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Environmental Provisions in Free Trade Agreements (FTAs)

Overview

Linkages between trade and environmental protection have long been a concern to some U.S. policymakers and stakeholders. The central question is whether trade liberalization (i.e., the removal of barriers on the free exchange of goods and services between nations) advances shared economic and environmental goals. Some observers argue that economic expansion brought on by trade liberalization adversely impacts the environment. Among other concerns, they contend that for developing countries, international competition may lead them to adopt less stringent environmental standards or to engage in more polluting activities. Thus, they claim that environmental provisions are necessary in trade agreements to help raise or maintain international standards and protect U.S. businesses and workers from perceived unfair competition. Other policy makers and stakeholders believe that trade liberalization and environmental protection are mutually supportive. They argue that while economic growth may adversely impact the environment during the initial stages of industrialization, it can also provide resources to mitigate such effects as countries develop. They also argue that trade liberalization can support U.S. environmental goals through the elimination of tariffs on environmental goods, and the reduction of trade-distorting subsidies.

Trade-related environmental provisions in U.S. FTAs were first introduced in the North American Free Trade Agreement of 1994 (NAFTA). Through the years, they have moved from side agreements to integral chapters within FTA texts, and increasingly have incorporated cooperation and dispute settlement (DS) mechanisms. By executive order in 1999, President Clinton required trade agreements to undergo environmental assessments. In the Trade Act of 2002 (P.L. 107-210), Congress included environmental provisions as a principal negotiating objective in renewing the President's Trade Promotion Authority (TPA) (previously known as fast-track) legislation. Since then, the United States has been at the forefront of using trade agreements to promote core environmental protections. The structure and use of environmental provisions is currently under debate in the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and in Congress' consideration of TPA renewal legislation.

The GATT and the WTO

Mechanisms to address environmental protection have been a part of international trade agreements since the General Agreement on Tariffs and Trade (GATT) was signed in 1947. While the GATT does not contain affirmative environmental commitments, Article XX lays out a number specific exceptions to its provisions—including exceptions for natural resources and protection of public health—to allow for environmental policy measures. Since its establishment in 1995, the World Trade Organization (WTO)--the successor to GATT--has addressed environmental issues through its dispute settlement system and through Doha Round negotiations concerning the relationship between existing WTO rules and international environmental treaties, known as "multilateral environmental agreements" (MEAs). While there has been much focus on the GATT and WTO dispute settlement systems, they have heard only nine Article XX cases during their existence.

In addition to the WTO's Doha Round, a plurilateral group of WTO members is negotiating the elimination of tariffs on environmental goods such as wind turbines or solar panels. Further, the reduction and elimination of fishing subsidies and fossil fuel subsidies are being negotiated in the WTO, G-20 and other fora.

Current Key Environmental Provisions in U.S. FTAs.

A party shall:

- Not fail to effectively enforce its environmental laws in a manner affecting trade and investment.
- Not waive or derogate environmental laws to promote trade or investment.
- Fulfill obligations under referenced multilateral environmental agreements (MEAs).
- Develop mechanisms to enhance environmental performance.
- Retain the right to exercise the "reasonable, articulable, *bona fide*" exercise of discretion in enforcement.

Other provisions include:

- Enforceable dispute settlement and consultations
- Cooperative and trade capacity building.
- Environmental Affairs Council.

Source: CRS analysis based on KORUS FTA.

Environmental Provisions in U.S. FTAs

Although the WTO has played an important role in global environmental discussions, bilateral and regional FTAs have also impacted environmental policies. FTAs commonly include more detailed provisions than the WTO on trade-related issues such as the environment. A brief evolution of these provisions is outlined below.

The North American Free Trade Agreement (NAFTA). The first U.S. bilateral FTAs—with Israel (1985) and Canada (1988)—did not contain environmental provisions.

NAFTA (1994, with Canada and Mexico), however, included a list of MEAs whose provisions generally would supersede NAFTA's in the event of conflict. President Clinton, fulfilling a campaign promise, further negotiated an environmental side agreement to NAFTA. The North American Agreement on Environmental Cooperation contained 10 objectives on environmental cooperation in matters affecting trade, technical assistance, and capacity building, and included a dispute settlement arrangement distinct from NAFTA that could levy a monetary assessment, with the suspension of trade benefits as a last resort. Since NAFTA, all U.S. FTAs have included environmental provisions. The U.S. FTA with Jordan (2001) contained the first environmental provisions incorporated directly into the agreement, but with less rigorous dispute settlement provisions.

FTAs under the 2002 Trade Promotion Authority. The G.W. Bush administration negotiated 11 FTAs with 16 countries under the five-year TPA put in place by the Trade Act of 2002. The environmental provisions in these agreements went beyond the U.S.-Jordan FTA in terms of scope, but they included only one enforceable provision: a party shall not fail to effectively enforce its environmental laws "in a manner affecting trade between the parties." Procedures for environmental disputes capped limits on monetary penalties at $15 million, with suspension of benefits as a last recourse. Other provisions include: (a) commitments not to derogate from one's own environmental laws to encourage trade; (b) extensive provisions for cooperation and capacity building; and (c) the creation of an Environment Affairs Council.

May 10, 2007 Agreement. Following the 2006 elections, the House sought changes in the labor, environmental and other provisions of the four then-pending FTAs: Columbia, Panama, Peru, and South Korea (KORUS). A bipartisan agreement between the Bush administration and the House leadership was reached on May 10, 2007. Concerning environmental provisions, the agreement

- Required the incorporation of seven referenced MEAs.
- Altered the non-derogation obligation for environmental laws from a "strive to" to a "shall" obligation.
- Called for all FTA environmental obligations to be enforced under the same dispute settlement procedures as other provisions in the agreement.

The May 10 provisions are reflected in the "Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (H.R. 1890/S. 995), which was introduced by Senators Hatch and Wyden and Representative Ryan on April 16, 2015. TPA-2015 was reported from the Senate Finance Committee on April 22, 2015, and from the House Ways and Means Committee on April 23. This TPA, as incorporated into H.R. 1314 by substitute amendment, passed the Senate on May 22 by a vote of 62-37.

Trans-Pacific Partnership (TPP). The U.S. Trade Representative (USTR) has outlined its negotiating objectives for the TPP with respect to environmental issues in a policy statement, "USTR Green Paper on Conservation and the Trans-Pacific Partnership." In addition to continued support for provisions of recent FTAs—including the May 10 Agreement provisions—the objectives also include new provisions to address wildlife trafficking, illegal logging, and illegal fishing subsidies.

Investment Provisions

In addition to environmental chapters, the United States also negotiates investment chapters in U.S. FTAs, as well as separate bilateral investment treaties (BITs). The FTA commitment not to derogate from environmental laws to attract investment (see above) first appeared in the investment chapter in NAFTA. U.S. FTAs recognize a government's right to adopt or maintain measures to ensure investment activities to protect legitimate public welfare objectives, including the environment, and indirect expropriation is defined to exclude such regulatory activity. Nonetheless, some stakeholders believe that the investor-state dispute settlement (ISDS) provision contained in the investment chapter allows investors to seek compensation for environmental laws and administration contrary to their interests, and they may create a chilling effect on the future use of regulatory authority in environmental matters. The USTR maintains that ISDS provides a neutral and transparent venue for the adjudication of basic rights and protections already afforded to investors under U.S. law.

Issues for Congress

In considering future TPA legislation or future trade agreement negotiations, Congress may examine the use and application of environmental provisions in FTAs. This debate could include inquiry into

- The impacts of increased trade and economic growth on both the domestic and international environment.
- The effectiveness of including environmental provisions in FTAs as a means of protecting U.S. businesses and workers from perceived unfair competition.
- The appropriateness of using FTAs as a vehicle for improving environmental practices in other countries.
- The appropriateness of using FTAs as a means of enforcing independently negotiated international environmental treaties (i.e., MEAs).
- The ability of the United States to achieve environmental objectives among widely divergent countries in regional FTAs, such as the TPP.
- The effectiveness of the Environment Affairs Councils in FTAs to provide technical assistance and capacity building, and to resolve or prevent disputes without recourse to dispute settlement.
- The effectiveness of dispute settlement provisions as they are applied to environment issues.

The extent to which investment provisions, including investor-state dispute settlement (ISDS), preserve a country's right to regulate in its national interest.

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