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# U.S.-Jordan Free Trade Agreement: Analysis of Environmental Provisions

Mary Tiemann
Specialist in Environmental Policy
Resources, Science, and Industry Division

## Summary

The U.S.-Jordan Free Trade Agreement (FTA) was signed on October 24, 2000, and submitted to Congress on January 6, 2001. The FTA's entry into force required the completion of necessary domestic legal procedures by each Party, and the Jordanian Parliament approved the agreement in May. This trade agreement generally was greeted with broad bipartisan support; however, it generated controversy because the text includes potentially precedent-setting provisions on environment and labor, and the provisions are subject to the agreement's dispute settlement process. The environmental provisions parallel those included in the North American Free Trade Agreement (NAFTA) environmental side agreement. Some interests view the inclusion of these provisions to be a model for addressing environmental issues in future trade negotiations, but others object to making the environmental provisions subject to dispute settlement and possibly sanctions. The Administration did not seek to alter the U.S.-Jordan FTA to address concerns with its labor or environment provisions, but the two governments exchanged letters stating their intent to try to resolve differences without recourse to formal dispute settlement procedures. On July 31, the House passed implementing legislation (H.R. 2603) by voice vote. The Senate passed H.R. 2603 by voice vote on September 24. The bill was signed into law (P.L. 107-43) on September 28. (For more details, see CRS Report RL30652, *U.S.-Jordan Free Trade Agreement*.) This report examines environmental provisions in the U.S.- Jordan FTA and compares them with related provisions in NAFTA and its environmental side accord.

During the past decade, environmental issues have gained an increasing level of attention in trade liberalization deliberations, although their inclusion in trade agreements remains controversial. No consensus has emerged on how, whether, or to what degree such issues might be addressed in trade agreements or in "fast track" legislation authorizing expedited congressional consideration of these agreements. Consequently, the U.S.-Jordan Free Trade Agreement (FTA) is of interest as it expands the consideration of environmental matters in a trade agreement by including environmental provisions within the body of the agreement and making these provisions subject to the FTA's dispute settlement process.

Views on the specific environmental provisions have been quite divergent. Some policymakers and environmental groups see the inclusion of these provisions to be either a model or a starting point for future U.S. trade negotiating strategy on environmental issues. Others view such provisions to be potentially protectionist by making enforcement of environmental laws subject to dispute settlement and possibly sanctions. Opponents also have expressed concern that such provisions could threaten U.S. sovereignty on domestic environmental matters. Thus, while an FTA with Jordan was widely supported in Congress, its environmental and labor provisions caused controversy. On June 21, U.S. Trade Representative Robert Zoellick stated that the Bush Administration would not seek to alter the FTA to address concerns regarding these provisions. However, the two governments exchanged letters stating their intent to resolve any implementation issues without recourse to formal dispute settlement procedures.

## Overview of Environmental Provisions

Briefly, in the FTA, the United States and Jordan "recognize that it is inappropriate to encourage trade by relaxing domestic environmental laws." This provision, which parallels NAFTA language, further states that each Party agrees to strive to ensure that it does not waive or otherwise derogate from such laws to encourage trade with the other Party. While calling for high levels of environmental protection, the FTA explicitly recognizes the right of each country to establish its own levels of domestic environmental protection, policies, and priorities. Perhaps most significantly, the FTA sets a precedent in stating that "a Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties." While similar language appears in the NAFTA environmental side agreement which has its own dispute settlement process, here this obligation is placed within the text of the trade agreement and is subject to the FTA's dispute settlement procedures. (See Table 1 below for a comparison of environmental provisions in the U.S.-Jordan FTA with similar provisions contained in the NAFTA and its environmental side agreement.)[1]

An unprecedented provision in NAFTA that is not included in the U.S.-Jordan FTA concerns the relationship of the FTA to multilateral environmental agreements (MEAs). NAFTA Article 103 lists three trade-related MEAs (e.g., the Montreal Protocol on ozone-depleting substances) that may take precedence over NAFTA if implementation conflicts arise, provided that the MEA is implemented in the least NAFTA-inconsistent manner. Parties may add other MEAs to this list. This issue – defining the relationship of MEAs to trade rules – has been on the agenda of the World Trade Organization's Committee on Trade and Environment for several years, and its resolution remains elusive.

## Enforcement Obligation and Dispute Settlement Procedures

The strength of the obligation to effectively enforce domestic environmental laws is directly related to the dispute settlement process. The U.S.-Jordan FTA sets out a

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[1] The U.S.-Jordan FTA and the NAFTA side agreement define "environmental laws" similarly for purposes of the enforcement provisions,. They generally include a broad range of environmental protection laws, including pollution laws and laws to protect endangered species. The NAFTA side accord explicitly excludes laws for managing the commercial or subsistence harvesting of natural resources. Both definitions explicitly exclude worker safety or health laws.

multi-step procedure for dispute settlement. First, the United States and Jordan "shall make every attempt to arrive at a mutually agreeable resolution through consultations" if a dispute arises. If the Parties do not resolve the dispute within 60 days through consultations, either Party has the right to refer the dispute to the Joint Committee. (The Joint Committee is a continuing body established to supervise the implementation of the Agreement and is composed of representatives of the Parties.) If the Joint Committee does not resolve the dispute, generally within 90 days, the dispute may be referred to a specially appointed three-person dispute settlement panel. The dispute settlement panel is authorized to make non-binding recommendations to resolve the dispute. After the panel issues its findings and recommendations within 90 days, the Joint Committee "shall endeavor to resolve the dispute, taking the panel report into account." If the Joint Committee does not resolve the dispute within 30 days, then "the affected Party shall be entitled to take any appropriate and commensurate measure."

Proposals to make the enforcement of environmental (and labor) laws subject to dispute settlement provisions and potentially sanctions under trade agreements have been controversial. Thus, the inclusion of this approach in the U.S.-Jordan FTA intensified the debate over this economically modest trade agreement. However, some supporters of the enforcement obligation were concerned that it also gives Parties such a degree of discretion in implementing it, that, in their view, it is unlikely that any circumstance would be considered a violation. In contrast, others objected to this provision and the possibility that an international tribunal would have authority to judge the adequacy of U.S. environmental laws and policy. A further concern was that the language entitling a Party "to take any appropriate or commensurate measure" would allow a Party to impose trade sanctions in response to environmental disputes. To address these objections, the two governments exchanged letters on July 23 stating their intent that each Party "would not expect or intend to apply the Agreement's dispute settlement enforcement procedures to secure its rights under the Agreement in a manner that results in blocking trade." Each government also "considers that appropriate measures for resolving any differences that may arise regarding the Agreement would be bilateral consultations and other procedures, particularly alternative mechanisms, that will help to secure compliance without recourse to traditional trade sanctions." The letters satisfied opponents sufficiently to clear the way for the advancement of implementing legislation, but supporters in the House objected to what they consider "second-tier" treatment of environmental and labor matters.

**Transparency.** When signing the FTA, the United States and Jordan also signed a Memorandum of Understanding on Transparency in Dispute Settlement (MOU). The MOU provides for public participation and transparency in the dispute resolution process and obligates the Parties to "solicit and consider the views of members of their respective publics ..." after receiving a request for consultations under the agreement. If a dispute panel is established, Parties must make their submissions to the panel publicly available, and oral presentations before the panel must be open to the public. The panel is directed to "accept and consider" *amicus curiae* submissions,[2] and must release its report to the public. The United States has long supported greater transparency in trade disputes, and non-governmental stakeholders have sought the opportunity to provide input into the process. Consequently, many view this MOU to be a significant complement to the FTA.

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[2] *Amicus curiae* submissions are briefs submitted by interested individuals or nongovernmental groups that are not a party to the dispute.

## Joint Statement on Environmental Technical Cooperation

The U.S.-Jordan FTA is accompanied by a non-controversial Joint Statement on Environmental Technical Cooperation which establishes a Joint Forum on Environmental Technical Cooperation. The Forum has a mandate to "advance environmental protection in Jordan by developing environmental technical cooperation initiatives, which take into account environmental priorities, and which are agreed to by the two governments, consistent with the U.S. country strategic plan for Jordan, and complementary to U.S.-Jordanian policy initiatives." The countries agree to consult with the public in pursuing the Forum's work. An annex to the joint statement details ongoing and future U.S.-Jordanian environmental technical cooperation programs.

## Environmental Review

In another environment-related action linked to the negotiation, the U. S. Trade Representative (USTR) prepared a draft environmental review of the proposed FTA. This environmental review, released in September 2000, was prepared in response to Executive Order 13141, issued by President Clinton on November 16, 1999. The order commits the United States to "factor environmental considerations into the development of its trade negotiating objectives." In the draft review, the USTR concluded that "the U.S. Government (USG) expects that the FTA with Jordan will not have any significant environmental effects in the United States."[3]

## Congressional Action

The U.S.-Jordan FTA states that its entry into force is "subject to the completion of necessary domestic legal procedures by each Party." Former President Clinton submitted the FTA to the 107th Congress on January 6, 2001. The Agreement was approved by the Jordanian parliament on May 9, 2001.

The Senate Finance Committee held a hearing on the FTA on March 20, 2001. On July 17, the Committee held a mark-up session for S. 643 (implementing legislation introduced by Senator Baucus), during which it approved an amendment in the nature of a substitute offered by Senator Baucus making various technical corrections. The Committee rejected an amendment offered by Senator Gramm that would have restricted the scope of the FTA's dispute resolution mechanism for purposes of addressing labor and environmental issues. The Senate Finance Committee approved S. 643 by voice vote on July 26, and reported S. 643 (S. Rept. 107-59) on September 4. In the House, Representative Levin introduced a companion bill (H.R. 1484) on April 4, 2001, which was referred to the House Ways and Means Committee and the Judiciary Committee. On

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[3] Although this was the first environmental review prepared for a trade agreement under the executive order, it was not the first time such a review was undertaken. In 1992, environmental groups called for the U.S. Government to prepare an environmental impact assessment under the National Environmental Policy Act (NEPA) for the proposed trade agreement between the United States and Mexico (and subsequently Canada). While a federal court ruled that the government was not required to prepare such an assessment, the Office of the USTR did prepare an extensive review of U.S.-Mexico environmental issues. (See Office of the U.S. Trade Representative, *Review of U.S.-Mexico Environmental Issues*, February 1992. 231p.)

July 26, the House Ways and Means Committee approved similar legislation, H.R. 2603, amended. The Committee reported H.R. 2603 (H. Rept. 107-176, Part I) on July 31, 2001, and the House passed it by voice vote the same day. The Senate indefinitely postponed action on S. 643 and passed H.R. 2603 by voice vote on September 24. On September 28, the President signed H.R. 2603 into law (P.L. 107-43), thus making way for the trade agreement's implementation.

The following table compares environmental provisions in the U.S.-Jordan FTA with those in the NAFTA and its environmental side agreement, the North American Agreement on Environmental Cooperation (NAAEC).

**Table 1. Comparison of U.S.-Jordan FTA, NAFTA, and NAAEC Key Environmental Provisions**

| Provision | U.S.-Jordan FTA | NAFTA | NAAEC |
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| Relaxation of laws to attract investment | Article 5.1. The Parties recognize that it is inappropriate to encourage trade by relaxing domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party. | Article 1114.2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement. | No comparable provision. |
| Adoption of environ-mental measures: levels of protection | Article 5.2. Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies an priorities, and to adopt or modify accordingly its environmental laws, each Party shall strive to ensure that its laws provide for high levels of environmental protection and shall strive to continue to improve those laws. | Article 1114.1. Nothing in this Chapter (on investment) shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with the Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. | Article 3. Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies an priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations. |

| Provision | U.S.-Jordan FTA | NAFTA | NAAEC |
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| Effective enforcement of environmental laws: obligation | Article 5.3(a). A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement. | No comparable provision. | Article 5.1. With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action, subject to Article 37... .<br>Article 37: Nothing in this Agreement shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party. |
| Effective enforcement of environmental laws: exercise of discretion | Article 5.3(b). The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources. | No comparable provision. | Article 45.1. For the purposes of this Agreement: A Party has not failed to "effectively enforce its environmental law" or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party: (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities. |