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Harmonizing Trade and Environment in Recent Free Trade Agreements in the Asia-Pacific Region

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Since 1999/2000, the Asia-Pacific region has been experiencing a boom in regional and bilateral free trade agreements, with the result that trade regimes are increasingly taking place in the context of FTAs and regional economic integration. Consequently, many of the key issues in the ever-growing interface between trade and environment have surfaced and need to be addressed at the level of these bilateral and regional trade agreements. This paper reviews approaches to the integration of trade and environment in recent free-trade agreements concluded in the Asia-Pacific region, with a view to identifying substantive provisions and procedural and institutional mechanisms that have been used. In addition, the paper looks at the extent to which the approach to trade and environment in Asia-Pacific free trade agreements differs from or follows that under the World Trade Organization.

Keywords: Free trade agreements, environment, World Trade Organization, Asia-Pacific, Doha Declaration.

Increasing global economic interdependence and the process of trade liberalization are leading to growing pressure on the environment and the use of natural resources. As a result, there is an ever-growing interface between trade and environmental conservation. This relationship generally revolves around three issues:

- The environmental impact of trade and trade policies;
- The potential effects of environmental measures on trade flows; and
- The use of trade measures to achieve environmental policy aims.

It is widely recognized that trade and environment can be mutually supportive. However, such a mutually supportive relationship should not be assumed to be automatic; rather, it is policy-driven. One essential condition for making trade and environment mutually supportive is to ensure that the process of trade liberalization through free trade agreements (FTAs) is preceded, accompanied, and followed by an integrated assessment of its environmental, economic, and social effects, and that adequate policies are put in place for preventing potential negative effects while enhancing positive ones. Moreover, it should be ensured that the process of trade liberalization runs parallel with the development and strengthening of effective and non-protectionist environmental legislation at national and international levels. Bilateral and regional trade agreements present a framework propitious to achieving these

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objectives, especially because the identification of positive synergies among trading partners, as well as convergence and/or co-operation, should be easier at bilateral and regional levels than at the multilateral level.

Free trade agreements are preferential trade agreements (PTAs) in which tariffs are eliminated entirely on the goods produced in the member countries, while countries maintain their own tariff structures with non-members. PTAs in which all members adopt a common external tariff structure are called custom unions. Custom unions imply a common trade policy, which means that member countries negotiate on trade issues as a single entity with non-members. PTAs concluded in the Asia-Pacific region, either bilateral or regional, are FTAs where tariffs are eliminated among member countries, but countries maintain their tariff structure vis-à-vis non-members. The increasing interest in bilateral and regional agreements is partly related to concerns over the inability of the newly established World Trade Organization (WTO) to take forward the trade liberalization agenda in a manner acceptable to all of its member countries. Despite the enthusiasm generated by the Fourth WTO Ministerial Conference held in Doha, Qatar, in November 2001, the failure of the Fifth WTO Ministerial Conference in Cancún, Mexico, September 2003 has helped to raise the profile of bilateral and regional agreements as an alternative avenue for trade negotiations.¹ This trend has increased particularly since some of the major global trade players, including the United States, openly indicated their intention to pursue further trade liberalization through bilateral agreements.² Whether FTAs already in existence or currently under negotiation would substitute or supplement the mechanisms of the WTO is a question for debate. What is clear, however, is that the FTAs would have significant impacts on global trade liberalization and the building of trade rules at the regional and global levels, including in areas where multilateral negotiations are in deadlock—which include rules on the relationship between trade and environment.

The integration of trade-related environmental concerns into FTAs is necessary for an approach that balances trade and investment liberalization with the needs of environmental conservation. This paper reviews approaches to the integration of trade and environmental concerns in recent FTAs concluded in Asia-Pacific, with a view to identifying the substantive provisions and procedural and institutional mechanisms that have been used in the various agreements. In addition, the paper looks at the extent to which the approach to trade and environment in Asian FTAs differs with that under the World Trade Organization. Trade and environment regimes in existing agreements are considered in terms of their implications for future FTAs as well as for future courses of action in the context of the WTO.

This paper examines the following regional and bilateral free trade agreements: the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (AFTA),³ the SAARC

1 The Fifth WTO Ministerial Conference failed because of disagreement between developed and developing member countries on whether negotiations should start on investment, transparency in government procurement, competition and trade facilitation. The First WTO Ministerial Conference held in Singapore between 9 and 13 December 1996 launched exploratory work on these four issues. Because of the link to the Singapore Ministerial, the four issues became known as the "Singapore Issues".

2 US Trade Representative Robert B. Zoellick has indicated that the United States' trade strategy includes advances on multiple fronts, including aggressively pursuing bilateral and regional trade agreements (Robert B. Zoellick, "America will not wait for the won't-do countries," *Financial Times*, September 22, 2003, London edition 1). Some observers regard the US policy of pursuing bilateral deals as a strategy to keep development goals out of US trade policy and avoid pressure for reform from the majority of WTO member countries in agriculture and other policy areas.

3 Adopted on January 28, 1992.

Preferential Trading Arrangement (SAPTA);⁴ the Agreement between New Zealand and Singapore on a Closer Economic Partnership (ANZSCEP);⁵ the Agreement between Japan and the Republic of Singapore for a New Age Economic Partnership (JSEPA);⁶ the Agreement between the EFTA States and Singapore;⁷ the Singapore-Australia Free Trade Agreement (SAFTA);⁸ the United States-Singapore Free Trade Agreement (USSFTA);⁹ and the Republic of Korea-Republic of Chile Free Trade Agreement.¹⁰

1. Trade and environment in the context of the WTO

The protection of the natural environment was first recognized by the multilateral trading system (MTS) as a legitimate public policy objective when the original General Agreement on Tariffs and Trade (GATT) was signed in 1947. However, it was only after the 1992 World Summit on Environment and Development in Rio de Janeiro that the relationship between trade and environmental policies became more explicit, during the Uruguay round. The word *environment* was explicitly mentioned in the preamble to the Marrakesh Agreement Establishing the World Trade Organization (WTO 1994a) and in the provisions of several agreements of the WTO. These agreements include a major revision of GATT, known as GATT 1994, which became the WTO's principal rule-book for trade in goods (WTO 1994f).

1.1. Environmental provisions in WTO agreements

a. The agreement establishing the World Trade Organization

The Preamble to the Marrakesh Agreement Establishing the World Trade Organization enounces that relations among member countries in the field of trade and economic endeavor should be conducted with a view to:

raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance them and for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

b. Article XX of GATT 1994

Article XX of GATT 1994 provides a general exception that allows member countries to take measures that would otherwise be inconsistent with their obligations. Under the present normative set-up of the WTO, GATT article XX(b) and article XX(g) are the most relevant provisions with regard to

4 Adopted on April 11, 1993.

5 Adopted on November 14, 2000.

6 Adopted on January 13, 2002.

7 Adopted on June 26, 2002.

8 Adopted on February 17, 2003.

9 Adopted on May 6, 2003.

10 Adopted on February 15, 2003.

environment and trade. Article XX(b) enables the adoption of measures necessary to protect human, animal or plant life or health. Article XX(g) covers exceptions relating to the conservation of exhaustible natural resources.

The article states that nothing in the GATT:

... shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health; ...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; ...

Box 1. Environmental provisions in selected WTO agreements

Agreement on Technical Barriers to Trade

The TBT is intended to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles to producers and exporters. However, it enables every WTO member to take:

measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment ... at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade ...

In order to prevent too many different standards, the TBT encourages countries to use international standards where these are appropriate, but it does not require them to change their levels of protection as a result.

The Committee on Technical Barriers to Trade receives notifications on environmental measures related to a variety of issues such as energy, genetically modified organisms, organic crops, pesticides, fertilizers, and hazardous wastes.

Agreement on the Application of Sanitary and Phytosanitary Measures

The SPS sets out the basic rules that permit governments to maintain appropriate sanitary and phytosanitary protection, while reducing possible arbitrariness of decisions. The SPS requires that sanitary and phytosanitary measures be “applied only to the extent necessary to protect human, animal or plant life or health.” Measures to ensure food safety and to protect the health of animals and plants should be based as far as possible on scientific principles and should not be maintained without sufficient scientific evidence (article 2.2). Safety measures should not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail, and should not be applied “in a manner which would constitute a disguised restriction on international trade” (article 2.3). The SPS allows limited freedom to apply the “precautionary principle” to deal with scientific uncertainty. The Committee on Sanitary and Phytosanitary Measures addresses notifications of measures relating to the protection of human, animal, or plant life or health.

The introductory paragraph (chapeau) of article XX cautions that such measures should not be applied “in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade ...”

Environmental provisions are contained in a number of other agreements of the WTO, including the Agreement on Agriculture; the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) (WTO 1994b); the Agreement on Subsidies and Countervailing Measures; the Agreement on Technical Barriers to Trade (TBT) (WTO 1994c); the Agreement on Trade-Related Intellectual Property Rights (TRIPS) (WTO 1994d); the General Agreement on Trade in Services (GATS); and the Agreement on Government Procurement.

1.2. Environmental institutions in the WTO

The WTO’s Committee on Trade and Environment (CTE) is the main mechanism responsible for coordinating policies in the field of trade and environment within the WTO; however, it cannot exceed the competence of the multilateral trading system, which is limited to trade policies and those trade-related aspects of environmental policies that may significantly affect trade for its members. The CTE was created following the adoption of the Ministerial Decision on Trade and Environment in Marrakech, Morocco on April 15, 1994 (WTO 1994e) and has the following mandate:

- a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
- b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system ...

The CTE is open to the entire WTO membership, and a number of intergovernmental organizations have observer status in its meetings. At the Fourth Ministerial Conference in Doha, ministers instructed the CTE to focus particularly on three issues in implementing all items of its work program: the effects of environmental measures on market access, the relevant provisions of the TRIPS agreement, and labeling requirements for environmental purposes (WTO 2001, para. 32). The CTE reported on its work on these issues to the Fifth Ministerial Conference.¹¹

1.3. Trade and environment in the Doha round of multilateral trade negotiations

The declaration of the Fourth WTO Ministerial Conference (WTO 2001), known as the Doha Declaration, marked a turning point in the evolution of the interface between trade and environment within the WTO. The Doha Ministerial was the first time that the environment was part of the negotiating agenda agreed to by WTO members at the multilateral level. While the Doha Declaration presents significant opportunities to take forward environmental concerns in the WTO, it was self-limiting in several ways. For example, although the Declaration instructs the CTE to work on the

¹¹ World Trade Organization Committee on Trade and Environment, Report to the Fifth Session of the Ministerial Conference in Cancún—Paragraphs 32 and 33 of the Doha Ministerial Declaration, WT/CTE/8 July 11, 2003.

identification of issues that require clarification and to make recommendations on the desirability of future negotiations, the Declaration stresses that the outcome of this work as well, as the negotiations carried out, shall not add to or diminish the rights and obligations of members under existing WTO agreements, nor alter the balance of these rights and obligations. Thus, the possible outcomes of any negotiations are significantly limited.

Nevertheless, the Doha Declaration is still regarded as a step forward in harmonizing the relationship between trade and environment at the multilateral level. Besides the instructions to the CTE mentioned above, the main environment-related provisions in the Doha Declaration are concerned with the following:¹²

- Negotiations on the relationship between WTO rules and the specific trade obligations in multilateral environmental agreements (MEAs), and procedures for information exchange and observer status with MEA secretariats (para. 31);
- Negotiations on the reduction or elimination of tariff and non-tariff barriers to environmental goods and services (para. 31);
- Negotiations on WTO disciplines on fishery subsidies, and the need for clarification and improvement (para. 28);
- Examination of the relationship between the TRIPS Agreement and the Convention on Biological Diversity by the TRIPS Council (para. 19; see also the instruction to the CTE mentioned above);
- Reviewing the environmental and development aspects of the negotiations with the objective of having sustainable development appropriately reflected, with the CTE and the Committee on Trade and Development acting as forums for debate (para. 51);
- Co-operation between the WTO and relevant international environmental and development organizations (para. 6); and
- Agriculture negotiations where so-called non-trade concerns will be taken into account (para. 13).

At the Fifth Ministerial Conference in Cancún, WTO member countries were due to decide whether negotiations should be held on the effects of environmental measures that impede market access and on those situations in which the elimination of restrictions and distortions would benefit trade, environment, and development (para. 32); on labeling requirements for environmental purposes (para. 32); and on the relationship between the TRIPS Agreement and the Convention on Biological Diversity (paras. 19 and 32).

The Cancún Ministerial was dominated by agriculture and the “Singapore Issues” (investment, transparency in government procurement, competition, and trade facilitation), with environment low on the agenda. WTO member countries came close to consensus (in the second revision of the Draft Cancún Ministerial Text submitted by the conference chairperson on September 13; WTO 2003) on the issue of inviting the secretariats of the United Nations Environment Program (UNEP) and United Nations Conference on Trade and Development (UNCTAD) and of those multilateral environmental

12 For a detailed analysis of the sectoral issues in the Doha Declaration, see Charnovitz 2003.

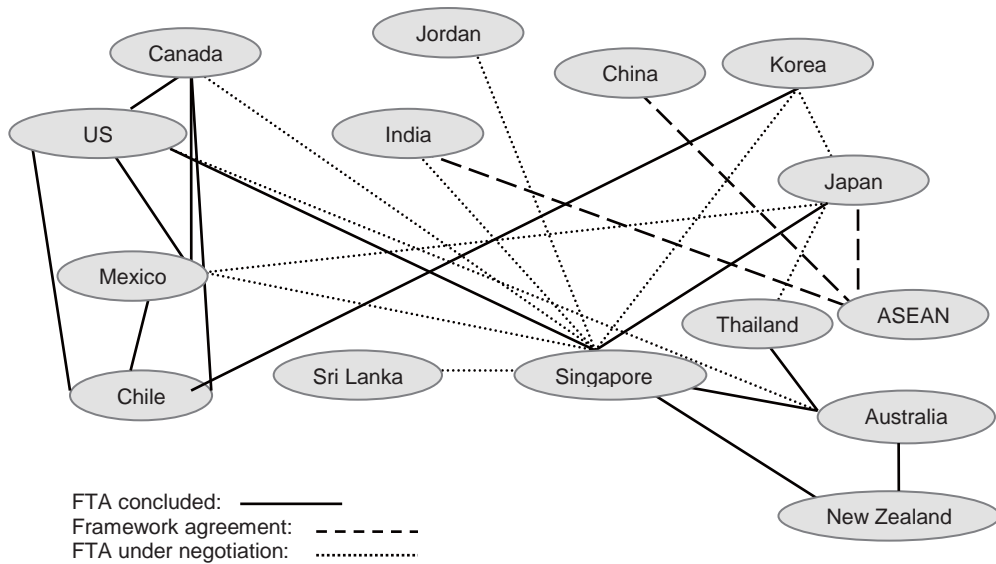


Figure 1. Web of FTAs concluded or under negotiation in the Asia-Pacific region (not exhaustive)

agreements invited thus far, to be observers in the CTE's Special Session, and for the duration of the negotiations. Talks among heads of delegations also seem to have come close to consensus on the issue of gene patenting of animals and plants, the Convention on Biological Diversity, and the protection of traditional knowledge. Eco-labeling was among the more difficult issues. With the collapse of the negotiations at Cancún, all these issues for negotiation were left as they were at the end of the Doha Ministerial.

1.4. *The momentum of FTAs in Asia*

For most of the period prior to 1999, Asia had stayed on the fringes of the movement towards concluding regional and bilateral agreements on trade. With a few exceptions, such as AFTA, formed in 1992 among member countries of the Association of Southeast Asian Nations (ASEAN)¹³ and SAPTA, concluded in 1995 by the South Asian Association for Regional Cooperation (SAARC),¹⁴ FTAs in the sense of article XXIV of the 1994 GATT, which forms part of the WTO agreements, were almost nonexistent in the region. It was only in 1999 and 2000 that government-level negotiations and studies began to gather momentum. Since then, several bilateral agreements have been concluded between countries in the region as well as with countries from other regions. Several proposals for FTAs are now under negotiation, involving not only individual countries, but also regional groupings such as ASEAN. Figure 1 presents a web of some of the FTAs already concluded or under negotiation in the Asia-Pacific region at the time of writing. It is worth noting that the increase in the number of FTAs has run parallel with the increase in imports and exports (see figure 2).

¹³ Member countries of ASEAN are Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei Darussalam, Viet Nam, Laos, Myanmar, and Cambodia.

¹⁴ Member countries of SAARC are Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka.

2. Trade and environment in FTAs concluded in Asia-Pacific

In most FTAs concluded in Asia-Pacific, parties go well beyond their WTO commitments in terms of tariff concessions. However, while negotiators within the WTO have been increasingly shifting their agendas towards issues other than tariffs—such as environmental protection, intellectual property rights, labor standards and competition policies—FTAs in Asia-Pacific, with the exception of the recent bilateral agreements such as USSFTA, have concentrated on issues related to trade liberalization per se. For example, the ASEAN FTA seeks to eliminate tariff and non-tariff barriers among member countries through progressive reduction of tariffs, elimination of import duties, and trade facilitation measures. It provides for binding commitments towards trade liberalization but has only a single exception covering environment.¹⁵ Likewise, SAPTA aims to promote and sustain mutual trade and economic co-operation among the Contracting States but covers no issues related to environment. Similarly, the Asia-Pacific Economic Cooperation (APEC),¹⁶ though not an FTA as such but rather a forum that promotes trade and investment liberalization on a non-binding basis, concentrates on matters aimed at improving economic prosperity for its member countries. This approach treating the environment as an external dimension to trade—environment being generally incorporated into the general exception clause often labeled following article XX of the 1994 GATT—was a common feature of early FTAs in Asia-Pacific. With few exceptions, the so-called new age FTAs (JSEPA, SAFTA, ANZSCEP) have expanded their scope beyond the issue of tariff reduction towards electronic commerce, trade facilitation, broadcasting, and so on, but not towards environment. These agreements have trade and investment expansion as their main objectives.

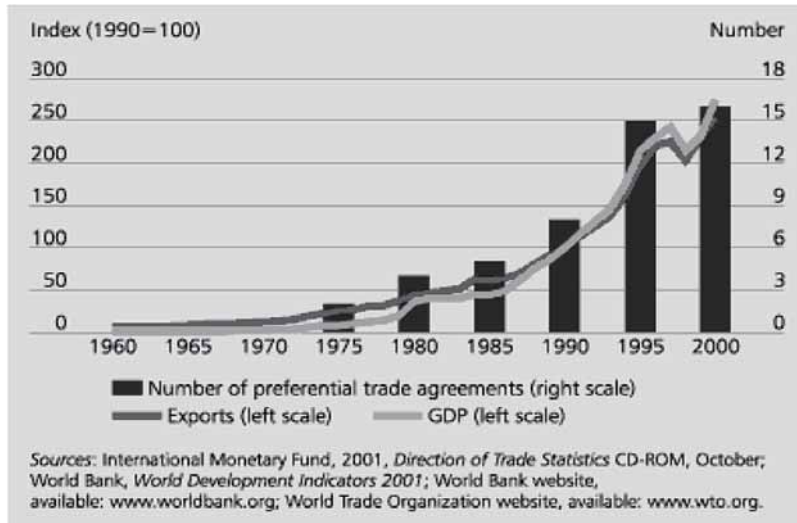
The low profile of environmental issues in negotiations for FTAs is related to the fact that FTAs are a relatively new phenomenon in Asia-Pacific, and as such they are primarily viewed as opportunities for faster-paced liberalization of trade and investment than would have happened through multilateral negotiations; therefore, priority is given to issues of trade and investment concessions. The limited inclusion of environment into FTAs is related to another concern: the effects of environmental policies on trade. Many developing economies perceive the inclusion of environmental concerns in trade negotiations as a form of “green protectionism” by more developed countries, who they believe may be using environmental standards as non-tariff trade barriers or to otherwise harm developing countries’ international competitiveness. This perception has partly resulted from cases of restriction against Asian goods in northern markets on the grounds of environment health safeguards.

Since the establishment of the Dispute Settlement Body of the WTO, only a handful of disputed cases related to environment have actually reached settlement.¹⁷ Among these figure landmark cases

15 “Nothing in this Agreement shall prevent any Member State from taking action and adopting measures, which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and archaeological value.”—Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, article 9, general exceptions.

16 APEC was established in 1989 as a forum for facilitating economic growth, cooperation, trade, and investment in the Asia-Pacific region. It has 21 member economies which are: Australia; Brunei Darussalam; Canada; Chile; People’s Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; the Republic of the Philippines; the Russian Federation; Singapore; Chinese Taipei; Thailand; United States of America; and Viet Nam. <http://www.apec.org/>.

17 Some of the cases disputed under GATT 1994 article XX that have involved Asian countries include the case brought by the United States against Thailand, *Thailand Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200,



Source: Asian Development Bank, 2002, Figure 3.2.

Figure 2. Asian and Pacific merchandise exports, GDP, and number of preferential trade agreements, 1960–2000

involving Asian countries such as the *Shrimp/Turtle case (United States—Import Prohibition of Certain Shrimp and Shrimp Products)*,¹⁸ in which India, Pakistan, Malaysia and Thailand challenged a US law prohibiting imports of shrimp from countries where the government did not obligate fishing boats to install turtle exclusion devices (TED) in order to prevent accidental catching and killing of sea turtles during shrimp fishing. The decision of the Appellate Body held that the environmental policy incorporated in US law fell under article XX(g) (see text below), and was exempted from the GATT disciplines. However, the Appellate Body condemned the United States for not doing enough to negotiate with East Asian countries to reach a compromise whereby this issue could have been resolved through an international agreement, and for applying its import measures in a discriminatory manner.¹⁹

adopted on November 7, 1990. Under the 1966 Tobacco Act, Thailand prohibited the importation of cigarettes and other tobacco preparations, but authorized the sale of domestically manufactured cigarettes; moreover, cigarettes were subject to an excise tax, a business tax and a municipal tax. The United States complained that the import restrictions were inconsistent with GATT article XI:1, and considered that they were justified neither by article XI:2(c) nor by article XX(b). It also argued that the internal taxes were inconsistent with GATT article III:2. Thailand argued, *inter alia*, that the import restrictions were justified under article XX(b) because the Government had adopted measures that could only be effective if cigarette imports were prohibited and because chemicals and other additives contained in US cigarettes might make them more harmful than Thai cigarettes. The Panel found that the import restrictions were inconsistent with article XI:1 and not justified under article XI:2(c). It further concluded that the import restrictions were not “necessary” within the meaning of article XX(b). The internal taxes were found to be consistent with article III:2.

18 Appellate Body Report and Panel Report, WT/DS58, adopted on November 6, 1998, case brought by India, Malaysia, Pakistan, and Thailand.

19 The Panel considered that the ban imposed by the United States was inconsistent with GATT article XI (which limits the use of import prohibitions or restrictions), and could not be justified under GATT article XX (which deals with general exceptions to the rules, including for certain environmental reasons). Following an appeal, the Appellate Body found that the measure at stake did qualify for provisional justification under article XX(g), but failed to meet the requirements of the chapeau of article XX, which defines when the general exceptions can be cited. The Appellate Body therefore concluded that the US measure was not justified under article XX of GATT.

Environment-related grounds have also been used in a number of other cases against exports of Asian goods, which have resulted in consultations among concerned parties under the WTO dispute-settlement mechanisms.²⁰ The use of environmental measures as grounds for prohibiting imports has likely contributed to generating a cautious approach to the issue of environmental exceptions in many Asia-Pacific countries, which in turn has affected the way environmental concerns are dealt with in FTAs.

2.1. Trade and environment models in Asia-Pacific

There are three common models for integrating environmental concerns into an FTA:

- A. the inclusion of *environmental provisions* in the preamble and/or text of the agreement (common to most FTAs);
- B. the inclusion of a specific *chapter on environment* (for example, the USSFTA, United States-Jordan FTA); and
- C. the adoption of an *environmental side agreement* (for example, the North American Free Trade Agreement, NAFTA).

In Asia-Pacific, concluded FTAs have followed either the first or second models; none has followed the NAFTA model.

The relationship between trade and environment concerns not only the effects of environmental measures on trade in goods and services and investment, and vice versa, within a single FTA, but also the relationships between the FTA in question and other agreements, in particular the relationships with regional or multilateral environmental agreements. Technical co-operation on environmental matters appears to be a feature of several agreements. In certain cases, this technical co-operation is subject to specific side agreements, even when the main agreement had only a few substantive provisions relating to the environment.

a. Environmental provisions

Provisions relating to environmental protection and sustainable development

General provisions related to environmental protection and sustainable development are enounced in the preambles or the objectives of agreements when parties aim at broader goals beyond trade and investment liberalization. The Preamble to the Agreement Establishing the WTO (WTO 1994a) states that the WTO has the objectives of:

raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance them and for doing so

²⁰ These include the request for consultations dated October 18, 2002, from the Permanent Mission of the Philippines to the Permanent Mission of Australia and to the chairman of the Dispute Settlement Body, regarding certain measures affecting the importation of fresh pineapple fruit. The measure in question required that fresh pineapple fruit from the Philippines, the Solomon Islands, Sri Lanka, and Thailand, among other requirements, be de-crowned and subjected to pre-shipment methyl bromide fumigation as conditions for importation into Australia. The Philippines' request for consultation was later joined by another request from Thailand dated November 5, 2002.

in a manner consistent with their respective needs and concerns at different levels of economic development.

The concepts of sustainable development and environmental protection are prominent in the United States-Singapore FTA. The USSFTA states in its Preamble that "...economic development, social development, and environmental protection are interdependent and mutually reinforcing components of sustainable development, and that an open and non-discriminatory multilateral trading system can play a major role in achieving sustainable development." The agreement further reaffirms "...the importance of pursuing [trade liberalization] in a manner consistent with the protection and enhancement of the environment, including through regional environmental co-operative activities and implementation of multilateral environmental agreements to which they are both parties." The Republic of Korea-Chile FTA also includes clear language with regard to sustainable development. The Parties state that the "... Agreement should be implemented with a view toward raising the standard of living, creating new work opportunities, and promoting sustainable development in a manner consistent with environmental protection and conservation."

However, these two agreements stand out as exceptional in this regard; the objectives of sustainable development and environmental protection are hardly mentioned in the preambles and objectives of most FTAs concluded in Asia-Pacific.

General exceptions relating to environmental protection and the conservation of natural resources

General exceptions similar to those set under the WTO (GATT 1994 article XX) are found in a number of Asia-Pacific FTAs (SAFTA, the EFTA-Singapore FTA, JSEPA, USSFTA, ASEAN FTA, and the Framework Agreement on the ASEAN Investment Area)²¹. Some of these agreements virtually reproduce the WTO provisions, whereas some others go beyond them.

AFTA: The general exceptions under AFTA are provided for in article 9 of the Agreement on the Common Effective Preferential Tariff Scheme for AFTA, which states that:

Nothing in this Agreement shall prevent any Member State from taking action and adopting measures, which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and archaeological value.

Article 9 covers exceptions related to the protection of human, animal, or plant life and health (similar to GATT 1994 article XX(b)), but it does not include provisions related to the conservation of exhaustible natural resources (GATT 1994 article XX(g)). The Framework Agreement on the ASEAN Investment Area features a similar approach.

JSEPA: The general exceptions in the JSEPA reproduce GATT 1994 article XX. These exceptions are found in several chapters of the Agreement, including chapter 2, article 19 (trade in goods); chapter 7, article 69 (trade in services); and chapter 8, article 83 (investment).

²¹ The ASEAN Framework Agreement on the ASEAN Investment Area was adopted October 7, 1998. Full text of the agreement is available at: <http://www.aseansec.org/6466.htm>.

USSFTA: GATT 1994 Article XX and its interpretive notes are incorporated into the USSFTA, *mutatis mutandis*, for provisions on national treatment and market access, rules of origin, customs procedures, textiles, and technical barriers to trade (article 21.1). One additional feature of the USSFTA is that it contains a provision clarifying that the two parties understand the provisions of GATT 1994 article XX(b) to include “environmental measures necessary to protect human, animal, or plant life or health,” and article XX(g) to apply to “measures relating to the conservation of living and non-living exhaustible natural resources,” which would enable this disposition to cover, *inter alia*, air and water, as these are now understood to be exhaustible natural resources.

Republic of Korea-Chile FTA The chapter on investment (chapter 10) contains a general exception (article 10.18) that states:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that an investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

b. Chapter on environment

The conclusion of the United States-Jordan FTA²² was the first time that a trade agreement included in its corpus a specific chapter addressing the issues of trade and environment and trade and labor. It has since produced a cascade effect, at least for other agreements concluded between the United States and third countries. This was the case in the USSFTA.

USSFTA: The USSFTA set a major precedent for Asia-Pacific by being the first FTA concluded in the region to address environmental issues in a specific chapter on environment (chapter 18). It also contains a number of environmental provisions in other chapters, including in the chapter on investment. Chapter 18 of the USSFTA precludes Parties from failing to effectively enforce their environmental laws through a sustained or recurring course of action or inaction and in a manner affecting trade between the Parties (article 18.2.a). The chapter commits each party to ensure that judicial, quasi-judicial, or administrative proceedings are available under its laws to sanction or remedy violations of its environmental laws as well as appropriate and effective remedies or sanctions which may include compliance agreements, penalties, fines, imprisonment, injunctions, the closure of facilities, and imposition of the cost of containing or cleaning up pollution (article 18.3).

Republic of Korea-Chile FTA: The Republic of Korea-Chile Agreement does not have a chapter explicitly dealing with environment. However, it includes two chapters on environmental issues, dealing respectively with sanitary and phytosanitary measures (chapter 8) and standards-related measures (chapter 9). Chapter 8 covers sanitary and phytosanitary measures that may, directly or indirectly, affect trade between the Parties. This chapter draws upon the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. Chapter 9 includes among its objectives guaranteeing the protection of human health or safety, animal or plant life or health, or the environment. It is interesting to note that

²² The United States-Jordan FTA was signed on October 24, 2000 and entered into force on December 17, 2001. It is the first trade accord to which the United States is a party that includes provisions prohibiting the easing of domestic environmental and labour regulations for the purposes of enhancing trade. The North America Free Trade Agreement, between the United States, Canada and Mexico, includes both environmental and labour side agreements, but unlike the United States-Jordan Agreement, these do not appear directly in the text of NAFTA and as such are not subject to the same disciplines.

environmental provisions contained in the United States-Chile FTA, concluded a few months after the Korea-Chile Agreement, are far more ambitious than the provisions in chapters 8 and 9 of the Korea-Chile agreement.²³ The same applies to the earlier Chile-Mexico FTA, signed on October 1, 1998.

2.2. Technical co-operation on the environment

Technical co-operation on the environment is an area in which FTAs concluded in Asia-Pacific have gone beyond what is provided for under GATT 1994 and other WTO agreements.

ASEAN FTA: The ASEAN FTA does not have a specific mechanism for environmental co-operation. However, ASEAN has a number of co-operative plans, programs, and agreements in the field of environment. These include sectoral as well as multisectoral co-operative initiatives: ASEAN environmental programs (for example, ASEAN sub-regional environmental programs since 1977), the Hanoi Plan of Action,²⁴ the ASEAN Agreement on the Conservation of Nature and Natural Resources,²⁵ and ASEAN Agreement on Transboundary Haze Pollution.²⁶

ASEAN Senior Officials on the Environment (ASOEN) is the main institution responsible for formulation, implementation, and monitoring of regional programs and activities on environment. It has three subsidiary working groups: the Working Group on Nature Conservation and Biodiversity; the Working Group on Coastal and Marine Environment; and the Working Group on Multilateral Environment Agreements.

The fact that environment is dealt with as a sectoral area of regional co-operation separates it from the trade-environment relationship. As a result, there is no direct inter-linkage between trade and environment in the sense of disciplines of mutual effect. However, it can be said that in terms of both its policy framework and its institutional mechanisms to achieve environmental policy goals, the ASEAN model has advantages for environmental protection.

JSEPA: The JSEPA contains a chapter on co-operation in the field of science and technology, including life sciences and environment. Modalities of co-operation are specified in an Implementation Agreement. Article 31 (b) of the Implementation Agreement lists the forms of co-operative activities, which are:

- (i) exchange of information and data;
- (ii) joint seminars, workshops, and meetings;
- (iii) visits and exchange of scientists, technical personnel, or other experts; and
- (iv) implementation of joint projects and programs.

23 The United States-Chile Free Trade Agreement was signed on June 6, 2003 (full text of the agreement available at: <http://www.ustr.gov/new/fta/Chile/final/index.htm>). It includes a chapter on environment. The environmental provisions include commitments by each Party concerning effective enforcement of its environmental laws, establishing and maintaining high levels of environmental protection, and not weakening environmental laws to encourage trade or attract investment. The FTA establishes an Environment Affairs Council to implement the environment chapter and to serve as a high-level forum to discuss environmental issues and concerns, with opportunities for public input at the Council's meetings. If either Party fails to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, the other Party can seek enforcement through dispute settlement procedures, including the use of monetary assessments backed by the suspension of trade benefits.

24 Text available at: <http://www.aseansec.org/8754.htm>.

25 Adopted on July 9, 1985. Full text available at: <http://www.aseansec.org/6080.htm>.

26 Adopted on June 10, 2002. Full text available at: http://www.aseansec.org/agr_haze.pdf.

USSFTA: The USSFTA commits the Parties to pursue co-operative environmental activities, including those pertinent to trade and investment and to strengthening environmental performance, such as information reporting, building enforcement capacity, and establishing environmental management systems. These are to be undertaken under a Memorandum of Intent on Co-operation in Environmental Matters between the Government of Singapore and the United States (article 18.6). Public involvement, including through the use of public-private partnerships, is expected to play a role in co-operative environmental activities.

2.3. Relationship with multilateral environmental agreements

Free trade agreements concluded in Asia-Pacific rarely make reference to MEAs, although the issue has received much attention in discussions at the policy level. Japan's submission to the WTO CTE²⁷ has been highly praised for analytically addressing the question of the linkages between trade agreements and MEAs (see Charnovitz 2000). Even so, reference to the relationship with MEAs has not been prominent in FTAs concluded by Japan, including the JSEPA. Japan's paper for the WTO CTE points out the complexity of MEAs, which contain many trade measures beyond those that are specific trade obligations.

The USSFTA is the most far-reaching FTA concluded in the Asia-Pacific region in terms of addressing the relationship between the trade obligations it sets and MEAs. The preamble to the USSFTA reaffirms the importance of pursuing the objectives of the Agreement "in a manner consistent with the protection and enhancement of the environment, including through regional environmental co-operative activities and implementation of multilateral environmental agreements to which they are both parties." Article 18.8 of the USSFTA, which is related to the relationship between the Agreement and environmental agreements, is more specific in its wording: "The Parties recognize the critical role of multilateral environmental agreements in addressing some environmental challenges, including through the use of carefully tailored trade measures to achieve specific environmental goals and objectives." However, although it underlines the issue in its text, the USSFTA does not set out any substantive obligations in respect of the relationship between itself and MEAs. Rather, the Parties take note of the agreement by WTO members to negotiate on the relationship between existing WTO rules and specific trade obligations set out in MEAs,²⁸ and "shall consult on the extent to which the outcome of those negotiations applies to this Agreement."

2.4. Environmental reviews and environmental reporting

Environmental reviews have been introduced as a means of assessing the environmental impacts, both positive and negative, of trade agreements. Such environmental reviews can be carried out *a priori* (that is, before the agreement is adopted) or *a posteriori* (after the agreement has entered into force).

While Singapore has concluded five FTAs—with New Zealand, Japan, the EFTA, Australia, and the United States—the agreement with the United States is the only one that has involved a formal and open

27 Japan 2002. With respect to discussions at the WTO level, the Japanese submission concludes that trade measures recommended by a Conference of MEA parties, but not specifically required in the MEA, ought not to be covered in the WTO negotiations.

28 The mandate for such negotiations is set forth in paragraph 31 of the Doha Declaration (WTO 2001).

process of environmental review. The USSFTA went through environmental impact reviews published in the United States by the Environmental Protection Agency and in Singapore by the Ministry of the Environment. The reason for this lies partly in US regulatory requirements for integrating environmental concerns into trade agreements. As a requirement of section 4(a) (ii) of US Executive Order 13141, *Environmental Review of Trade Agreements*,²⁹ reviews of the environmental effects of trade agreements entered into by the United States are mandatory. According to the Order, "[t]rade agreements should contribute to the broader goal of sustainable development," and "[e]nvironmental reviews are an important tool to help identify potential environmental effects of trade agreements, both positive and negative, and to help facilitate consideration of appropriate responses to those effects whether in the course of negotiations, through other means, or both."

Executive Order 13277 (2002), under the US Trade Act of 2002, delegates certain authorities and assigns certain functions to the US trade representative and provides that the president shall conduct environmental reviews consistent with Executive Order 13141 and its relevant guidelines and report on such reviews to the House Committee on Ways and Means and the Senate Committee on Finance.

Under the US environmental review process, a draft environmental review is prepared and released during the course of negotiations to provide policymakers and negotiators with information concerning potentially significant environmental issues. The public is invited to make comments on the draft environmental review. A final environmental review is released after the trade agreement is concluded, describing the environmental review process and the US Government's conclusions regarding the agreement's potential environmental impacts. The final environmental review is also subject to public comment.

2.5. Procedural and institutional mechanisms

a. Environmental institutions

Several Asia-Pacific FTAs have set up institutional mechanisms relating to the environment, in particular for environmental co-operation. Environmental institutions generally operate on the basis of action plans that are adopted separately from the main agreement. Under ASEAN, environmental institutions include ASOEN, the Meeting of the ASEAN Environment Ministers, and the ASEAN Secretariat. ASOEN's co-operation programs and projects are guided by the ASEAN Strategic Plan of Action on the Environment. The environmental institutions under ASEAN operate parallel to the institutions dealing with trade. While the approach of having parallel institutions pursuing equally important mandates may contribute to enhancing the profile of environment in overall co-operation, it could also result in weak functional linkages, thus leaving the question of harmonization unsolved. Yet whether such an approach is preferable to an institutional structure with a small committee on environment within an institution primarily devoted to trade is a question for debate.

²⁹ Executive Order 13141, *Environmental Review of Trade Agreements* (text available at: <http://www.ustr.gov/environment/execo.pdf>), was signed on November 16, 1999, under the Clinton administration. The Order institutionalizes the use of environmental reviews as a policy tool to assess potential environmental effects of trade agreements, both positive and negative, and to help facilitate consideration of appropriate responses where effects are identified. Agreements that require environmental review are: (i) comprehensive multilateral trade rounds; (ii) bilateral or plurilateral free trade agreements; and (iii) major new trade liberalization agreements in natural resource sectors. The Order provides for opportunities for public input.

Under APEC, there is no separate working group specifically for environmental issues. Environmental issues are highlighted as subjects for existing working groups such as those on energy and human resource development. The prominence of environmental issues on the agenda of APEC is, however, growing. Environment or sustainable development ministers from APEC countries have started meeting more regularly and have identified three environmental areas to prioritize in the APEC work program: creating sustainable cities, clean production, and protection of the marine environment.

The chapter on the environment in the USSFTA provides for the establishment of a joint committee to supervise the implementation of the Agreement, including on environmental issues. The chapter instructs the committee to consider at its first meeting each Party's review of the environmental effects of the Agreement and provide the public the opportunity to voice their views on those effects. The chapter also calls for establishment of several mechanisms in the implementation of the Agreement, as follows:

- The Parties shall form a subcommittee consisting of government officials to discuss matters related to the operation of the Chapter on Environment (Institutional arrangements);
- Each Party shall develop or maintain procedures for dialogue with its public concerning the implementation of the Chapter on Environment to ensure the opportunities for public participation in the discussion (Opportunities for public participation);
- The Parties shall pursue co-operative environmental activities (Environmental co-operation);
- The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter and may seek advice or assistance from any person or body they deem appropriate (Environmental consultations).

b. Dispute settlement

Most regional and bilateral FTAs in Asia-Pacific take a co-operative and non-litigious approach with regard to implementation and enforcement; the agreements provide mechanisms for co-operation while specific aspects of implementation are defined unilaterally. For the matter of settling disputes, most FTAs call for recourse to a dispute settlement body similar to that of the WTO, through the selection of a dispute settlement panel.

3. Conclusion

- In most FTAs concluded in Asia-Pacific, parties go well beyond their WTO commitments in terms of tariff concessions. However, while negotiators within the WTO are increasingly shifting their agendas towards issues other than tariffs—environmental protection, intellectual property rights, labor standards, and competition policies—with the exception of recent bilateral agreements such as the USSFTA, FTAs in Asia-Pacific have concentrated on issues related to trade liberalization per se.
- Environmental concerns are generally addressed as part of general exceptions in the FTAs concluded in Asia-Pacific. Most of these FTAs have followed the approach of GATT 1994 article XX,

concerning exceptions related to the conservation of exhaustible natural resources and the protection of human, animal, and plant resources.

- Most ongoing negotiations towards the conclusion of FTAs do not reflect the evolution with regard to linkages between trade and environment represented by the Doha Declaration. Obligations remain confined to the traditional approach of listing environment as one area of co-operation and the inclusion of general exceptions in line with GATT article XX. However, there is an emerging trend in some of the so-called new-age agreements, which are taking a more integrative approach to trade and environment, in terms of both substantive provisions and procedural provisions. In certain areas, these agreements have even gone beyond what is provided for under the WTO in balancing trade and environmental obligations.
- One striking common characteristic of FTAs that include important environmental provisions is that they are invariably concluded among wealthy countries with rigorous environmental standards (for example, the United States and Singapore). Environmental provisions similar to those contained in the USSFTA are not found in agreements involving groups of countries at varying levels of development, such as ASEAN, or in bilateral agreements among developing countries (for example, the Korea-Chile FTA, as compared with the US-Chile FTA). Modeling FTAs on the USSFTA may therefore not be a panacea.
- In East Asia, several FTAs are under consideration between ASEAN and Japan, the Republic of Korea, and China. These will account for a large share of trade within the Asia-Pacific region and are likely to have significant environmental implications. The extent to which these agreements harmonize the environmental effects of trade and investment liberalization will be even of more importance since the Fifth WTO Ministerial Conference in September 2003 failed to bring significant progress in this area.
- Finally, experience with FTAs to date provides a further indication that environmental protection requires a global approach with a strengthening of international institutions devoted to environmental protection, and greater linkages with the WTO and other relevant institutions such as the World Bank. The inclusion of environmental protection in FTAs could be regarded as complementary to these approaches, or even a driving force for pushing the environment further up the WTO agenda, but should not be considered as an alternative to a multilateral approach. FTAs can therefore be used especially for facilitating co-operation and capacity building, as bilateral and regional frameworks provide more flexibility for such purposes than global organizations do.

Annex 1: Summary of environmental measures in selected free trade agreements in the Asia-Pacific region

| | ASEAN FTA | SAPTA | ANZSCEP | JSEPA | USSFTA | Republic of Korea-Chile |
|---|---|-------|---------|---|--|---|
| Does it have a formal mechanism for civil society participation? | No | No | No | No | Yes Citizens can lodge complaints about lack of enforcement of domestic environmental laws. A specific article (18.5) relates to public participation in discussions related to the implementation of the chapter on environment. | Yes Non-governmental organizations of both Parties are allowed to participate in, and express their opinions and comments on, the process of standards-related measures. |
| Are sanctions available as an enforcement mechanism? | No | No | No | No | Yes The chapter on environment provides for sanctions and remedies such as: compliance agreements, penalties, fines, imprisonment, injunctions, the closure of facilities, and the cost of containing or cleaning up pollution. | No |
| What institutional arrangements for environment are there in the FTA? | A ministerial-level council and the secretary-general of the ASEAN Secretariat. | No | No | The Joint Committee on Science and Technology to cover environment. | A joint committee will be created which, inter alia, is to consider the review performed by each Party of the environmental effects of this Agreement and provide the public with an opportunity to provide views on those effects. | A Fair Trade Commission, under which a Committee on Sanitary and Phytosanitary Measures and a Committee on Standards-Related Measures are established |

| | ASEAN FTA | SAPTA | ANZSCEP | JSEPA | USSFTA | Republic of Korea-Chile |
|---|-----------|-------|---------|--|---|--|
| Environmental co-operation | | | | Targeted program for co-operation on environment under chapter 8 (Science and Technology) of the implementation agreement. | Memorandum of Intent on Co-Operation in Environmental Matters to be entered into between the Government of Singapore and the United States. | Committee on Sanitary and Phytosanitary Measures and Committee on Standards-Related Measures to promote technical co-operation in the respective areas |
| Are there environmental provisions <i>within</i> the FTA? | Yes | No | Yes | Yes | Yes | Yes |
| Are there environmental provisions in the preamble? | Yes | No | Yes | No | Yes | Yes |
| Does the FTA have a chapter on environment? | No | No | No | No | Yes Chapter 18. | No No environmental chapter per se, but two chapters deal respectively with sanitary and phytosanitary measures (chapter 8) and standards-related measures (chapter 9). |

| | ASEAN FTA | SAPTA | ANZSCEP | JSEPA | USSFTA | Republic of Korea-Chile |
|---|--|-------|--------------------|--|---|-------------------------|
| Does the FTA have exceptions similar to GATT 1994 article XX? | Yes Article 9: General Exceptions in Agreement on the CEPT Scheme of the ASEAN FTA, which is a key mechanism for AFTA. | No | Yes Article 71. | Yes In several chapters, including on trade in goods, trade in services, and investment. | Yes GATT 1994 article XX and its interpretive notes are incorporated into and made part of the Agreement, <i>mutatis mutandis</i> , for provisions on national treatment and market access, rules of origin, customs procedures, textiles, and technical barriers to trade. | Yes |
| Does the FTA have articles on MEAs? | No | No | No | No | Yes Preamble and article 18.8. | No |

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