another WTO dispute panel.

While many American environmentalists failed to appreciate the significance of appellate body ruling, the US government has not. It regards the outcome of the shrimp/turtle case as a major political triumph: the WTO had effectively revised its legal interpretation of the rules governing one of the most persistent sources of trade conflict between the US and its trading partners.<sup>23</sup> The USTR headlined its press release announcing that a second dispute panel had

found America's slightly revised implementation of its sea turtle protection law to be fully consistent with the decision of the Appellate Panel, "U.S. Wins on WTO Case in Sea Turtle Conservation." Zoellick commented, "We have long maintained that the WTO Agreements recognize the legitimate environmental concerns of Members, and this report confirms our view. I am pleased that the arguments we have made in this and other disputes have contributed to the body of cases illustrating the WTO's sensitivity to environmental concerns."<sup>24</sup>

The EU was also pleased with the outcome of this case since a number of environmental policies that its trading partners, including the US, have challenged have also revolved around the extra-territorial application of environmental regulations. But the EU does not share America's satisfaction with the extent to which the shrimp/turtle dispute panel decision has "greened" the WTO. It wants WTO rules to be clarified in order to broaden significantly the basis upon which a country can regulate or restrict imports based on how they were produced outside its borders. According to the EU, "It is increasingly clear that how a good is made is important and can no longer be dismissed as a luxury or detail of concern only to developed countries. . . ."<sup>25</sup>

The EU's position on the appropriate status of environmentally related trade restrictions under the GATT/WTO has shifted markedly over the last decade. In 1991, the EU, along with virtually every other GATT member, applauded the dispute panel ruling against the US in the tuna/dolphin case for striking a much needed blow against America's unilateral efforts to extend the scope of its environmental standards outside its borders. Now, it is the EU that is

in the forefront of urging the WTO to permit a wide range of environmentally-related trade restrictions to protect the global environment--even in the absence of an international treaty. This change in the EU's position largely reflects its increasingly active leadership role in addressing international environmental issues--a role formerly occupied by the US.

### *Eco-Labels*

A related point of contention between the EU and the US involves the legal status of environmental labels. Both the US and the EU support the use of eco-labels, both for the environmental impact of the product itself as well as for how it is produced. However, the use of eco-labels is much more common in Europe, where at both the national and European level they have become a major instrument of environmental policy. The US has periodically expressed concern about the EU's criteria for awarding eco-labels on the grounds that the European system has a "potential for discrimination against US firms whose production processes and methods differ from those used in the EU while having comparable environmental impacts."<sup>26</sup> In one of its annual reports to Congress the USTR listed the EU's eco-label scheme as a "topic of continuing concern," though the US has not filed a formal complaint.

Within the CTE, the relationship of eco-labels to the WTO has emerged as a major point of contention between the US and the EU. One key issue is their legal status. Specifically, does the Technical Barriers to Trade Agreement (TBT) which covers both technical regulations and standards, include eco-labels? The US claims that it does since the definition of both standards and technical

regulations in the TBT explicitly includes labeling requirements as they apply to a product, process or production method. This would make national, or in the case of the EU, regional, eco-labels subject to the same WTO discipline as any other technical standard, meaning they would be required to treat products from all WTO member countries equally and could not be prepared, adopted or applied with the intention or effect of creating “unnecessary obstacles to trade.” However, the US has not advocated a change in WTO rules; rather it believes that the TBT is already sufficiently flexible both to protect the use of eco-labels based on PPMs as well as to subject them to WTO scrutiny.

The EU initially argued that the TBT does not cover eco-labels at all, a position that it based on the absence of specific references to environmental labels, as distinguished from “labeling requirements” in the TBT. However, as environmental concerns in Europe have grown, the EU’s position has shifted. As in the case of the trade status of MEAs, the EU now wants the relationship between WTO rules and Non-Product Related Process and Production Methods (NPRPPM, usually referred to as PPMs) to be “clarified.” It particularly supports explicit recognition of the WTO-compatibility of eco-labeling schemes based on a life-cycle approach. According to the European Commission, “EU consumers are increasingly concerned about a growing range of NPRPPM issues which they feel affect their everyday lives.”<sup>27</sup> Accordingly, “subject to . . . important procedural safeguards, there should be scope within WTO rules to use such market based, non-discriminatory non-protectionist instruments as a means of achieving environmental objectives.”

*WTO Dispute Settlement*

Underlying the differences between the EU and US views toward modifying WTO rules governing regulatory standards that restrict trade is a divergence in their perceptions of the adequacy of WTO rules and their interpretation by dispute panels to protect legitimate health, safety and environmental regulations. According to the US, “WTO rules recognize that there can be legitimate differences of view on scientific and technical issues in the development of health, safety and environmental measures . . . .WTO dispute settlement decisions in this area already reflect a considerable degree of deference to domestic regulatory authorities on health and safety matters.”<sup>28</sup> The US has expressed confidence that “WTO panels will show . . . deference to U.S. regulators given the integrity, rigor, and open and participatory nature of the U.S. regulatory system.”<sup>29</sup> Clearly this confidence was significantly reinforced by the ultimate outcome of the shrimp/turtle dispute.

But the EU does not share this rather sanguine view of the WTO dispute settlement process, for the obvious reasons that a number of EU health and environmental regulations either have been or are likely to become vulnerable to challenges by Europe’s partners, including the US. The most dramatic example, of course, is the EU’s beef hormone ban, which prohibited both the administration of growth hormones to cattle and the sale of any meat from cattle to which hormones had been administrated. The WTO’s overturning of the EU’s ban on American meat imports from cattle to which hormones had been administrated represented a highly visible challenge to a regulation that the EU and many of its

citizens regarded as both important and necessary. Clearly in this case, the WTO dispute panel appeared to show inadequate “deference” to the EU regulatory process and the values and preferences of its citizens.

Even in the absence of formal dispute proceedings, WTO rules have made EU regulations vulnerable. For example, the EU was forced to modify its politically popular ban on the imports of furs from countries which permitted the use of leg-hold traps, when it faced the likelihood of a successful legal challenge by the US and Canada. The EU has also found its efforts to develop forest certification schemes that would restrict imports of tropical timber undermined by questions about their consistency with WTO rules. The US has periodically raised questions about the WTO consistency of the EU’s eco-labeling standard for paper products. More recently, US electronic producers, backed by the USTR, have expressed concern about the trade implications of the EU’s directive on Restrictions on Hazardous Substances in Electronic and Electronic Equipment. This directive, which was approved in 2002, requires the phasing out the use of heavy metals in electronic products in order to protect landfills. As similar restrictions have not been approved in the US, American exporters face the challenge of modifying the composition of their products in order to enjoy continued access to the European market.

Most importantly, the EU’s restrictions on genetically modified foods and seeds remain an ongoing source of trade tension with the US.<sup>30</sup> As of January 2003, the EU had not approved a new biotechnology crop for more than four years, due in large measure to the inability of Member States to agree on criteria

for labeling and traceability. This has been very frustrating to both American government officials and much of the farm industry. The American view is that the EU's concerns about the safety of genetically modified agriculture have no scientific basis. Not only has the EU's moratorium reduced American corn exports to the EU by approximately \$250 million per year, but European policies have encouraged other countries to adopt similar restrictions, thus reducing the market for American agricultural exports. There is growing domestic pressure for the US to challenge the EU's regime for genetically modified foods before the WTO and the US has periodically threatened to file a formal complaint.

The American experience has been quite different. American fuel economy standards were essentially found to be GATT consistent in a case brought by the EU that was decided shortly before the Uruguay Round Agreement was submitted to Congress. While the first trade dispute adjudicated by the newly formed WTO did declare an EPA rule governing the composition of reformulated gasoline to be WTO inconsistent, the dispute had no substantive implications for American environmental standards. Indeed, the Clinton Administration privately recognized that the US had imposed a trade barrier masquerading as an environmental regulation and was actually pleased with the outcome. American environmentalists did sharply criticize the WTO ruling but were unable to generate much public interest in the dispute. As already noted, the appellate body in the shrimp/turtle case essentially endorsed American regulations aimed at protecting sea turtles outside its borders, in effect reversing much of the holding of the dispute panel in the tuna/dolphin case.



More broadly, with the exception of the second tuna/dolphin case, the US has never lost an environmentally related trade dispute with the EU (though the EU did formally support Venezuela in the reformulated gasoline case). Nor has it been forced to modify any of its environmental regulations because of fears that the EU might file a formal complaint with the GATT/WTO. Nor do any significant American health, safety or environmental regulations now appear vulnerable to international trade legal challenges from any WTO member, including the EU. It is important to note that since 1994, every trans-Atlantic environment related trade dispute between the US and the EU has stemmed from American accusations that EU regulations were NTBs. For a politically influential segment of American producers, the most important health, safety or environmental NTBs are now those imposed by the EU. (Fifteen years ago, the phrase “non-tariff trade barrier” evoked Japan.) Alternatively, for Europeans, it is the US that represents the most important external threat to their ability to maintain their regulatory standards.

### *Subsidies*

Just as the US has begun to challenge the EU’s agricultural subsidies on the grounds that they are environmentally harmful, so has the EU’s defense of them increasingly rested on their environmental as well as social benefits. The EU contends that agriculture makes an essential contribution to the achievement of a number of important social goals beyond the production of food and fiber. The “multifunctional” roles of farming include the preservation and enhancement of the rural landscape, environmental protection and the viability of rural areas.<sup>31</sup> In

the case of subsidies for fisheries, the EU's position is more nuanced. While acknowledging that fisheries suffer from the tragedy of the commons, it argues the focus within the CTE on subsidies, particularly those granted to their fleets by developed countries, and their possible effects on over-capacity, is simplistic. Not only is there no clear definition as to what constitutes a subsidy, but in fact the vast majority of developed country support for fisheries was devoted to general services such as infrastructure and research which do not directly contribute to over capacity.

### Conclusion

Why has the EU identified trade and environment as one of three new areas on which it wants negotiations at the next international trade round, even though the WTO dispute settlement decisions have become increasingly responsive to environmental considerations? *The Economist* suggests that it has to do with different trans-Atlantic legal traditions. "Anglo-Saxons may be happy with case law, but politicians in continental Europe, where laws are based on a civil code, like to write rules in advance."<sup>32</sup> Indeed, many of the differences between the EU and the US do have to do with means rather than ends. After all, both want the WTO to be relatively flexible in accommodating a range of environmentally related trade restrictions. The US, however, believes that such an accommodation is adequately taking place through the decisions of the Appellate Body, while the EU disagrees and wants it to be rule-based.

Yet *The Economist* is only partially correct. For there are also substantive disagreements. The EU is more vulnerable to having its protective regulations challenged through the WTO than is the US. And this in turn reflects the significant changes in regulatory politics that have taken place in Europe and the US over the last decade. Since 1990, the rate at the US has strengthened or expanded the scope of environmental standards has significantly declined. In the critical area of international environmental policy, the US no longer plays a leadership role: it has ratified neither the Basel Convention on Hazardous Wastes nor the Kyoto Protocol and it only reluctantly signed the Biosafety Protocol. The Bush Administration is highly unlikely to change this pattern.

By contrast, environmental policy in the EU has become increasingly vigorous over the last decade. Fifteen years ago, it was unusual to find a European health, safety or environmental standard that was stricter than its American counterpart. Now there many. These include the EU's bans on beef and dairy hormones, antibiotics in animal feed and the use of leg-hold traps, its increasingly rigorous recycling requirements for products ranging from cars to computers to phones, its extensive eco-labeling schemes, and its wide ranging restrictions on genetically modified foods and seeds. At the global level, it is Europe that has taken a leadership role in seeking to restrict trade in hazardous wastes, protect rain forests, maintain biodiversity and reduce carbon emissions. In short, since the early 1990s, environmental issues have been much more politically salient in Europe than in the US.<sup>33</sup>

It is precisely those EU's regulatory standards that are more stringent than their American counter-parts that are most likely to be subject to trade disputes. (Note however that stringency should not be confused with effectiveness: more stringent regulations may or may not be more effective.) To be sure, domestic pressures in the US may inhibit the filing of another formal challenge to a politically popular EU health, safety or environmental regulation. After all, the US does not want to provoke a further political backlash against globalization nor further strain trans-Atlantic relations. But for the Europeans, this is insufficient. In addition, according to an EU official, the American position on the Kyoto global climate change agreement has "reverberated into the politics of trade and environment and trade negotiations," making the EU less trustful of the American commitment to environmental protection and thus even more determined to have these issues addressed in the next trade round.<sup>34</sup>

These differences were largely papered over in the November 2001 declaration of the Fourth Ministerial Conference in Doha, Qatar, which officially launched the next WTO trade round. Thus the US agreed to negotiations aimed at clarifying how WTO rules apply to MEAs that contain trade provisions, and to explore if existing WTO rules stand in the way of eco-labeling policies. For its part, the EU agreed to clarify and improve WTO rules that apply to fisheries subsidies. Both supported negotiations aimed at reducing trade barriers to environmental goods and services and to expand cooperation between WTO officials and those governing MEAs. But the substantive differences between the

EU and the US on trade and environmental linkages are likely to re-emerge if and when the Doha Round resumes.

<sup>1</sup> See for example, David Vogel, Trading Up Cambridge: Harvard University Press, 1995, Daniel Esty, Greening the GATT Washington DC: Institute for International Economics, 1994

<sup>2</sup> quoted in Vogel. 136

<sup>3</sup> quoted in *ibid*, p. 137

<sup>4</sup> quoted in William Lash III. The Clinton Trade Tango: One Step Forward, Two Steps Back Center for the Study of American Business, May 1984, p. 7

<sup>5</sup> quoted in Vogel, p. 137

<sup>6</sup> For an excellent analysis of the politics of the CTE, see, Gregory Shaffer, "The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters," The Harvard Environmental Law Review Vol. 24, No. 2, 2000, pp. 563-592

<sup>7</sup> For the United States, see Elizabeth DeSombre, Domestic Sources of International Environmental Policy Cambridge: MIT Press, 2000

<sup>8</sup> Quoted in I.M. Destler, and Peter J. Balint The New Politics of American Trade: Trade, Labor and the Environment Washington DC: Institute for International Economics, October 1999 p. 10

<sup>9</sup> "Calming the Waters: A Talk with the US Trade Rep," Business Week July 23, 2001 p. 41

<sup>10</sup> "Promoting the Noble Cause of Commerce," Economist August 3, 2002

<sup>11</sup> Preparations for the 1999 Ministerial Conference, A Communication from the United States, 7/30/99

<sup>12</sup> USTR: Declaration of Principles on Trade and Environment

<sup>13</sup> see for example, Hakan Nordstrom and Scott Vaughan, Trade and Environment, Special Studies 4, World Trade Organization, 1999, Part II: A, E

<sup>14</sup> Declaration of Principles on Trade and Environment"

<sup>15</sup> "The Non-Trade Impacts of Trade Policy – Asking Questions, Seeking Sustainable Development," Informal Discussion Paper Rev. 1 Directorate General for Trade, EU, January 8, 2001

<sup>16</sup> *ibid*

<sup>17</sup> USTR 2000 Annual Report, p. 81

<sup>18</sup> This section draws on Mark Pollack and Gregory Shaffer, "The Challenge of Food Safety in Transatlantic Relations," in Transatlantic Governance in the World Economy Mark Pollack and Gregory Shaffer, eds. New York: Bowman and Littlefield, 2001, pp. 170 - 172

<sup>19</sup> "The Non-Trade Implications."

<sup>20</sup> Quoted in James Cameron, "The Precautionary Principle," in Trade, Environment, and the Millennium Gary Sampson and W. Bradnee Chambers, eds. United Nations University Press, 1999 p. 259

<sup>21</sup> Declaration of Principles

<sup>22</sup> Michael Weinstein and Steve Charnovitz, "The Greening of the WTO," Foreign Affairs November/December 2001, pp. 154- 155

<sup>23</sup> see, for example, "Carrie Wofford, "A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT," The Harvard International Law Review Vol. 24, no. 2, 2000, pp. 564 – 592

<sup>24</sup> USTR Press Release, "U.S. Wins WTO Case on Sea Turtle Conservation," June 15, 2001

<sup>25</sup> "The Non-Trade Impacts"

<sup>26</sup> David Vogel, Barriers or Benefits? Washington DC, Brookings Institution Press, 1997, p 49

<sup>27</sup> "The Non-Trade Impacts"

<sup>28</sup> Declaration of Principles

<sup>29</sup> *ibid*

<sup>30</sup> Neil King, Jr. "Zoellick Slams EU for 'Immoral' View on Biotech Crops," Wall Street Journal January 10, 2002, p. A8.

<sup>31</sup> "The Non-Trade Impacts"

<sup>32</sup> "Playing games with prosperity," Economist July 28, 2001 p. 26

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<sup>33</sup> For a broader analysis of this development see, David Vogel, “The Hare and the Turtle: The New Politics of Consumer and Environment Regulation in Europe, “ British Journal of Political Science (forthcoming)

<sup>34</sup> *ibid*