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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 policymakers and stakeholders believe that trade liberalization and environmental protection can be 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. President George H.W. Bush instituted the first environmental assessment of a trade agreement with NAFTA in 1992, and President Clinton formalized the practice by executive order in 1999. In the Trade Act of 2002 (P.L. 107-210), Congress included environmental provisions as a principal trade 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. Additional negotiating objectives were incorporated into the Bipartisan Comprehensive Trade Priorities Act (TPA)(P.L. 114-26), enacted into law on June 29, 2015. Environmental provisions in the proposed Trans-Pacific Partnership (TPP) and the potential Transatlantic Trade and Investment Partnership (T-TIP) are currently under debate.

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 of general exceptions to its provisions—including exceptions for natural resources and protection of human, animal, or plant life, and public health—that could 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, there have been only nine Article XX cases on environmental issues to date.

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 or elimination of fishing and/or fossil fuel subsidies is being negotiated in the WTO, G-20, and U.S. free trade agreements.

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 from environmental laws to promote trade or investment.
- Fulfill obligations under certain multilateral environmental agreements (MEAs).
- Develop mechanisms to enhance environmental performance.
- Retain the right to exercise the "reasonable "or "*bona fide*" exercise of discretion in enforcement.

Other provisions include:

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

Source: CRS.

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 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. It also 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 than more recent agreements.

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 and investment; (b) extensive provisions for cooperation and capacity building; and (c) the creation of an Environment Affairs Council.

TPA-2015. TPA was renewed until July 1, 2021, subject to a resolution of disapproval vote in 2018. TPA-2015 enhanced U.S. trade negotiating objectives on the environment from the 2002 TPA in several ways. It:

- Requires the incorporation of seven referenced MEAs in a country's laws.
- Alters the non-derogation obligation for environmental laws from a "strive to" to a "shall" obligation.
- Calls for all FTA environmental obligations to be enforced under the same dispute settlement procedures as other provisions in the agreement.

Aspects of the May 10, 2007, agreement were included in 2015 TPA, which strengthened the negotiating objectives of the 2002 TPA and were applied to U.S. FTAs with Colombia, Panama, Peru, and South Korea.

TPP. The TPP negotiations were concluded in October 2015, and U.S, Trade Representative Michael Froman signed the agreement on February 4, 2016, in New Zealand. President-elect Donald Trump announced on November 21, 2016, that the United States would withdraw from the TPP on his first day in office. TPP included several new features in addition to core provisions noted above from TPA-2015; however, it is unclear whether they would be retained in any future bilateral FTAs, the negotiation of which the President-elect has indicated he favors. They include obligations to:

- Affirm commitments to certain MEAs to which TPP countries are a party. Include subject matter obligations related to other MEAs, while not requiring joining or adhering to the MEA itself.
- Obligate countries to address illegal trade in flora and fauna in their own countries.
- Prohibit the "most harmful" fisheries subsidies and include commitments on sustainable use of biodiversity, conservation and management of fisheries.
- Liberalize trade in environmental goods and services.

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. TPP recognizes a government's right to adopt or maintain measures to protect legitimate public welfare objectives, which the TPP specifically mentions, and indirect expropriation is defined to exclude such regulatory activity except in rare circumstances. Nonetheless, some stakeholders believe that the investor-state dispute settlement (ISDS) provision allows investors to seek compensation for environmental laws and administration contrary to their interests, and may create a chilling effect on the future use of regulatory authority in environmental matters. The USTR and other stakeholders maintain 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 the TPP, future TPA legislation, or future trade agreement negotiations, Congress may wish to examine the use and application of environmental provisions. Issues could include:

- 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 effectiveness of 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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