# TAKING STOCK: TRADE'S ENVIRONMENTAL SCORECARD AFTER TWENTY YEARS OF "TRADE AND ENVIRONMENT"

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## INTRODUCTION

In 1994, environmentalists optimistically believed that the new interest in trade and the environment could "lead to the resolution of tensions between trade and environment."[1] At that time, environmentalists had good reason for optimism. They had successfully stalled the North American Free Trade Agreement ("NAFTA")[2] until Canada, Mexico, and the United States ("the Parties") agreed to address North American trade-environment linkages and coordinate environmental policy through the North American Agreement on Environmental Cooperation ("NAAEC").[3] The NAAEC even established a trinational environmental institution, the Commission for Environmental Cooperation ("CEC"), to fulfill these functions. Significantly, the CEC included a Secretariat with independent authority to explore environmental issues within the broad scope of the CEC's work[4] and investigate allegations from citizens that one of the three Parties was failing to enforce its environmental law effectively.[5]

In many respects, the NAAEC represents the high-water mark for linking trade and environmental issues. Through the NAAEC, the Parties not only sought to explore specific trade-environment concerns such as whether Parties might be failing to enforce

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1. Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459, 461 (1994).

2. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 & 605 (1993) [hereinafter NAFTA]. NAFTA was implemented in the United States through Public Law No. 103-182, 107 Stat. 2057 (1993).

3. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC]. The NAAEC is not technically an international treaty, as treaties require Senate ratification. Instead, it was enacted through an Executive Order of the President. Exec. Order No. 12,915, 59 Fed. Reg. 25,775 (May 13, 1994).

4. *See* NAAEC, *supra* note 3, arts. 11, 13.

5. *Id.* arts. 14–15.

environmental law to attract investment or trade, but also to coordinate environmental policy throughout the region. By responding to a number of specific concerns of environmentalists, the NAAEC represented a substantial change in direction from the insular world of the global trading regime.

Subsequent free trade agreements ("FTAs"), however, have failed to act on the lessons learned from NAFTA and the NAAEC,[6] and otherwise have fallen short in responding to criticisms from the environmental community about the process and scope of trade agreements. Substantively, the environmental provisions of FTAs fail to account for the most important effect of trade—the effects of trade liberalization on the environment ("scale effects"). As a result of the notorious *Tuna/Dolphin* dispute in which dispute-settlement panels concluded that rules of the General Agreement on Tariffs and Trade ("GATT")[7] prevented the United States from barring the importation of "dolphin *un*friendly tuna,"[8] FTAs continue to focus on committing parties to maintain high levels of environmental protection to prevent them from using trade law to trump environmental standards. In addition, despite little evidence that companies move operations to countries with low environmental standards,[9] FTAs also continue to focus on prohibiting parties from lowering environmental standards to attract investment. Owing to a particular concern that Mexico was failing to enforce its environmental laws, post-NAFTA FTAs still focus on investigating failures to enforce environmental law effectively.[10]

Concerning process, FTAs have also largely failed to take into account efforts by the environmental community to make trade decision making more transparent at both the national and international levels. The environmental community remains woefully underrepresented on advisory committees to the Office of

6. *See* Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 201 (2008) (describing many of the lessons that could have been learned from the NAAEC, but that have not been addressed in subsequent FTAs).

7. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. During the negotiations that established the World Trade Organization ("WTO"), the 1947 version of the GATT was amended to replace the phrase "Contracting Parties" with "Members." It is now known as GATT 1994. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

8. Report of the Panel, *United States — Restrictions on Imports of Tuna*, DS29/R (June 16, 1994), *reprinted in* 33 I.L.M. 839 (1994) [hereinafter *Tuna/Dolphin II*]; Report of the Panel, *United States — Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Tuna/Dolphin I*].

9. *See* Daniel C. Esty, *Sustainable Development and Environmental Federalism*, 3 WIDENER L. SYMP. J. 213, 219–20 (1998).

10. For a thorough background on the adoption of competitiveness concerns in the NAAEC, see Wold, *supra* note 6, at 214–21.

the United States Trade Representative ("USTR"), the agency responsible for developing U.S. trade policy and negotiating FTAs.[11] Even where environmentalists predominate, as on the National Advisory Committee, which advises the Environmental Protection Agency ("EPA") on trade and environment issues arising under the NAAEC, the agencies largely ignore the advice of the advisory committee.[12] In addition, because trade disputes involve important questions of public policy, environmentalists and others have long called for transparent dispute settlement. With respect to investment disputes, through which private investors may bring challenges to environmental and other laws affecting investments, environmentalists have asked that such disputes be directed away from investment tribunals and toward national courts.[13] However, the proceedings of tribunals in both investment and noninvestment disputes remain closed and the documents confidential as a matter of policy.

Despite these shortcomings of FTAs, not all trade-environment concerns of environmentalists have gone unresolved. In fact, some progress has been made to make trade institutions more transparent. For example, the World Trade Organization ("WTO") publishes dispute-settlement reports on its website, the USTR places its submissions online, and submissions and other documents in post-NAFTA FTA investment cases are now made public.[14] In addition, trade jurisprudence, while certainly not embracing environmental concerns, has in some respects left more policy space for environmental measures. Indeed, in *Shrimp/Turtle II*,[15] the WTO's Appellate Body allowed the United States to maintain unilaterally imposed trade restrictions based on the way that shrimp were harvested—the very type of measure that touched off the trade-environment debate in the *Tuna/Dolphin* disputes.

11. For a list of the USTR advisory committees' members and their associated organizations, see Office of the U.S. Trade Rep., Advisory Committees, http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees (last visited Apr. 27, 2010).

12. Readers can compare the advice from the National Advisory Committee and the responses of the Environmental Protection Agency at: U.S. Envtl. Prot. Agency, Coop. Envtl. Mgmt., Letters of Advice and Response, http://www.epa.gov/ocem/nac/response/ (last visited Apr. 27, 2010).

13. *See* HOWARD MANN & KONRAD VON MOLTKE, INT'L INST. FOR SUSTAINABLE DEV., NAFTA'S CHAPTER 11 AND THE ENVIRONMENT: ADDRESSING THE IMPACTS OF THE INVESTOR-STATE PROCESS ON THE ENVIRONMENT 12–18 (1999) (recognizing "the ability of investor-state disputes to impact on very significant areas of public policy" and that this impact calls for "a normal court system [in which] there is a minimum level of accountability brought on by the public availability of the pleadings of the governments that are parties to a litigation").

14. *See infra* Part II.D.

15. Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia)*, paras. 135–38, 153–54, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *Shrimp/Turtle II*].

More can certainly be done. Moreover, because President Obama needs Congress to grant him the authority—called "trade promotion authority"—to negotiate new trade agreements, now is the time to reconsider the concerns of environmentalists in light of twenty years of "trade and the environment." In particular, FTAs must assess potential scale effects and ensure that trading partners have the appropriate institutional and legal capacity to cope with environmental problems that may emerge from trade liberalization. In fact, a principal failure of NAFTA, the NAAEC, and all other FTAs to which the United States is a party, is their failure to take into account the rich literature detailing the need to ensure that domestic environmental and other relevant institutions are prepared for trade.[16] This failure has had predictable effects in Mexico.[17] Moreover, in the absence of sound public policy reasons for maintaining confidential dispute-settlement proceedings and inequitable representation on trade advisory committees, far more can be done to make trade policymaking more transparent.

This Article assesses the wins and losses since the beginning of the trade-environment debate and whether FTAs are incorporating the lessons learned from the past. Part I begins by revisiting the claims by environmentalists that liberalized trade harms the environment, that trade law would be used to overrule environmental law, and that trade policymaking lacks transparency. Part II assesses the validity of these claims and, to the extent they are valid, evaluates whether environmentalists have succeeded in making trade law more consistent with environmental objectives and trade policymaking more transparent. Overall, Part II concludes that the losses outweigh the wins, with a few ties. Part III provides recommendations for Congress as it begins its consideration of new legislation granting trade promotion authority to the President.

## I. THE ENVIRONMENTAL CRITIQUE OF TRADE

From the inception of the trade and environment debate,

16. *See, e.g.*, KEVIN P. GALLAGHER, FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND 41–48 (2004); Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 526 (2003) (noting that comprehensive and far-reaching environmental and development objectives "must be conceived of, and implemented, *before* agreeing to" liberalize trade); Wold, *supra* note 6, at 224–25.

17. SCOTT VAUGHAN & GREG BLOCK, COMM'N FOR ENVTL. COOPERATION OF N. AM., FREE TRADE AND THE ENVIRONMENT: THE PICTURE BECOMES CLEARER 31 (2002) (reporting that "the speed with which trade and other kinds of liberalization are proceeding appear[s] to be overwhelming the capacity of domestic regulators generally (in the financial as well as environmental spheres) to ensure robust oversight of the course and consequences of changes markets").

environmentalists worried that trade liberalization would adversely affect the environment and that trade rules might override both domestic and international environmental law. Just as unnerving as these potential effects of trade was the perceived inability to influence rules, because trade policymaking and dispute settlement were not open to the public.

### *A. Regulatory, Competitiveness, Scale, and Composition Effects*

Environmentalists feared that trade rules would have *regulatory effects*—that trade rules would be used to quash domestic environmental laws and trade restrictions in multilateral environmental agreements ("MEAs").[18] In fact, in the absence of environmental provisions in trade agreements, international trade rules may constrain a government's options for protecting its citizens' health and the environment.[19] Environmentalists offered the *Tuna/Dolphin* dispute as a prime example of the manifestation of this fear. In that dispute, a GATT panel ruled that U.S. efforts to protect dolphins by only allowing the importation of tuna caught using specific "dolphin-friendly" techniques violated GATT rules.[20] For environmentalists, trade restrictions are an important environmental policy tool, because they can "leverage . . . worldwide environmental protection, particularly to address global or transboundary environmental problems and to reinforce international environmental agreements."[21] Free trade proponents counter by arguing that trade agreements might have a positive regulatory effect by encouraging governments to eliminate environmentally harmful subsidies and transfer pollution control technology.[22] They also maintain that trade restrictions, especially unilateral ones, "often impose unfair economic burdens for environmental protection on developing countries."[23]

Environmentalists also worried that trade liberalization would cause *competitiveness effects*.[24] Competitiveness effects concern

18. CHRIS WOLD, SANFORD GAINES & GREG BLOCK, TRADE AND THE ENVIRONMENT: LAW AND POLICY 7 (2005).

19. DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 42 (1994) (stating that trade agreements "can be used to override environmental regulations unless appropriate environmental protections are built into the structure of the trade system"); WOLD, GAINES & BLOCK, *supra* note 18, at 7.

20. *Tuna/Dolphin II*, *supra* note 8, paras. 6.1–.2; *Tuna/Dolphin I*, *supra* note 8, paras. 7.1–.3.

21. ESTY, *supra* note 19, at 42.

22. *See, e.g.*, Jagdish Bhagwati, *Trade and Environment: The False Conflict?*, *in* TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 159, 162–64 (Durwood Zaelke et al. eds., 1993).

23. *Id.* at 166–68.

24. *See* ESTY, *supra* note 19, at 20–23 (discussing the pressure to reduce environmental controls in order to boost competitiveness in the new framework of trade regulation).

"differences across countries in their national environmental standards and whether those differences impair the ability of firms in high-standard countries to compete with firms in low-standard countries."[25] In other words, "countries with lax environmental standards have a competitive advantage in the global marketplace and put pressure on countries with high environmental standards to reduce the rigor of their environmental requirements."[26] This is known as the "race to the bottom."[27] In addition, environmentalists worried that investment would flow to areas with low environmental standards or weak enforcement of environmental standards, creating "pollution havens."[28] Trade proponents countered that a country's lower environmental standards may represent that country's different environmental conditions.[29] For example, a country's vast forests may obviate the need for stringent forest management. A country's different environmental standards may also reflect that country's priorities and preferences.[30] For example, while Americans may prefer conservation of dolphins and other marine mammals, regardless of their conservation status, others may view them as a culturally important food source.

Third, environmentalists complained that trade has *scale and composition effects*.[31] "*Scale and composition effects* concern the growing scale of international trade and the composition of that trade, that is, the particular mix of goods being traded."[32] For environmentalists, "[w]ithout environmental safeguards, trade may cause environmental harm by promoting economic growth that results in the unsustainable consumption of natural resources and waste production."[33] Their assessment was echoed by two prominent economists who remarked, "Although many positive things can be said about liberalizing and thus increasing trade, the structure of trade, as we know it at present, is a curse from the

25. WOLD, GAINES & BLOCK, *supra* note 18, at 7.

26. ESTY, *supra* note 19, at 42.

27. Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 603–09 (1996) (discussing both sides of the "race to the bottom" argument); *see also* WOLD, GAINES & BLOCK, *supra* note 18, at 7–8 (discussing how competitiveness effects could lead to a race to the bottom).

28. Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2046 (1993).

29. *See* Bhagwati, *supra* note 22, at 165–67.

30. *See id.*

31. *See* ESTY, *supra* note 19, at 42; WOLD, GAINES & BLOCK, *supra* note 18, at 6.

32. WOLD, GAINES & BLOCK, *supra* note 18, at 6.

33. ESTY, *supra* note 19, at 42. Professor Esty did not necessarily advocate this point of view, but he was perhaps the first to analyze trade-environment linkages in a sophisticated way. As part of that analysis, he succinctly summarized the main arguments of environmentalists and free trade proponents. *See also* WOLD, GAINES & BLOCK, *supra* note 18, at 5–8; Block, *supra* note 16, at 511–12.

perspective of sustainable development."[34] While this criticism could apply to any kind of growth, trade-based economic growth poses unique problems. As described more fully in Part II.C, lowering trade barriers allows a rush of economic activity and quick exploitation of natural resources before ill-equipped regulatory bodies can adapt regulations and other infrastructure to the new circumstances. In such circumstances, any benefits from trade-led economic growth are outweighed by environmental harm.[35] For free trade proponents, trade liberalization will lead to economic growth, which can improve environmental conditions by altering social preferences for environmental protection and increasing economic resources available to spend on environmental-enhancement measures.[36]

### *B. Transparency*

Since the earliest days of the trade and environment debate in the early 1990s, environmentalists have criticized the lack of transparency in domestic[37] and international[38] trade decision making. Environmentalists come from a culture of public hearings,[39] liberal use of the Freedom of Information Act ("FOIA")[40] to obtain documents, notice-and-comment rulemaking,[41] and, perhaps most significantly, public dispute settlement in state or federal court.[42] Within international environmental regimes, as well, environmentalists may obtain official documents, attend meetings of the parties as observers, make interventions on the floor of the meeting,[43] and even participate in direct negotiation of

34. Trygve Haavelmo & Stein Hansen, *On the Strategy of Trying to Reduce Economic Inequality by Expanding the Scale of Human Activity*, *in* ENVIRONMENTALLY SUSTAINABLE ECONOMIC DEVELOPMENT: BUILDING ON BRUNDTLAND 41, 46 (Robert Goodland et al. eds., 1991).

35. *See infra* Part II.C and accompanying notes.

36. Bhagwati, *supra* note 22, at 162–63.

37. *See, e.g.*, Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631 (1994); Mark Ritchie, *Democratizing the Trade Policy-Making Process: The Lessons of NAFTA and Their Implications for the GATT*, 27 CORNELL INT'L L.J. 749 (1994).

38. *See, e.g.*, Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT'L L.J. 699 (1994).

39. *See, e.g.*, Press Release, Envtl. Prot. Agency, Public Hearings Scheduled on Clean Air Proposal to Substantially Strengthen National Air Quality Standards for Lead (June 9, 2008), *available at* http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/af0e5f1c9aeb335485257463 0062a5c2!OpenDocument.

40. 5 U.S.C. § 552 (2006).

41. *Id.* §§ 551–706; *see also* THOMAS C. BEIERLE & JERRY CAYFORD, DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS 3 (2002).

42. For an extensive discussion of the participatory culture from which environmentalists come, see generally BEIERLE & CAYFORD, *supra* note 41.

43. In this respect, the following provision, found in the Convention on

resolutions and other treaty documents.[44]

Within the trade regime, environmentalists found a strange, unwelcoming world. At the national level, trade documents were difficult to obtain, with the USTR rejecting requests for information, such as dispute-settlement reports resolving disputes in which the United States was a party.[45] Trade advisory committees usually had no environmental representation.[46] At the international level, environmentalists found GATT dispute settlement to be a closed-door affair, with even nondisputing GATT-contracting parties unable to attend.[47] Decisions of GATT panels were made public, but only in an obscure journal known as *Basic Instruments and Selected Documents*, generally only found in law school libraries.[48] They also learned that their ideas were not welcome in amicus briefs or in interventions at GATT meetings. Daniel Esty has astutely described these contrasts in openness, transparency, and participation in environmental and trade policymaking as a "clash of

International Trade in Endangered Species of Wild Fauna and Flora, is typical of multilateral environmental agreements:

> Any body or agency technically qualified in protection, conservation or management of wild fauna and flora, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one-third of the Parties present object:
>
> > (a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and
> >
> > (b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located.
>
> Once admitted, these observers shall have the right to participate but not to vote.

Convention on International Trade in Endangered Species of Wild Flora and Fauna art. XI, para. 7, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

44. For example, the author of this Article recently participated as an observer in the Fifteenth meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora in Doha, Qatar (March 13–25, 2010). While there, he directly participated in negotiations to revise resolutions that direct the parties to implement the Convention in particular ways. He also made floor statements to the Convention's parties on various topics under consideration.

45. *See infra* Part II.D.2.a and accompanying notes.

46. *See* Goldman, *supra* note 37, at 672–77.

47. For more on transparency and public participation in the WTO and NAFTA, see Donald McRae, *Trade and the Environment: The Issue of Transparency*, *in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 237, 252 (David L. Markell & John H. Knox eds. 2003) (concluding that "the WTO and NAFTA processes provide limited opportunities for public participation"); *see also* Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 FORDHAM INT'L L.J. 173 (2000).

48. *See, e.g.*, Report of the Panel, *United States Manufacturing Clause*, L/5609, GATT B.I.S.D. (31st Supp.) at 74 (1985).

cultures."[49]

## II. TRADE'S ENVIRONMENTAL SCORECARD

Twenty years have passed since environmentalists began making their arguments against trade. As described below, some predicted effects, such as competitiveness effects, have not materialized. Others, such as scale effects, have. On transparency, some progress has been made, but not enough to satisfy environmentalists. Overall there have been more "losses" than "wins," although there have also been several "ties."

### *A. Regulatory Effects*

#### *1. Domestic Measures*

While the trade and environment debate kicked off with the *Tuna/Dolphin* dispute (a dispute that most environmentalists considered to be clear evidence of regulatory effects), a review of trade and environment cases yields decidedly mixed results as to whether trade law has had regulatory effects or prevented the accomplishment of environmental objectives. In *Tuna/Dolphin*, for example, the United States did in fact impose discriminatory measures on Mexican fishermen that were unnecessary from an environmental perspective. For example, although Mexican fishermen could kill twenty-five percent more dolphins than U.S. fishermen in the eastern tropical Pacific yellowfin tuna fishery, this number was based on the number of dolphins actually killed by U.S. fishermen.[50] Thus, Mexican fishermen could not know until the end of the season whether their dolphin mortality rate was consistent with U.S. restrictions. Imposing a quota would have been a much more sensible approach from a trade perspective and an environmental perspective, provided that the quota bore some relationship to the biological needs of dolphins. That said, the panel ruled that countries could not distinguish products based on their processes or productions methods,[51] such as harvesting techniques and pollution-control requirements, unless the distinction was justified pursuant to one of the exceptions to GATT rules.

Another major trade-environment dispute yielding ambiguous results, *United States — Reformulated Gasoline*,[52] arose when the U.S. Congress prevented the EPA from implementing nondiscriminatory rules for ascertaining pollutant levels in domestic

49. ESTY, *supra* note 19, at 36, 211–13.
50. *Tuna/Dolphin I*, *supra* note 8, para. 5.2.
51. *Tuna/Dolphin I*, *supra* note 8, paras. 5.14–.15.
52. Panel Report, *United States — Standards for Reformulated and Conventional Gasoline (Treatment of Imported Gasoline and Like Products of National Origin)*, WT/DS2/R (Jan. 29, 1996) [hereinafter *United States — Reformulated Gasoline*].

and foreign gasoline.[53] Congress directed the EPA to impose stricter requirements on foreign producers.[54] Naturally, a WTO panel found these discriminatory requirements inconsistent with Article III of the GATT, which requires WTO members to treat imported products no "less favourabl[y]" than like domestic products.[55] The United States argued that different rules were required to ease administrative burdens associated with verifying and enforcing pollutant levels in the gasoline of foreign producers.[56] The history of the rule suggests another story. The EPA had in fact proposed a rule to address concerns from Venezuela and other countries protesting U.S. rules.[57] However, Congress passed a rider, proposed by a Philadelphia congresswoman, preventing the EPA from completing any further work on the rule.[58] Not coincidentally, Sun Oil Company ("Sunoco") had its main refinery in the district of this congresswoman.[59] Sunoco is a competitor of Citgo, a subsidiary of PDVSA, the Venezuelan state-owned oil company.[60]

The most recent WTO dispute, *Brazil — Retreaded Tyres*,[61] also leaves one questioning whether environmental concerns were lost. In this dispute, Brazil barred the importation of retreaded tires, ostensibly to prevent dengue, yellow fever, malaria, and other diseases spread by mosquitoes that breed in pools of water that collect in discarded tires.[62] Brazil also claimed that the accumulation of waste tires creates a risk of tire fires and toxic leaching, and that this risk has substantial adverse effects on human health and the environment.[63] The European Communities

53. *Id.* para. 2.13.

54. *Id.* paras. 2.1, .9, .11.

55. *Id.* para. 6.16.

56. Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/9 (Apr. 29, 1996).

57. Regulation of Fuels and Fuel Additives: Individual Foreign Refinery Baseline Requirements for Reformulated Gasoline, 59 Fed. Reg. 22,800 (May 2, 1994).

58. Act of Sept. 28, 1994, Pub. L. No. 103-327, 108 Stat. 2298, 2322; *see also* Andrew Maykuth, *Costlier New Gas Will Be Law on Jan. 1*, PHILA. INQUIRER, Oct. 19, 1994, at A1.

59. The Pennsylvania congresswoman referred to in this article is Marjorie Margolies-Mezvinsky. *See* Maureen Lorenzetti, *Lines Drawn over Venezuela RFG Rule*, PLATT'S OILGRAM NEWS, Mar. 25, 1994, at 7 (noting that Margolies-Mezvinskey "counts Philadelphia independent refiner Sun Oil as one of her constituents"). For Representative Margolies-Mezvinsky's comments regarding the reformulated gasoline program, see 140 CONG. REC. H11,489–90 (1994) (statement of Rep. Margolies-Mezvinsky).

60. Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. PA. J. INT'L ECON. L. 347, 368–69 (1998).

61. Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter Appellate Body Report, *Brazil — Tyres*].

62. *Id.* para. 119.

63. *Id.* paras. 58–59.

("EC"), however, believed that Brazil's restrictions were designed to protect domestic retreading industries from foreign competition. It noted that since the Brazilian restrictions were imposed in 2000, Brazilian imports of *retreaded* tires dropped to zero whereas imports of *used* tires increased from 5,000 metric tons to 70,000 metric tons in 2005.[64] The EC argued that these data suggested that Brazil's ban was motivated by trade concerns, not environmental concerns—Brazilian companies were now importing used tires to manufacture and sell higher-value retreaded tires.[65] The WTO panel and Appellate Body agreed with Brazil that the import ban was necessary to protect human life within the meaning of the GATT. Nonetheless, the Appellate Body concluded that Brazil's law constituted arbitrary and unjustifiable discrimination, inconsistent with Article XX of the GATT.[66] The Appellate Body concluded that Brazil's ban was not saved by Article XX of the GATT because Brazil allowed imports of retreaded tires from countries participating in MERCOSUR (the Southern Common Market, a customs union of Argentina, Brazil, Paraguay, and Uruguay). Brazil allowed imports from those countries only because a MERCOSUR dispute-settlement panel found that the import ban on retreaded tires violated Brazil's commitments under that agreement. Nonetheless, the WTO's Appellate Body concluded that Brazil's discrimination did not relate to the purpose of the import ban on retreaded tires—protection of human health—and thus was inconsistent with the requirements of Article XX of the GATT.[67]

A number of other cases solidify a "split decision" on trade's regulatory effects. In at least three other disputes, efforts to use the GATT to overturn environmental concerns were rebuffed.[68] Trade panels have found the following environmental trade restrictions consistent with the GATT: (1) U.S. import taxes on foreign chemicals that were no higher than taxes imposed on the same domestically-produced chemicals earmarked to pay for the clean-up of hazardous waste sites;[69] (2) U.S. taxes on automobiles that decline as the automobile's fuel efficiency increases, again, when the taxes were the same as those imposed on domestically produced

64. First Written Submission of the European Communities, *Brazil — Measures Affecting Imports of Retreaded Tyres*, paras. 79–81, WT/DS332 (Apr. 27, 2006), *available at* http://trade.ec.europa.eu/doclib/docs/2006/july/tradoc_129251.07.06.pdf.

65. Appellate Body Report, *Brazil — Tyres*, *supra* note 61, paras. 13–14.

66. *Id.* para. 258.

67. *Id.* para. 246.

68. *Shrimp/Turtle II*, *supra* note 15; Report of the Panel, *United States — Taxes on Automobiles*, para. 6.1–.2, DS31/R (Oct. 11, 1994), *reprinted in* 33 I.L.M. 1397 (1994) [hereinafter *Taxes on Automobiles*]; Report of the Panel, *United States — Taxes on Petroleum and Certain Imported Substances*, paras. 5.2.5, .2.8–.2.10, L/6175 (June 17, 1987), GATT B.I.S.D. (34th Supp.) at 136 (1988) [hereinafter *Superfund*].

69. *Superfund*, *supra* note 68, para. 5.2.8, .2.10.

automobiles;[70] and (3) U.S. restrictions on shrimp when countries had not adopted legislation to conserve sea turtles that was as effective as U.S. law.[71]

On the other hand, the "science" cases brought under the Agreement on Sanitary and Phytosanitary Measures tell a different story. In each of five cases, WTO members seeking to protect their environment and citizens from hormone-treated meat products,[72] genetically modified foods,[73] and invasive species[74] have lost their cases because they failed to justify their trade restrictions with a valid risk assessment. Much more could be written about each of these cases. For example, the EC, even ten years after the original dispute, could not marshal the scientific evidence to support its ban on hormone-treated meat products.[75] The larger question is whether it should have to when protection of human health is at issue.

In short, the split decision on these cases results in a tie: *0-0-1*.[76]

*2. Multilateral Environmental Agreements*

Environmentalists have long wanted to see FTAs specifically exempt the trade obligations of MEAs from trade scrutiny.[77] Although no country has formally challenged a trade measure of an MEA as inconsistent with trade rules, MEAs use trade restrictions in a variety of ways. First, MEAs, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), control trade to discourage or prevent unsustainable exploitation of natural resources, especially when the trade itself

70. *Taxes on Automobiles*, *supra* note 68, paras. 6.1–.2.

71. *Shrimp/Turtle II*, *supra* note 15, paras. 136–54.

72. Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products*, para. 208, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

73. Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, para. 8.10, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006).

74. Appellate Body Report, *Japan — Measures Affecting the Importation of Apples*, para. 243, WT/DS245/AB/R (Nov. 26, 2003); Appellate Body Report, *Japan — Measures Affecting Agricultural Products*, para. 143, WT/DS76/AB/R (Feb. 22, 1999); Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, para. 279, WT/DS18/AB/R (Oct. 20, 1998).

75. Appellate Body Report, *Continued Suspension of Obligations in the EC-Hormones Dispute*, paras. 736–37, WT/DS320/AB/R, WT/DS321/AB/R (Oct. 16, 2008).

76. A separate question not addressed in this article is the extent to which WTO rules support environmental objectives. For example, environmentalists have called for WTO rules to explicitly recognize as legitimate policy instruments the use of ecolabels, distinctions based on processes and production methods, and the use of environmentally beneficial subsidies. The author hopes to address these issues in a second part to this scorecard.

77. *See, e.g.*, KEVIN R. GRAY, ACCOMMODATING MEAS IN TRADE AGREEMENTS 3 (2004), *available at* http://www.worldtradelaw.net/articles/graymea.pdf.

constitutes an environmental threat.[78] The parties to CITES have thus prohibited trade for commercial purposes in species threatened with extinction, such as elephants, whales, gorillas, and many others.[79] Second, some MEAs use trade measures to control trade in environmentally harmful substances to protect the environment of the importing country. The prior informed-consent provisions of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,[80] the Cartagena Protocol on Biosafety to the Convention on Biological Diversity,[81] and others fall within this group. Third, MEAs, including CITES and the Montreal Protocol on Substances that Deplete the Ozone Layer,[82] among others, control or prohibit trade with nonparties to prevent "free riders" and to discourage the migration of industries to countries with standards lower than those established by the treaty.[83] Fourth, MEAs such as CITES, the Montreal Protocol, and several fisheries treaties[84] have imposed trade sanctions against parties and nonparties to encourage compliance with the rules of the treaty.[85] All told, a WTO study identified trade-related measures in thirty-

78. CITES, *supra* note 43, pmbl.

79. *Id.* art. II, para. 1 (defining "Appendix I" species); *id.* art. III, para. 3(c) (prohibiting trade for "primarily commercial purposes").

80. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 6, Mar. 22, 1989, 28 I.L.M. 649.

81. Cartagena Protocol on Biosafety to the Convention on Biological Diversity art. 8, Jan. 29, 2000, 2226 U.N.T.S. 208.

82. Montreal Protocol Parties: Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer art. 4, June 29, 1990, 30 I.L.M. 537 [hereinafter London Amendments to the Montreal Protocol]; Protocol on Substances that Deplete the Ozone Layer art. 4, Sept. 16, 1987, 26 I.L.M. 1541 [hereinafter Montreal Protocol].

83. *See* London Amendments to the Montreal Protocol, *supra* note 82, art. 4; Montreal Protocol, *supra* note 82, art. 4; CITES, *supra* note 43, art. X.

84. *See, e.g.*, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks arts. 18–19, Aug. 4, 1995, 2167 U.N.T.S. 3; United Nations Convention on the Law of the Sea art. 153, Dec. 10, 1982, 1833 U.N.T.S. 3.

85. CITES, for example, has imposed sanctions against parties for failing to report and adopt adequate national implementing legislation, among other reasons. *See* CITES, Notification to the Parties, Gabon and Somalia, Recommendation to Suspend Trade (July 3, 2008), *available at* http://www.cites.org/eng/notif/2008/e041.pdf. For a complete guide to compliance within CITES, see generally ROSALIND REEVE, ROYAL INST. OF INT'L AFFAIRS, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY AND COMPLIANCE (2002). Lawyers for the CITES Secretariat report that the threat of trade sanctions often draws high-level political attention that "result[s] in action being taken quickly to enact legislation, develop work plans, control legal/illegal trade, or improve the basis for government decision making" to avoid trade sanctions or to have them withdrawn. Marceil Yeater & Juan Vasquez, *Demystifying the Relationship Between CITES and the WTO*, 10 REV. EUR. COMMUNITY & INT'L ENVTL. L. 271, 274 (2001).

two different MEAs.[86]

Regardless of the purpose of the trade restrictions, this use of trade restrictions in MEAs has drawn questions about the applicability of trade rules to MEAs and about how and in which forum such disputes should be resolved. For example, the WTO's Committee on Trade and Environment has been charged with negotiating, as part of the WTO Doha Development Agenda, an outcome to "the relationship between existing WTO rules and specific trade obligations" of MEAs.[87] However, this has led to a considerable secondary debate over the meaning of "specific trade obligations"[88] and even over what constitutes an MEA. Even before the collapse of the Doha Round negotiations, resolution of this issue seemed uncertain.[89]

FTAs involving the United States have done little to untangle this issue. For example, NAFTA states that the "specific trade obligations" of an enumerated MEA take precedence over the provisions of NAFTA, so long as the Party invoking the MEA employs the alternative that is "the least inconsistent" with the other provisions of NAFTA.[90] NAFTA only nudges the debate forward by specifying which MEAs are subject to the rule.[91]

86. Special Session of the Comm. on Trade & Env't., *Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements*, Annex 2, para. 37, WT/CTE/W/160/Rev.2 (Apr. 25, 2003).

87. World Trade Organization, Ministerial Declaration of 14 November 2001, para. 31(i), WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

88. WTO members have submitted many documents as part of these discussions. *See, e.g.*, Special Session of the Comm. on Trade & Env't., *Submission by India: Relationship Between Specific Trade Obligations Set Out in MEAs and WTO Rules*, TN/TE/W/23 (Feb. 20, 2003); Special Session of the Comm. on Trade & Env't, *Submission by the United States: Sub-Paragraph 31(i) of the Doha Declaration*, TN/TE/W/20 (Feb. 10, 2003).

89. For a summary of the various proposals for analyzing specific trade obligations of MEAs under WTO rules, see Comm. on Trade & Env't, *Report (1996) of the Committee on Trade and Environment*, WT/CTE/1 (Nov. 12, 1996).

90. NAFTA, *supra* note 2, art. 104. The United Nations Environmental Program has reported that only three other bilateral trade agreements (Canada-Chile, Canada-Costa Rica, and Chile-Mexico) follow this NAFTA rule. UNITED NATIONS ENVIRONMENT PROGRAMME & INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, ENVIRONMENT AND TRADE: A HANDBOOK 68 (2d ed. 2005) [hereinafter U.N. HANDBOOK].

91. The original list of MEAs included CITES, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, and the Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area. NAFTA, *supra* note 2, art. 104, Annex 104.1. By letter agreement, the Parties later added to the list the Convention on the Protection of Migratory Birds Between Canada and the United States, and the Convention for the Protection of Migratory Birds and Game Mammals Between the United States and Mexico.

Nonetheless, NAFTA does not define "specific trade obligations" and it mandates the use of the least trade-restrictive alternative.

In subsequent FTAs, the parties merely "affirm their existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which [such] Parties are party."[92] Moreover, the environmental chapters of the FTAs do not clarify matters. For example, the parties to the Dominican Republic – Central America – United States Free Trade Agreement ("CAFTA-DR")[93] recognize that MEAs "play an important role in protecting the environment globally and domestically" and that the parties "shall continue to seek means to enhance the mutual supportiveness" of MEAs.[94] U.S.-Peru takes a different approach. It requires each party to "adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under the [MEAs] listed in Annex 18.2," such as CITES, the Montreal Protocol, and others.[95]

Regardless of the approach taken, the FTAs do not exempt any particular trade restrictions of MEAs from trade scrutiny. Environmentalists lose. Score: *0-1-1*.

92. *See, e.g.*, Free Trade Agreement, U.S.-Chile, art. 1.3, June 6, 2003, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file186_3990.pdf [hereinafter U.S.-Chile FTA]. At least one FTA, U.S.-Canada, creates substantial ambiguity. There, the parties affirm their existing rights and obligations under other treaties, but also stipulate that the provisions of the present agreement "shall prevail to the extent of [any] inconsistency." Free Trade Agreement, U.S.-Can., art. 104, Oct. 4, 1988, 27 I.L.M. 293 (1988). This FTA is not in effect, however, so long as NAFTA remains in effect. *See* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 107, 107 Stat. 2057, 2065 (1993) (providing that the U.S.-Canada Free Trade Agreement would be "suspended" for such period as NAFTA remains in force).

93. Dominican Republic – Central America – United States Free Trade Agreement, Aug. 5, 2004, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [hereinafter CAFTA-DR].

94. *Id.* art. 17.12.

95. Trade Promotion Agreement, U.S.-Peru, art. 18.2, Apr. 12, 2006, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf [hereinafter U.S.-Peru FTA]. The full list of MEAs is as follows: CITES; the Montreal Protocol; the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, done at London, February 17, 1978, as amended; the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, done at Ramsar, February 2, 1971, as amended; the Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, May 20, 1980; the International Convention for the Regulation of Whaling, done at Washington, December 2, 1946; and the Convention for the Establishment of an Inter-American Tropical Tuna Commission, done at Washington, May 31, 1949. *Id.* Annex 18.2.

### *B. Competitiveness Effects*

After environmentalists claimed that environmental conditions would worsen in Mexico as a result of NAFTA, the CEC and others explored more closely the relationship between trade liberalization and competitiveness effects. They concluded that liberalized trade does not lead to lax environmental standards, a race to the bottom, pollution havens, or the migration of businesses to countries with lax environmental standards.[96] Overall, sector-specific studies of the effects of trade liberalization have concluded that differences in environmental standards "may have been a factor" leading some U.S. companies to relocate to Mexico, but that "in general, there is little evidence that large-scale shifts in industrial investment and relocation to pollution havens have occurred."[97] As these studies have shown, companies do not migrate to take advantage of lax environmental standards because environmental compliance costs are, as a general rule, a small percentage of total operating costs.[98] When companies relocate, they do so to take advantage of market access and lower labor costs.[99]

Environmentalists were wrong about competitiveness effects, but the issue would not have received the same attention had they not raised it as part of the NAFTA negotiations. As a result, the environmentalists win: *1-1-1*.

96. In one study of competitiveness effects in the NAFTA region, researchers used three measures of environmental quality (per capita sulfur dioxide emissions, per capita toxic chemical releases, and state compliance costs) and found "no evidence that border states altered the manner in which they determined their levels of environmental protection during the early 1990s." G. Fredriksson & Daniel L. Millimet, *Is There a Race to the Bottom in Environmental Policies?: The Effects of NAFTA*, *in* COMMISSION FOR ENVIRONMENTAL COOPERATION OF NORTH AMERICA, THE ENVIRONMENTAL EFFECTS OF FREE TRADE 241, 245 (2002); *see also* Claudia Schatan, *The Environmental Impact of Mexican Manufacturing Exports Under NAFTA*, *in* GREENING NAFTA, *supra* note 47, at 133, 147 (noting that Mexico increased foreign trade after NAFTA, but that "[t]his increase in foreign trade . . . is not attributable to Mexico's becoming a pollution haven" and that "Mexican trade trends do not suggest a shift of export specialization toward more polluting sectors after 1994").

97. U.S. CONG. OFFICE OF TECH. ASSESSMENT, TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES 40 (1992) (studying data concerning the manufacturing sector).

98. In the United States, pollution abatement costs are generally small compared to total operating costs. For example, pollution abatement costs for the tobacco products industry were just 0.12% of total costs; for the fabricated metals products industry, 0.42%; for petroleum and coal products industry, 1.93%; and for all industries evaluated, an average of 0.62%. HÅKAN NORDSTRÖM & SCOTT VAUGHAN, TRADE AND ENVIRONMENT 37 (1999), *available at* http://www.wto.org/english/news_e/pres99_e/environment.pdf.

99. *See* U.S. CONG. OFFICE OF TECH. ASSESSMENT, *supra* note 97, at 8 (stating that "the [U.S-Mexico] border area, with its low labor costs, proximity to the United States, and duty-free export processing zones, has attracted many U.S. firms over the years").

While competitiveness concerns have waned, trading partners may be tempted to lower environmental standards to attract investment. As such, in NAFTA and subsequent FTAs, including CAFTA-DR, the parties recognize that it is "inappropriate to encourage trade and investment by weakening or reducing the protections afforded in domestic environmental laws."[100] Most FTAs make disputes arising out of this obligation subject to consultations, as under CAFTA-DR.[101] At least one FTA, the U.S.-Peru FTA, makes this obligation subject to dispute settlement.[102] The FTAs also provide 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."[103] This obligation is also subject to dispute settlement.[104]

In addition, the NAAEC gave citizens the right to file submissions alleging that one of the trading partners is "failing to effectively enforce its environmental law."[105] While the process includes many defects, such as a remedy that includes only a "factual record" without recommendations for improving enforcement,[106] the submissions process does provide an outlet for citizens to express their concerns over lax enforcement of

100. U.S.-Chile FTA, *supra* note 92, art. 19.2, para. 2. For agreements containing identical or nearly identical language, see U.S.-Peru FTA, *supra* note 95, art. 18.3, para. 2; Agreement on the Establishment of a Free Trade Agreement, U.S.-Bahr., art. 16.2, para. 2, Sept. 14, 2004, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file287_6299.pdf [hereinafterU.S.-Bahrain FTA]; CAFTA-DR, *supra* note 93, art. 17.2, para. 2; Free Trade Agreement, U.S.-Austl., art. 19.2, May 19, 2004, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file819_5164.pdf [hereinafter U.S.-Australia FTA]. The NAFTA language is also more or less the same. NAFTA, *supra* note 2, art. 1114, para. 2.

101. CAFTA-DR, *supra* note 93, art. 17.10; *see also* U.S.-Bahrain FTA, *supra* note 100, art. 16.8; U.S.-Chile FTA, *supra* note 92, art. 19.6; U.S.-Australia FTA, *supra* note 100, art. 19.7.

102. U.S.-Peru FTA, *supra* note 95, art. 18.12.

103. CAFTA-DR, *supra* note 93, art. 17.2, para. 1(a); U.S.-Chile FTA, *supra* note 92, art. 19.2, para. 1(a); *see also* U.S.-Peru FTA, *supra* note 95, art. 18.3, para. 1(a) (containing similar language). In the case of Australia, where many environmental matters are the responsibility of the States, these obligations extend to relevant federal and state laws. U.S.-Australia FTA, *supra* note 100, art. 19.2, para. 1(a).

104. U.S.-Peru FTA, *supra* note 95, art. 18.12; CAFTA-DR, *supra* note 93, art. 17.10; U.S.-Australia FTA, *supra* note 100, art. 19.7; U.S.-Chile FTA, *supra* note 92, art. 19.6.

105. NAAEC, *supra* note 3, art. 14, para. 1.

106. For more on the many problems of the process, see Wold, *supra* note 6, at 227–32; *see also* Geoff Garver, *Tooth Decay*, 25 ENVTL. F. 34 (2008); David Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425, 439–53 (2010); Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT'L & COMP. L. REV. 415 (2004).

environmental laws. In some cases, moreover, a submission has resulted in improvements to enforcement and environmental law.[107] Whatever its value, the citizen submission process has been included only in the CAFTA-DR,[108] Colombia,[109] Panama,[110] and Peru[111] FTAs.

Clearly these types of provisions and processes are included in FTAs as a result of insistence from environmentalists, resulting in a win for them: *2-1-1*.

### *C. Scale Effects*

Since the early 1990s, when environmentalists began calling for environmental impact assessments of trade and a focused look at how trade affects the environment, much has been learned about scale and composition effects. For example, the CEC has reported that national, continental, or global studies of environmental impacts must be augmented by studies of smaller geographic areas because the larger studies of environmental change are unlikely to identify (and are more likely to mask) environmental impacts in specific geographic locations.[112] Thus, even if the overall environmental condition of a country improves, trade may cause local hot spots of environmental problems. NAFTA is a case in point, where trade liberalization has led to increased water pollution from nitrogen loading in areas of intensive farming.[113]

In addition, even when trade has brought benefits to a country, these benefits have not outweighed the environmental harm. In Mexico's agricultural sector, for example, "scale effects of trade-related shifts to large-scale agri-business operations have not been offset by improved technologies or stronger regulations."[114]

107. Mexican environmentalists report that a citizen submission alleging the failure to enforce Mexico's environmental-impact-assessment law in the construction of a pier in Cozumel had several environmental benefits, including the reform of Mexico's environmental law. Gustavo Alanís Ortega, *Public Participation Within NAFTA's Environmental Agreement: The Mexican Experience*, *in* LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION: NAFTA EXPERIENCES, GLOBAL CHALLENGES 183, 184–85 (John J. Kirton & Virginia W. MacLaren eds., 2002).

108. CAFTA-DR, *supra* note 93, arts. 17.7–.8.

109. Trade Promotion Agreement, U.S.-Colom., arts. 18.8–.9, Nov. 22, 2006 (pending congressional approval), *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file644_10192.pdf.

110. Trade Promotion Agreement, U.S.-Pan., arts. 17.8–.9, June 28, 2007 (pending congressional approval), *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file314_10400.pdf.

111. U.S.-Peru FTA, *supra* note 95, arts. 18.8–.9.

112. VAUGHAN & BLOCK, *supra* note 17, at 25–26.

113. Scott Vaughan, *The Greenest Trade Agreement Ever?: Measuring the Environmental Impacts of Agricultural Liberalization*, *in* NAFTA'S PROMISE AND REALITY: LESSONS FROM MEXICO FOR THE HEMISPHERE 61, 67–68, 73 (2003).

114. VAUGHAN & BLOCK, *supra* note 17, at 26; *see also* Vaughan, *supra* note 113, at 69–80.

Similarly, although the composition of Mexican industry became less pollution-intensive, this reduction in pollution intensity was outweighed by increased scale effects because Mexico did not adequately resource its institutions to prepare for increases in investments in particular industries.[115] Overall, "environmental degradation has overwhelmed any benefits from trade-led economic growth."[116]

Moreover, contrary to the claims of trade proponents that trade will increase the demand for higher environmental standards, the CEC has found "little evidence to support the notion that greater revenues arising from trade expansion will be moved to bolster the resources of environmental authorities in order to address trade-related scale effects."[117] In fact, the CEC found that "the speed with which trade and other kinds of liberalization are proceeding appear[s] to be overwhelming the capacity of domestic regulators generally (in the financial as well as environmental spheres) to ensure robust oversight of the course and consequences of changes markets."[118] Between 1985 and 1999, the period just before NAFTA when Mexico was liberalizing its markets and through the early years of NAFTA, Mexico's GDP grew by thirty-eight percent.[119] Nonetheless:

> rural soil erosion grew by 89 percent, municipal solid waste by 108 percent, water pollution by 29 percent, and air pollution by 97 percent. Disaggregating air pollution, sulfur dioxide grew by 42 percent, nitrous oxides by 65 percent, hydrocarbons by 104 percent, carbon monoxide by 105 percent, and particulate matter by 43 percent.[120]

These conclusions do not appear to be unique to NAFTA. Instead, a consensus is building that "increased trade and growth without appropriate environmental policies in place may have unwanted effects on the environment."[121]

The importance of these conclusions from the NAFTA and NAAEC experience for future FTAs is clear: comprehensive and far-reaching environmental and development objectives "must be

115. GALLAGHER, *supra* note 16, at 41–45, 68.

116. KEVIN P. GALLAGHER, INTERHEMISPHERIC RESOURCE CENTER, FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND 2 (2004); *see also* CEC, UNDERSTANDING AND ANTICIPATING ENVIRONMENTAL CHANGE IN NORTH AMERICA: BUILDING BLOCKS FOR BETTER PUBLIC POLICY 20–22, 35–36 (2003) (describing the dramatic changes in demographics due to liberalization of the agricultural sector).

117. VAUGHAN & BLOCK, *supra* note 17, at 26.

118. *Id.*

119. Kevin P. Gallagher, *The CEC and Environmental Quality: Assessing the Mexican Experience*, *in* GREENING NAFTA, *supra* note 47, at 117, 119.

120. *Id*.

121. World Bank [WB], *Trade, Global Policy, and the Environment*, at 1 (Discussion Paper No. 402, 1999) (*prepared by* Per G. Fredriksson).

conceived of, and implemented, *before* agreeing to" liberalize trade.[122] Moreover, without substantial assistance, developing countries are unlikely to "develop the necessary environmental policies to steer trade-led growth in a sustainable manner."[123]

Neither the WTO nor subsequent FTAs have done anything to address scale. First, the environmental reviews required by Executive Order 13,141 only focus on environmental impacts in the United States and, as appropriate, global and transboundary impacts.[124] When the future trading partner is a developing county, the review thus misses scale effects in the country or region most likely to experience the most significant environmental impacts from a trade agreement. As the Government Accountability Office ("GAO") concludes, "the environmental reviews we examined for these FTAs do not provide in-depth or comprehensive descriptions of the myriad environmental challenges faced by FTA partners."[125]

For failure to consider these impacts, environmentalists lose: *2-2-1*.

Second, FTAs require U.S. trading partners to ensure that their domestic environmental laws provide for high levels of environmental protection and to strive to continue to improve such laws.[126] These provisions are no doubt intended to prevent competitiveness effects, but high environmental standards would also help prevent scale effects. For example, if an FTA increases trade in timber products, the environmental impacts may not be significant if a country has laws to ensure sustainable forest management.

Determining whether scale effects are prevented by high

122. Block, *supra* note 16, at 526.

123. Gallagher, *supra* note 119, at 125.

124. Exec. Order No. 13,141, 64 Fed. Reg. 63,169 (Nov. 16, 1999). The Bipartisan Trade Promotion Authority Act of 2002 ("BTPAA") provides that environmental reviews will be conducted consistently with Executive Order 13,141. 19 U.S.C. § 3802(c)(4) (2006).

125. GOV'T ACCOUNTABILITY OFFICE, No. GAO-09-439, INTERNATIONAL TRADE: FOUR FREE TRADE AGREEMENTS GAO REVIEWED HAVE RESULTED IN COMMERCIAL BENEFITS, BUT CHALLENGES ON LABOR AND ENVIRONMENT REMAIN 59 (2009), *available at* http://www.gao.gov/new.items/d09439.pdf [hereinafter FOUR FREE TRADE AGREEMENTS].

126. *See, e.g.*, U.S.-Peru FTA, *supra* note 95, art. 18.1:

> Recognizing the sovereign right of each Party to establish its own levels of domestic environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall strive to ensure that those laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve its respective levels of environmental protection.

*Id.* Almost identical language is found in other FTAs. *See, e.g.*, U.S.-Bahrain FTA, *supra* note 100, art. 16.1; CAFTA-DR, *supra* note 93, art. 17.1; U.S.-Australia FTA, *supra* note 100, art. 19.1; U.S.-Chile FTA, *supra* note 92, art. 19.1.

environmental standards requires a judgment prior to entering the FTA in force that the country already has high environmental standards and monitoring after the entry into force of the FTA to ensure ongoing compliance. Clearly this is not being done. In the words of the GAO again, "USTR does not proactively monitor the implementation of environmental provisions [in FTAs] and . . . [the State Department's Oceans and International Environmental and Scientific Affairs Bureau] lacks a structure to manage and monitor implementation of environmental projects."[127] The USTR itself has complained that "absent baselines and better information and analytic tools, it does not know how it realistically could assess if FTA partner countries are complying with general commitments to maintain strong protections or are implementing their own laws, as agreed upon in the FTAs."[128]

In other words, USTR does not have baseline information on which to assess scale effects. It does not have that information because, first, the United States does not require appropriate environmental impact assessments. Second, the United States does not ensure that a country's environmental laws are adequate to address the challenges of implementing an FTA prior to implementation of that FTA. Even if it had this information, USTR is not evaluating an FTA's environmental consequences—a necessary component for adapting domestic institutions, legislation, and trade agreements to those impacts. This is particularly troubling with respect to more recent FTAs with developing countries, because they typically lack the institutions necessary to monitor environmental impacts.[129]

Scale has become the most important aspect of the trade and environment debate and one that continues to be underrepresented in discussions of future FTAs. As a result, environmentalists lose: *2-3-1*.

### *D. Transparency*

As noted in the Introduction, environmentalists have struggled with the lack of transparency in national and international trade policymaking and with trade dispute settlement. As described below, some progress has been made at least in terms of obtaining dispute-settlement decisions. In other respects, however, little has changed.

127. FOUR FREE TRADE AGREEMENTS, *supra* note 125, at 61.

128. *Id.* at 62.

129. PETER BARTELMUS, ENVIRONMENT, GROWTH AND DEVELOPMENT: THE CONCEPTS AND STRATEGIES OF SUSTAINABILITY 103 (1994).

*1. International*

a. *Closed-Door Dispute Settlement*. Trade dispute settlement has always been a closed-door affair.[130] Whether under the GATT, the WTO, or FTAs, WTO members and FTA parties alike have rarely opened their dispute-settlement doors to the public. This is true in both state-to-state disputes and investor-state disputes under investment provisions of various FTAs. These confidentiality provisions are broad: they also prohibit nondisputing WTO or FTA members from observing dispute-settlement hearings.[131] On the other hand, the WTO now hosts a comprehensive website of documents relating to dispute settlement and other matters.[132]

The WTO's bar to public observance of dispute settlement has had some exceptions, but only when all disputing parties agree to allow public observation. For example, the WTO opened its doors to the public for hearings during the second *Hormones* dispute and the *Biotech* dispute.[133] Under NAFTA, some aspects of the *Methanex* dispute were opened to the public.[134]

130. Under the WTO's Understanding on Dispute Settlement, deliberations of panels and the Appellate Body are confidential. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments — Results of the Uruguay Round, arts. 14.1, 17.10, 33 I.L.M. 1125 (1994).

131. A WTO member may, however, join a dispute as a "third party" and be entitled to receive all submissions, make submissions, and "be heard." *Id.* art. 10.2.

132. *See* WTO, Official Documents and Legal Texts, http://www.wto.org/english/docs_e/docs_e.htm (last visited Apr. 27, 2010).

133. *See* WTO, WTO Meeting in the Dispute on Certain IT Products Opened to the Public (June 11, 2009), *available at* http://www.wto.org/english/news_e/news09_e/hear_ds375_376_377_11jun09_e.htm. Disputing parties have allowed the public to observe even part of a proceeding in only a handful of the more than 400 WTO disputes. DIRECTORATE-GENERAL FOR TRADE, EUROPEAN COMMISSION, GENERAL OVERVIEW OF ACTIVE WTO DISPUTE SETTLEMENT CASES INVOLVING THE EU AS COMPLAINANT OR DEFENDANT AND OF ACTIVE CASES UNDER THE TRADE BARRIERS REGULATION (2010), http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf. The other disputes open to the public have been the following: Request for Consultations by the United States, *European Communities and Its Member States — Tariff Treatment of Certain Information Technology Products*, WT/DS375/1 (June 2, 2008); Panel Report, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (Oct. 31, 2005); and Request for Consultations by the United States, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/1 (Oct. 12, 2004).

134. *See* Int'l Inst. for Sustainable Dev., Methanex Background, http://www.iisd.org/investment/bits/methanex_background.asp (last visited Apr. 27, 2010). In this dispute, Methanex argued that California's efforts to ban MTBE (methyl tertiary butyl ether) violated its investment rights under NAFTA. The United States ultimately won the case. Final Award of the

Certainly the secrecy that shrouds trade dispute settlement has fueled public suspicions that important public policy issues are being decided in smoke-filled backrooms, or perhaps more accurately, the WTO's "green room,"[135] delegitimizing decisions regardless of the careful scrutiny decision makers give an issue.[136] Indeed, former U.S. Trade Representative Mickey Kantor has called the WTO "one of the most secret, non-controlled organizations in the world,"[137] even calling WTO dispute-settlement panels "star chamber proceedings that are making the most important decisions that affect the lives of all of our citizens—especially in the environmental area—and there is no accountability whatsoever."[138] A former WTO panel member has said that "[t]here is no reason for WTO proceedings to remain secret, and there is every reason for them to be open to the light of public scrutiny."[139]

The only possible valid reason for closing the doors to dispute settlement is the hope that shielding such disputes from the public will depoliticize the issues and make disputes more amenable to compromise and settlement without resort to actual panel proceedings. Once a dispute goes to a panel, however, little incentive exists to maintain such secrecy because the time for settlement through consultations has passed. Indeed, the disputing

Tribunal on Jurisdiction and Merits, Methanex Corp. v. United States (NAFTA Arbitral Tribunal, 2005), *available at* http://www.state.gov/documents /organization/51052.pdf.

135. The "Green Room" is the name used to describe the Director-General's conference room, although "green room" meetings can take place elsewhere. Such meetings are limited to twenty to forty delegations, usually at the level of heads of delegations. Critics of the WTO use the phrase "green room" pejoratively, because these small group meetings may exclude large blocs, and their interests, from meetings. WTO, UNDERSTANDING THE WTO 104 (2008) *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding _e.pdf.

136. In 1994, Konrad von Moltke wrote that "[w]ithout greater transparency [in international trade processes], it will be difficult to allay public suspicions that important decisions of public policy are being made in secret." Konrad von Moltke, *Dispute Resolution and Transparency*, *in* THE GREENING OF WORLD TRADE 112, 131 (Jan C. McAlpine & Patricia LeDonne eds., 1993). In 2010, a simple search of the world wide web will find numerous articles, blogs, and other writings on the secrecy of the WTO specifically and trade policymaking generally.

137. Joel Connelly, *Kantor Criticizes WTO's Secrecy*, SEATTLE POST-INTELLIGENCER, Nov. 30, 1999, at A18.

138. Charnovitz, *supra* note 47, at 178 (quoting United States Trade Representative Mickey Kantor, Remarks on Trade and Environment at the Global Legislators Organization for a Balanced Environment (Feb. 28, 1994)).

139. James Bacchus, former Chairman of the Appellate Body, Remarks to the National Foreign Trade Council: Open Doors for Open Trade: Shining Light on WTO Dispute Settlement 3 (Jan. 29, 2004), *available at* http://www.worldtradelaw.net/articles/bacchusopendoors.pdf.

parties often broadcast their positions far and wide in the hopes of garnering public support for their positions.[140]

The NAFTA partners have partially reversed course, declaring in a binding "note of interpretation" that "[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration."[141] Consistent with that declaration, the Parties have agreed to make all documents submitted to, or issued by, Chapter Eleven tribunals available to the public in a timely matter. Nevertheless, the Parties could not direct the investment tribunals to permit citizens the right to observe their proceedings because those proceedings are subject to the procedural rules established by the investment tribunals.[142] As a result, the right to observe an investment dispute is being considered on a case-by-case basis, with some panels allowing the public to attend hearings and others not.[143]

Post-NAFTA FTAs have kept the dispute-settlement doors slightly ajar. In the Bipartisan Trade Promotion Authority Act of 2002 ("BTPAA"),[144] Congress directed the Bush administration to ensure that all investment-related requests for dispute-settlement proceedings, submissions, findings, and decisions are "promptly made public" and that all hearings are made open to the public.[145] As a consequence, U.S-Peru, CAFTA-DR, and other FTAs require public disclosure of all notices, pleadings, memorials, briefs, orders, awards, and decisions in both investment[146] and noninvestment disputes.[147] While some FTAs now require investor disputes to be open to the public, the same is not true for noninvestment

140. For an example of such political "posturing," see Bradley S. Klapper, *E.U.: U.S. Aid to Boeing Cost Airbus $27B in Lost Revenues*, PRESS-REGISTER (Mobile, Ala.), Sept. 27, 2007, at A9 (discussing how the United States and European Union engaged in accusations over illegal subsidies and tax breaks to Boeing and Airbus while their dispute was pending before a WTO panel).

141. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en.

142. NAFTA itself does not establish a forum for investment disputes. Instead, these disputes are heard under the rules of the United Nations Commission on International Trade Law ("UNCITRAL") or the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, as administered by the International Centre for Settlement of Investment Disputes ("ICSID"). NAFTA, *supra* note 2, art. 1120.

143. *See* Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 812 (2008).

144. 19 U.S.C. §§ 3801–13 (2006).

145. *Id.* § 3802(b)(3)(H).

146. *See* U.S.-Peru FTA, *supra* note 95, art. 10.21, para. 1; CAFTA-DR, *supra* note 93, art. 10.21, para. 1.

147. *See* U.S.-Peru FTA, *supra* note 95, art. 21.10, para. 1(c); CAFTA-DR, *supra* note 93, art. 20.10, para. 1(c).

disputes.[148]

Given the relevance of both investor and noninvestor disputes for public policy, the differential treatment of transparency is difficult to understand. In any event, environmentalists have made some progress, at least with post-NAFTA FTAs, thus scoring a tie. Score: *2-3-2*.

b. *Amicus Curiae Briefs.* Recognizing that they were unlikely to pry the doors of dispute settlement completely open, environmentalists also tried to ensure participation in dispute settlement through amicus curiae briefs or some other form of consultation.[149] In 1993, attorneys from the Center for International Environmental Law wrote that disputes involving environmental matters required citizens to "filter [information] through their governments and hope it is used."[150] That remains largely true today.

One of the few nods to transparency and openness made by the WTO occurred when the Appellate Body in *Shrimp/Turtle* ruled that panels were not prohibited from accepting and reviewing amicus curiae briefs from NGOs.[151] Subsequent decisions in environmental and other disputes have affirmed the right of NGOs and businesses to submit amicus curiae briefs in Appellate Body proceedings.[152] While the Appellate Body has asserted the right to receive and consider amicus briefs, it frequently declines to consider

148. *See*, *e.g.*, U.S.-Peru FTA, *supra* note 95, art. 10.21, para. 2; CAFTA-DR, *supra* note 93, art. 10.21, para. 2 (requiring investor disputes to be open to the public).

149. *See* Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 511 (1993) (suggesting multiple institutional changes in the GATT to improve access for environmentalists).

150. Robert F. Housman & Durwood J. Zaelke, *Making Trade and Environmental Policies Mutually Reinforcing: Forging Competitive Sustainability*, 23 ENVTL. L. 545, 569 (1993).

151. The Appellate Body in *Shrimp/Turtle I* ruled that:

> [A]uthority to *seek* information [pursuant to articles 11–13 of the DSU] is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted.

Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, para. 108, WT/DS58/AB/R (Oct. 12, 1998).

152. *See, e.g.*, Appellate Body Report, *European Communities — Trade Description of Sardines*, para. 167, WT/DS231/AB/R (Sept. 26, 2002); Appellate Body Report, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, para. 42, WT/DS138/AB/R (May 10, 2000) [hereinafter *Lead and Steel Products*].

them.[153] Indeed, in the uproar over the Appellate Body's decision in *Shrimp/Turtle*, the Appellate Body rejected seventeen amicus briefs without explanation.[154] Later amicus briefs have been accepted, but only rarely does a panel or the Appellate Body reference them.[155]

Congress again asserted its will by calling for FTAs to allow for acceptance of amicus curiae submissions from businesses, unions, and nongovernmental organizations.[156] For example, U.S.-Peru and CAFTA-DR allow tribunals to "accept and consider" amicus curiae submissions from persons or entities.[157] Some recent NAFTA Chapter Eleven panels have accepted amicus curiae briefs and held hearings open to the public, despite the lack of an explicit mandate to do so.[158]

Overall, environmentalists score a clear tie with amicus briefs. Score: *2-3-3*.

c. *Policymaking*. As with dispute settlement, trade policymaking remains a closed-door affair. In the wake of strong public resistance to the ongoing Uruguay Round negotiations and the leaked release of the unadopted *Tuna/Dolphin* Panel report, the WTO made some small, tepid attempts to engage NGOs. The WTO's General Council adopted "Guidelines for Arrangements on Relations with Non-Governmental Organizations."[159] These Guidelines, however, were quite limited in how the different bodies of the WTO could interact with NGOs. For example, the Guidelines directed the Secretariat to engage NGOs, but only through events such as

153. *See, e.g.*, *Lead and Steel Products*, *supra* note 152, para. 42 (concluding that "we have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision").

154. *Amicus Brief Storm Highlights WTO's Unease with External Transparency*, BRIDGES BETWEEN TRADE & SUSTAINABLE DEV. (Int'l Centre for Trade & Sustainable Dev., Geneva, Switz.), Nov.–Dec. 2000, at 1.

155. This author has only seen a single citation to an amicus brief in a dispute-settlement report. Panel Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, para. 7.91, WT/DS332/R (June 12, 2007). Brazil had attached this amicus brief to its own submission. On appeal, the Appellate Body decided not to take into account two amicus briefs submitted by environmental organizations. Appellate Body Report, *Brazil — Tyres*, *supra* note 61, para. 7.

156. *See* 19 U.S.C. § 3802(b)(3)(H)(iii) (2006).

157. U.S.-Peru FTA, *supra* note 95, art. 10.20, para. 3; CAFTA-DR, *supra* note 93, art. 10.20, para. 3.

158. *See, e.g.*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, United Parcel Service of America Inc. v. Government of Canada, paras. 63–64, 73 (NAFTA Arbitral Trib., 2001), *available at* http://www.state.gov/documents/organization/6033.pdf; Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," Methanex Corp. v. United States, paras. 47–53 (NAFTA Arbitral Trib., 2001), *available at* http://www.state.gov/documents/organization/6039.pdf.

159. General Council, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WT/L/162 (July 23, 1996), *available at* http://www.wto.org/english/forums_e/ngo_e/guide_e.htm.

symposia and briefings.[160] The chairs of WTO Councils could meet with NGOs, but only in "their personal capacity" unless the council or committee decided otherwise.[161] The Guidelines concluded by noting the "broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings" and that any closer consultation should be addressed at the national level.[162] While the General Council later that year allowed NGOs to attend the WTO Ministerial Conference in Singapore, they were offered a seat but not a voice—an invitation to an NGO to make a statement was withdrawn during the conference.[163] Similarly, FTAs do not establish opportunities for public participation in policymaking.

Environmentalists lose. Score: *2-4-3*.

*2. National*

a. *Public Release of Documents.* At the national level, environmentalists have also struggled for meaningful participation. Long before the WTO established its website with access to WTO dispute-settlement reports, environmentalists tried to gain access to such documents through the USTR.[164] In a series of cases brought by Public Citizen[165] and the Center for International Environmental Law,[166] consumer-advocate and environmental organizations began to open the USTR's vault of GATT documents and other trade documentation.

First, Public Citizen sued under the FOIA[167] to require the USTR to disclose any submissions it made to the panels.[168] With respect to U.S. submissions to GATT panels, Public Citizen argued that USTR was required to disclose these submissions because they constituted "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal

160. *Id.* para. 4.
161. *Id.* para. 5.
162. *Id.* para. 6.
163. Charnovitz, *supra* note 47, at 181 ("At the conclusion of the Ministerial [Conference], the NGOs sought to make a statement, but were turned down."); *see also* Virginia A. Leary, *The WTO and the Social Clause: Post-Singapore*, 8 EUR. J. INT'L L. 118, 119 (1997); *Free Telephone Calls, Tiger Beer, Extravaganzas!*, EARTH TIMES, Dec. 16–31, 1996, at 10 (observing that during the conference, NGOs "were kept out of the main proceedings and lobbying was restricted" to limited encounters with delegates).
164. *See* Charnovitz, *supra* note 149, at 511.
165. For background information on this group, see About Public Citizen, http://www.publiccitizen.org/Page.aspx?pid=2306 (last visited Apr. 27, 2010).
166. For background information on this group, see The Center for International Environmental Law, http://www.ciel.org (last visited Apr. 27, 2010).
167. 5 U.S.C. § 552 (2006).
168. Pub. Citizen v. Office of the U.S. Trade Rep., 804 F. Supp. 385, 386 (D.D.C. 1992).

Register."[169] The court agreed.[170] The court rejected USTR's contention that USTR could withhold GATT dispute-settlement reports pursuant to any of FOIA's exemptions, including the exemption for matters "in the interest of foreign . . . policy."[171] FOIA only allows nondisclosure for documents relating to national defense and foreign policy "under criteria established by an Executive order" and only if those documents are properly classified pursuant to such Executive Order.[172] While the court acknowledged the underlying concern of the United States—that release of negotiating positions, arguments made to dispute resolution panels, and pre-adoption panel decisions would harm foreign relations—it found no Executive Order or other U.S. law that would justify nondisclosure.[173] Later, the Center for International Environmental Law successfully invoked FOIA to obtain negotiating texts and related materials generated during free trade talks.[174]

In the aftermath of these lawsuits, USTR has become much more open. It maintains a website[175] that hosts a wide range of trade-related information, including full texts of all FTAs, environmental cooperation agreements, and related documents,[176] U.S. submissions,[177] and a wide range of other information.

Environmentalists win. Score: *3-4-3*.

169. *Id.* at 387 (quoting 5 U.S.C. § 552(a)(2)(B)).

170. The court explained:

> Plaintiffs have made an adequate showing, by providing examples of submissions that clearly contain interpretive statements, that these submissions contain statements of policy and interpretations adopted by USTR. The submissions constitute the agency's interpretation of the United States' international legal obligations, even if not personally approved by the Trade Representative herself. As such, they inevitably will have been subject to review by agency personnel in accordance with government policies.

*Id.*

171. *Id.* at 388.

172. 5 U.S.C. § 552(b)(1).

173. *Pub. Citizen*, 804 F. Supp. at 388. The court further concluded that GATT rules favored but did not require confidentiality. Moreover, even if the GATT required confidentiality, the pre-WTO GATT was not ratified by two-thirds of the Senate, and therefore did not enjoy the legal stature of treaty law conferred by the Supremacy Clause of the U.S. Constitution. The rules of FOIA thus compelled disclosure. *Id.*

174. Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Rep., 237 F. Supp. 2d 17, 34 (D.D.C. 2002).

175. Office of the United States Trade Rep., http://www.ustr.gov (last visited Apr. 27, 2010).

176. Office of the United States Trade Rep., Trade Agreements, http://www.ustr.gov/trade-agreements (last visited Apr. 27, 2010).

177. Office of the United States Trade Rep., WTO Dispute Settlement, http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement (last visited Apr. 27, 2010).

b. *Advisory Committees and Trade Policymaking.* The USTR and its negotiating teams are informed by more than thirty advisory committees that provide technical information and advice to USTR. Some of these committees are highly specialized, such as the Industry Trade Advisory Committee on Chemicals, Pharmaceuticals, Health/Science Products and Services.[178] Others have broader scope and influence, most notably the Advisory Committee for Trade Policy and Negotiations ("ACTPN"), which provides "advice on virtually all aspects of trade negotiations and implementation of trade agreements and policies."[179] These committees are composed primarily of affected industries and rarely of environmental or consumer groups. Environmentalists have long argued that these committees must be opened to broader participation[180] so that "affected economic interests" cannot use these committees to lobby USTR "to protect or expand their markets."[181] Although the Federal Advisory Committee Act ("FACA") requires representation to be "fairly balanced,"[182] environmentalists and consumer groups have frequently needed to litigate in order to compel USTR to provide more balanced representation on these advisory committees.[183]

The negotiation of NAFTA did lead to some improvements, in particular the creation of the Trade and Environment Policy Advisory Committee ("TEPAC") to provide advice to the USTR on issues involving trade and the environment.[184] Perhaps TEPAC's most important function is to analyze the environmental impacts of

178. *See* Int'l Trade Admin., Industry Trade Advisory Committee on Chemicals, Pharmaceuticals, Health/Science Products and Services, http://www.ita.doc.gov/itac/committees/ITAC03.ChemicalsPharmaceuticalsHealth&Science.asp (last visited Apr. 27, 2010).

179. Goldman, *supra* note 37, at 672.

180. *See, e.g.*, *id.* at 672–77.

181. WOLD, GAINES & BLOCK, *supra* note 18, at 865.

182. The Federal Advisory Committee Act governs the establishment, operation, and administration of advisory committees that provide advice to the President or to agencies. *See* 5 U.S.C. app. 2 §§ 1–16 (2006). For the specific provision referenced in this Article, see *id.* § 5 (requiring that "the membership of [an] advisory committee . . . be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee").

183. *See, e.g.*, Wash. Toxics Coal. v. Office of the U.S. Trade Rep., No. C00-730R, 2003 WL 23742560, at *1–3 (W.D. Wash. Jan. 15, 2003) (concerning consumer and environmental groups who successfully sued to include environmental representatives on the Industry Sector Advisory Committee on Chemicals and Allied Products for Trade Policy Matters); Nw. Ecosystem Alliance v. Office of the U.S. Trade Rep., No. C99-1165R, 1999 WL 33526001, at *1–2, *4 (W.D. Wash. Nov. 9, 1999) (granting summary judgment for environmentalists who sued to broaden the membership of the forest and paper product trade committees).

184. *See* 19 U.S.C. § 2155(c) (2006) (authorizing the establishment of what became TEPAC and other advisory committees); Exec. Order No. 12,905, 59 Fed. Reg. 14,733 (Mar. 25, 1994) (establishing TEPAC).

FTAs and provide an "advisory opinion on whether and to what extent the agreement promotes the interests of the United States."[185]

Significant problems remain, however. For example, TEPAC has had trouble maintaining interest among labor and environmental groups because of the disproportionate representation by other interest groups.[186] Industry trade advisory committees ("ITACs"), despite being required to include public-interest advocates, rarely have anything approaching proportional representation.[187] As of this writing, for example, ITAC-3 on chemical and allied industries has thirty-five representatives from chemical and allied industries, but not one environmental representative.[188] Whatever the standard for "fairly balanced" representation means under FACA, it does not mean this.

In addition, the advisory committees (as well as congressional staff) appear to have little opportunity to actually advise USTR. As TEPAC member Dan Magraw recently testified:

> TEPAC generally has very little or no access to actual U.S. negotiating positions prior to or during U.S. negotiations. Instead, TEPAC receives general, sometimes perfunctory briefings which lack confidential information and often occur often [sic] only *after* USTR has completed negotiations. Negotiating texts which are put on the internal, classified website are often out-of-date or already agreed [to].[189]

This situation is not anomalous, but rather systemic. As the GAO recently reported, many members of congressional committees that USTR must consult during FTA negotiations under "trade promotion authority" also complain that they are often told what USTR has already done, rather than asked for advice that could

185. Exec. Order No. 12,905, 59 Fed. Reg. at 14,733.

186. The members of TEPAC "should be broadly representative of the key sectors and groups of the economy with an interest in trade and environmental policy issues." *Id*. For the most current list of TEPAC representatives, see Office of the U.S. Trade Rep., Trade and Environment Policy Advisory Committee, http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/trade-and-environment-policy-advisory-committ (last visited Apr. 27, 2010).

187. *See The Trade Advisory Committee System: Hearing Before the Subcomm. on Trade of the H. Comm. on Ways and Means*, 111th Cong. 5 (2009) (statement of Daniel B. Magraw, Jr., President, Center for International Environmental Law), *available at* http://waysandmeans.house.gov/media/pdf/111/magraw.pdf [hereinafter Magraw Statement]; James Salzman, *Seattle's Legal Legacy and Environmental Reviews of Trade Agreements*, 31 ENVTL. L. 501, 517–18 (2001).

188. *See* Magraw Statement, *supra* note 187, at 5; Industry Trade Advisory Committee, ITAC-3 Membership List, http://ustraderep.gov/assets/Who_We_Are/Advisory_Committee_Lists/asset_upload_file970_5742.pdf (last visited Apr. 27, 2010).

189. Magraw Statement, *supra* note 187, at 3.

influence ongoing negotiations.[190]

In addition, even where advisory committees receive documents before final decisions have been made, the documents still are not provided with sufficient time for committee members to offer meaningful advice. In one example, TEPAC was given just eleven business days to review the U.S.-Peru Environmental Cooperation Agreement[191]—hardly sufficient time to evaluate whether that agreement promotes U.S. interests.

Environmentalists lose. Score: *3-5-3*.

## III. RECOMMENDATIONS FOR MOVING FORWARD

In many respects, the environmentalists' trade-environment agenda could be described as an attempt to bring good governance to trade policymaking. For example, there is nothing particularly "environmental" about transparency. Similarly, while environmentalists have focused on environmental and environmental-policy impacts of regulatory, competitiveness, and scale effects of trade policy, similar concerns are also embraced by labor, human rights, and other interest groups. As such, environmentalists' concerns—and the failure of trade policy to embrace those concerns to date—may help guide the future of FTA negotiations.

This is an opportune time to embrace these concerns. On July 1, 2007, authority under the BPTAA expired.[192] Congress has yet to give President Obama new authority to negotiate trade agreements. As noted above, the BTPAA did much to help make trade policy more transparent.[193] It also helped make USTR take into account environmental concerns in trade agreements beyond NAFTA/NAAEC. Any new grant of trade promotion authority could—and should—direct FTAs to address scale effects and improve transparency.

### *A. Addressing Effects*

As described in Part II.B, research has shown few competitiveness effects from trade rules. In addition, a review of regulatory effects shows mixed results. Trade rules have sometimes been used to overturn environmental rules, but those environmental rules did have discriminatory effects. Also, efforts to use trade rules to overturn environmental rules have not always succeeded. On the

190. GOV'T ACCOUNTABILITY OFFICE, No. GAO-08-59, INTERNATIONAL TRADE: AN ANALYSIS OF FREE TRADE AGREEMENTS AND CONGRESSIONAL AND PRIVATE SECTOR CONSULTATIONS UNDER TRADE PROMOTION AUTHORITY 29, 42 (2007), *available at* http://www.gao.gov/new.items/d0859.pdf [hereinafter CONSULTATIONS UNDER TRADE PROMOTION AUTHORITY].

191. Magraw Statement, *supra* note 187, at 4.

192. *See* 19 U.S.C. § 3803 (2006).

193. *See supra* notes 144–48 and accompanying text.

other hand, studies on scale effects have shown a need for much more attention to institutional development and law reform as a precondition to implementing an FTA. Without ignoring competitiveness and regulatory effects, future TPAs and FTAs should focus on scale effects.

The United States already has a process for doing so. Prior to initiating FTA negotiations, agency officials judge six factors for selecting future FTA partners: "[1] country readiness, [2] economic/commercial benefit, [3] benefits to the broader trade liberalization strategy, [4] compatibility with U.S. interests, [5] congressional/private sector support, and [6] U.S. government resource constraints."[194] The first factor, country readiness, assesses a "country's political will, trade capabilities, and rule of law systems."[195]

"Country readiness" should be transformed into an analysis of a country's *institutional and legal capacity* to implement trade agreements. The pursuit of "highly comprehensive 'gold standard' bilateral and regional FTAs"[196] intensifies the need to ensure that institutions have the capacity to address changes deriving from the FTAs. The "gold standard" limits future FTA partners to those who are willing to accept a sweeping array of trade-liberalization objectives, including agriculture, a "negative list" approach to services under which all service sectors are covered unless they are specifically excluded, protection of intellectual property rights, as well as expanded market access.[197] In other words, FTAs will target those countries seeking substantial trade liberalization.

Despite the wealth of information concerning the need to have robust institutions in place before trade liberalization occurs,[198] the

194. CONSULTATIONS UNDER TRADE PROMOTION AUTHORITY, *supra* note 190, at 12; *see also* GOV'T ACCOUNTABILITY OFFICE, No. GAO-04-233, INTERNATIONAL TRADE: INTENSIFYING FREE TRADE NEGOTIATING AGENDA CALLS FOR BETTER ALLOCATION OF STAFF AND RESOURCES 9–10 (2004), *available at* http://www.gao.gov/new.items/d04233.pdf [hereinafter INTENSIFYING FREE TRADE NEGOTIATING AGENDA].

195. INTENSIFYING FREE TRADE NEGOTIATING AGENDA, *supra* note 194, at 9. The GAO noted, however, that:

> U.S. agencies involved in FTA partner selection discussions may interpret this factor somewhat differently, since each agency filters the information though the lens of its specific mission. For example, USTR may review a prospective candidate's adherence to trade obligations and its leaders' commitment to negotiating all trade issues that currently comprise the comprehensive FTAs that the United States seeks to negotiate. However, Treasury may look at the candidate's overall macroeconomic stability and the strength of its financial and banking system.

*Id.*

196. CONSULTATIONS UNDER TRADE PROMOTION AUTHORITY, *supra* note 190, at 18.

197. *Id.*

198. *See, e.g.*, DANI RODRIK, UNITED NATIONS DEV. PROGRAMME, THE GLOBAL

United States has not asked its trading partners to have them. A review by the GAO of four U.S. FTAs (Chile, Jordan, Morocco, and Singapore) recently revealed that "implementation of environmental laws in [Chile, Jordan, and Morocco] . . . continues to be a challenge" and that "[s]ome of the challenges described were common across these partners, such as weaknesses in their government institutions in implementing environmental laws and regulations."[199] In fact, although the pre-FTA environmental review of Chile showed concerns relating to mining, fishing, forestry, agriculture, and environmental enforcement, the environmental commission established under the United States-Chile Environmental Cooperation Agreement fails to incorporate these sectors as priorities for cooperation.[200] While one should not expect FTAs and the environmental-cooperation agreements negotiated as part of FTAs to cure a trading partner's environmental problems, when the FTA may exacerbate or create certain environmental problems, it should ensure that the proper laws and institutions are in place to avoid them.[201]

The GAO's review of the four FTAs also shows that the time for leveraging environmental benefits and making improvements to institutions and laws is before the FTA is signed. For example, even though the FTAs with Chile, Singapore, and Morocco contain provisions to encourage cooperation to strengthen the partners' capacity to protect the environment, little has apparently been done.[202] The USTR and State Department appear to shrug off any criticism of implementation by stating that FTA provisions on the environmental and cooperation mechanisms are "aspirational" commitments, even while recognizing that the "environmental challenges facing FTA partners are enormous" and that some trading partners have only "nascent environmental regimes."[203]

GOVERNANCE OF TRADE AS IF DEVELOPMENT REALLY MATTERED 25–26 (2001), *available at* http://www.wcfia.harvard.edu/sites/default/files/529_Rodrik5.pdf; Block, *supra* note 16, at 526; Dani Rodrik et al., *Institutions Rule: The Primary of Institutions over Geography in Economic Development*, 9 J. ECON. GROWTH 131, 146 (2004).

199. FOUR FREE TRADE AGREEMENTS, *supra* note 125, at 54.

200. *Id.* at 55.

201. The U.S.-Singapore FTA may provide an exception to this rule. There, Singapore adopted improved laws and regulations to implement the CITES. Because Singapore is a significant transit country for trade in wildlife and wildlife products, the action was important and apparently undertaken with the encouragement of the U.S. government. *Id.* at 56. Whether the U.S.-Singapore FTA, however, would have increased wildlife trade is a question. The United States is not a significant wildlife trading partner with Singapore. *See* U.S. TRADE REP., FINAL ENVIRONMENTAL REVIEW OF THE U.S.-SINGAPORE FREE TRADE AGREEMENT 20 (2003), http://www.ustr.gov/sites/default/files/Singapore%20final%20review.pdf.

202. FOUR FREE TRADE AGREEMENTS, *supra* note 125, at 58.

203. *Id.* at 60.

That "environmental problems identified during the FTA negotiations remain a concern"[204] should give one pause as to the commitment of the USTR to fulfill its congressional mandate to "strengthen the capacity of United States trading partners to protect the environment,"[205] but also the ability of FTAs to leverage environmental commitments after the FTA is completed.

Thus, to address *scale effects*, Congress must mandate the following:

> (1) Prior to the adoption of any FTA, the USTR, in consultation with relevant agencies, must evaluate the institutional and legal capacity of the prospective trading partner. When problems exist, those problems must be resolved before the United States adopts the FTA.
>
> (2) To inform and assist with the evaluation of the institutional and legal capacity, the United States must assess the potential environmental impacts of an FTA on the prospective trading partner.
>
> (3) Once the FTA is in effect, the United States must evaluate the environmental impacts of the FTA to determine whether any adjustments should be made to (a) the FTA's core trade obligations; (b) legislation, institutions, and institutional structures needed to implement the FTA; and (c) the type and amount of capacity-building given to U.S. trading partners.

In addition to ensuring that future trading partners have institutional and legal capacity to address environmental challenges before the FTA is adopted, Congress should resolve the potential *regulatory effects* resulting from a potential conflict between MEAs and the trading regime. This could be done as follows:

> (4) Future FTAs should expressly exempt trade measures implemented pursuant to those MEAs to which the FTA parties are party, as well as any relevant regional environmental agreements. However, FTAs would not exempt stricter domestic measures—measures permitted by an MEA but which exceed the requirements of the MEA.

To guard against potential *competitiveness effects*, trade promotion authority should require the following:

> (5) Any FTA should prohibit each country from weakening its environmental laws, as FTAs currently do. USTR should use the information obtained from the evaluation of institutional and legal capacity to establish a baseline of information from which to measure whether a country is weakening its environmental laws.
>
> (6) Any new FTA should *not* include a process for parties to

204. *Id.*
205. 19 U.S.C. §3802(b)(11)(D) (2006).

challenge another party's failure to effectively enforce environmental law, as the newer ones do.[206] Since evidence does not suggest that failures to enforce derive from efforts to attract investment, this issue merely detracts from what really needs to be done—focusing on scale effects. To focus on scale effects, FTAs should require periodic assessment of environmental impacts.

### *B. Transparency*

From a public policy perspective, not just an environmental perspective, the lack of transparency in the dispute-settlement and policymaking fora of the WTO and FTAs is extremely confounding. On the one hand, the power-based concerns of developing countries are easy to understand; they worry that if NGOs are allowed a presence in trade policymaking, their share of power may be diminished. On the other hand, if the goal is to develop optimal policy that integrates not only trade concerns but also factors that may affect trade, such as people and the environment, then hearing the voices of interest groups—whether those interests lean toward the conservative, liberal, trade-oriented, environmental, labor, or otherwise—can only improve policymaking.[207]

From a purely pragmatic perspective, the closed-door policies of the WTO and FTAs do nothing to convince citizens that trade is beneficial to ordinary citizens. Such policies instead fuel suspicion that governments, through trade agreements, have something to hide that they do not want citizens to see. As such, the WTO, NAFTA, and other trade agreements are easy to demonize as "GATTzilla"—"a prehistoric monster strangling a dolphin, chewing up the earth, spilling DDT," abusing workers, and trampling our democratic rights.[208] As Thomas Cottier noted a decade ago, the

206. The FTAs also provide 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." U.S.-Chile FTA, *supra* note 92, art. 19.2, para. 1(a); *see also* U.S.-Peru FTA, *supra* note 95, art. 18.3, para. 1(a); CAFTA-DR, *supra* note 93, art. 17.2, para. 1(a). This obligation is subject to dispute settlement. U.S.-Peru FTA, *supra* note 95, art. 18.12; CAFTA-DR, *supra* note 93, art. 17.10, para. 7; U.S.-Chile FTA, *supra* note 92, art. 19.6.

207. A large number of excellent articles have been written on the need to make dispute-settlement and policymaking fora more transparent. *See, e.g.*, Charnovitz, *supra* note 47; Steve Charnovitz & John Wickham, *Non-Governmental Organizations and the Original International Trade Regime*, J. WORLD TRADE, Oct. 1995, at 111; Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433 (1998); Daniel C. Esty, *Non-governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123 (1998); Housman, *supra* note 38; Naomi Roht-Arriaza, *Precaution, Participation, and the "Greening" of International Trade Law*, 7 J. ENVTL. L. & LITIG. 57 (1992).

208. WOLD, GAINES & BLOCK, *supra* note 18, at 69.

"publicity of hearings of panels and amicus curiae briefs from non-governmental organisations could further enhance the legitimacy, and acceptance, of the WTO dispute-settlement process."[209]

By way of comparison, about 14,000 people representing NGOs descended on Copenhagen as official observers to the climate-change negotiations. In addition, the author recently returned from negotiations within CITES on permitting issues for marine species taken on the high seas. Representing NGOs, he engaged directly with governments over specific language of the draft resolution being negotiated.

For these reasons, any future TPA or FTA should include the following elements:

> (1) All dispute settlement concerning investment and noninvestment disputes must be subject to open and transparent procedures that include the right of citizens to observe the proceedings regardless of the subject matter of the dispute. From a public policy perspective, there is no difference between an investor challenging an environmental law and an FTA party challenging that same law. However, dispute settlement need not take place within national courts as proposed by the TRADE Act[210]—there are valid concerns about judicial independence in many countries that would deter foreign investment or cast doubt on the validity of judicial decisions.
>
> (2) All notices and submissions and other documents associated with dispute settlement under an FTA must be made available to the public, regardless of subject matter.
>
> (3) Congress must specify the minimum number of individuals from public-interest organizations that must be included on different types of advisory committees. While industry representatives clearly provide a valuable perspective to trade and environmental issues, they should not be represented on the TEPAC or ACTPN in greater numbers than members of public-interest organizations. What constitutes "fair and balanced" representation on the ITACs is likely to be different, since those ITACs deal with specific industries where industry representatives are likely to have more of the type of information wanted by trade negotiators. Nonetheless, public-interest representation must be far greater than it is now.

209. Thomas Cottier, *The WTO and Environmental Law: Three Points for Discussion*, *in* TRADE AND THE ENVIRONMENT: BRIDGING THE GAP 56, 58–59 (Agata Fijalkowski & James Cameron eds., 1998).

210. Trade Reform, Accountability, Development, and Employment Act of 2009, H.R. 3012, 111th Cong. § 4(b)(6)(c) (2009).