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RHETORIC OR REALITY: THE IMPACT OF THE URUGUAY ROUND AGREEMENT ON FEDERAL AND STATE ENVIRONMENTAL LAWS

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I. INTRODUCTION

Maintaining the ability to adopt and enforce stringent food, health and environmental protection measures was a critical issue for the United States [hereinafter "U.S."] in the Uruguay Round negotiations. Those negotiations resulted in the signing of the Uruguay Round Agreement [hereinafter "URA"] and the establishment of the World Trade Organization [hereinafter "WTO"].¹

Desiring a greener trade agreement, environmental organizations opposed congressional approval of the URA. In opposing the agreement, these groups argued before the U.S. Congress that the URA would put U.S. food, safety and environmental measures in "serious jeopardy" and that "[the agreement] raised serious concerns about the continued ability of the U.S. to protect its citizens and the environment."²

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1. The URA represents the most comprehensive trade agreement in history. It will liberalize trade in industrial goods, textiles and agricultural products; elaborate rules on subsidies and dumping; establish a framework for liberalizing trade in services; and create a system to address intellectual property in foreign investment. The WTO will oversee the URA and resolve disputes. Finally, the URA will convene a working group on trade and environmental issues to address environmental issues that arose during the negotiation of the Uruguay Round. For a further discussion of the URA, see R. Steinberg, *The Uruguay Round: A Preliminary Analysis of the Final Act (1994)* (unpublished article, on file with the law firm of Morrison & Foerster).

2. Hearings on the Final Agreement of the Uruguay Round of the General Agreement on Tariffs and Trade Before the Subcommittee on Trade of the House Ways and Means Comm., 103d Cong., 2d Sess. (1994) (statement of Rob-

In fact, environmental organizations claimed that the URA would empower the WTO to dictate what U.S. citizens should be afraid of and what the U.S. would be permitted to do "to ameliorate those fears."³ To further provoke opposition, environmental organizations united with Jesse Helms and others in claiming that U.S. sovereignty was being ceded to some powerful international trade bureaucracy.

A more sober analysis of the actual text of the agreement reveals that these doomsday predictions are unjustified—the sky is not falling on the U.S. environmental regulatory regime or on U.S. sovereignty. In fact, even legislators who are widely held out by environmentalists as friends of the environment, such as Senator Barbara Boxer and Representative Jim Bachhus, supported, and continue to support, the agreement.⁴

The key components of the URA relating to public health, safety and environmental regulations are: (1) the Agreement on Sanitary and Phytosanitary Measures⁵; (2) the Agreement on Technical Barriers to Trade⁶; and (3) the Understanding on Rules and Procedures Governing the Settlement of Disputes⁷.

This paper examines the likely impact of these agreements on U.S. and California food safety and environmental regulations, as well as an area not expressly addressed by the URA—use of trade measures to further environmental objectives.

ert Houseman of the Center for Int'l Environmental Law on Behalf of the Sierra Club).

3. *Id.*

4. In supporting the URA, Senator Boxer stated: "I have looked closely at the concerns about our environmental, health and safety laws. I understand these concerns. But I am confident that our laws can and will be protected." *INSIDE U.S. TRADE*, Oct. 14, 1994, at 19.

5. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement on Sanitary and Phytosanitary Measures (S & P Agreement), 33 I.L.M. 9 (1994).

6. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement on Technical Trade Barriers (TBT Agreement), 33 I.L.M. 9 (1994).

7. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), 33 I.L.M. 1226 (1994).

II. THE S & P AGREEMENT

The S & P Agreement addresses health and safety standards, which are referred to as sanitary and phytosanitary measures.⁸ Members of the General Agreement on Tariffs and Trade ("GATT") all agree on the right of governments to take action to adopt health and safety regulations even if those measures restrict trade. While the URA encourages harmonization of standards where an international standard provides the level of protection a government deems appropriate,⁹ the primary concern of the S & P Agreement is how to differentiate between legitimate food safety regulations and measures intended to be disguised protectionist devices.

Directly discerning the "intent" of a government is a difficult task. Therefore, the S & P Agreement sets forth several basic criteria aimed at distinguishing between measures intended to regulate food safety and those intended as trade protectionist devices. For example, the S & P Agreement requires that S & P measures "are not applied in a manner which would constitute . . . a disguised restriction on international trade" and that S & P measures have a basis in science.¹⁰

While S & P measures must meet basic criteria designed to avoid phony health and safety measures, *the S & P Agree-*

8. The S & P Agreement, Annex A(1) defines "sanitary and phytosanitary measures" as:

Any measure applied:

- to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuff;
- to human life or health within the territory of the Member from the risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
- to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests; or

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods . . . sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety.

S & P Agreement, *supra* note 5, annex A(1).

9. See discussion *infra* part I.C.

10. See, e.g., S & P Agreement, *supra* note 5, Preamble, art. 6.

ment explicitly leaves to individual governments the policy question as to how much risk is appropriate. In the preamble to the S & P Agreement, the Members of the WTO acknowledge that they do not wish to "requir[e] Members to change their appropriate level of protection of human, animal or plant life or health."¹¹

Similarly, Article 11 of the S & P Agreement recognizes the right of governments "to introduce or maintain [S & P] measures which result in a higher level of [S & P] protection than would be achieved by measures based on the relevant international standards . . . as a consequence of the level of [S & P] protection a Member determines to be appropriate"¹² Article 5 expressly addresses some of the factors a member shall consider in establishing the appropriate level of protection. These provisions establish that the S & P Agreement leaves to individual governments the political decision regarding what level of risk is appropriate.¹³

Critics contend that the S & P Agreement will restrict the ability of the U.S. to establish and enforce stringent food safety standards. Specifically, critics claim that the S & P Agreement will:

- allow international trade experts to second-guess U.S. judgment regarding the health and safety concerns posed by a chemical, product or process.
- require the U.S. to "harmonize" its food safety standards by adopting international food standards that are less strict than current U.S. standards.
- prevent the U.S. from rejecting food imports that it does not consider safe; and
- prohibit or restrict a state from enforcing stricter food safety standards than those of the federal government.

These are serious charges. However, these concerns were critical to the U.S. throughout the negotiation process, and a careful reading of the S & P Agreement makes it clear

11. S & P Agreement, *supra* note 5, Preamble; *see also* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organization (WTO Agreement), 33 I.L.M. 1125, 1144 (1994).

12. S & P Agreement, *supra* note 5, art. 11.

13. These provisions are an important improvement compared to the previous GATT regime, which did not expressly acknowledge the right of governments to select the level of protection they deem appropriate.

that the final text adequately addresses each of these concerns.

A. Use of Scientific Principles

Article 6 of the S & P Agreement directs members to base their S & P measures on science:

Members shall insure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is *based on scientific principles and is not maintained without sufficient scientific evidence*, except as provided for in paragraph 7 of Article 5 [relating to interim measures].¹⁴

Critics assert that Article 6 would enable trade panels "to second-guess the scientific basis for domestic safety standards" and "prevent countries from acting on suspected food hazards until there is conclusive scientific proof."¹⁵ Critics also argue that the science requirement will impair the right of governments to adopt measures to avoid harms with extremely low, or zero, health or safety risk.¹⁶

The concern over requiring measures to be based on science is unjustified. First, Article 6 applies only to the method of avoiding risk, for example, whether there is a scientific basis to support the determination that harm exists. Article 6 does not prevent a government from determining the appropriate level of risk, including zero risk.¹⁷

Second, Article 6 only requires that a measure be "based on scientific principles" and that a measure not be maintained "without sufficient scientific evidence."¹⁸ These standards do not require that a measure be based on the "best" science and do not authorize a panel to determine the "weight" of the scientific evidence" in evaluating a specific provision. Rather, the test acknowledges that scientific certainty is rare, and requires a political judgment regarding uncertainty and risk. That determination is reserved to individual governments. Moreover, in interpreting the scope of

14. S & P Agreement, *supra* note 5, art. 6 (emphasis added).

15. Patti Goldman, *Cost of Commerce*, THE RECORDER, June 23, 1994, at 4. See also Hearings on the Uruguay Round Agreement Under the General Agreement on Tariffs and Trade before the Senate Commerce Comm., 103d Cong., 2d Sess. (1994) (Statement of Lori Wallach, Staff Attorney Public Citizen).

16. Goldman, *supra* note 15, at 4.

17. See S & P Agreement, *supra* note 5, art. 16.

18. S & P Agreement, *supra* note 5, art. 6.

this provision, it is important to remember the purpose of the science requirement—to ferret out disguised protectionist devices.

Third, concern over Article 6 is unjustified because Article 6 does not impose restrictions on U.S. regulations that do not already exist. The Administrative Procedures Act already subjects U.S. regulations to scientific review under an “arbitrary and capricious” standard. The standard applied by a panel under Article 6 will be at least equally deferential because the panel is not intended to be a judge of the regulation, but is only intended to discern whether the measure is a trade barrier. Further, while U.S. courts generally give some deference to regulatory agencies,¹⁹ the S & P Agreement gives a government complete deference in selecting the appropriate level of risk and authorizes a government to adopt a measure based upon incomplete evidence.²⁰ These S & P provisions indicate that substantial deference will be given to S & P measures by trade panels. Moreover, since only WTO members may bring challenges to U.S. regulations under the URA, it is less likely that regulations will be challenged under the S & P Agreement than under the Administrative Procedures Act.

B. *Use of Risk Assessment*

Article 16 of the S & P Agreement provides that measures shall be based “on an assessment, as appropriate to the circumstances, of risks to human, animal or plant life or health, taking into account risk assessment techniques developed by international organizations.”²¹ As with Article 6, Article 16 is intended to ensure that a government does not adopt a measure for the purpose of protecting a domestic industry.

Critics contend that the risk assessment provision will make food safety measures with extremely low-risk or zero-risk levels illegal under GATT, in part because such low levels may not be justified using a reasonable cost-benefit risk analysis and because science may not justify such low-risk levels.

19. See, e.g., *Chevron v. NRDC*, 467 U.S. 836 (1984).

20. S & P Agreement, *supra* note 5, arts. 18, 19. See discussion, *infra* part 1.B.

21. S & P Agreement, *supra* note 5, art. 16.

This criticism ignores the distinction between a government's right to select the appropriate risk level and the S & P measure adopted to implement that level. For example, an oft cited example of a U.S. law that could be challenged under the S & P Agreement is the Delaney Clause, which requires that processed foods contain no residue of cancer-causing additives. Even though many scientists may argue that trace amounts of such chemicals pose very little risk, the political decision to adopt a zero-risk tolerance is not subject to challenge under the S & P Agreement. While the S & P Agreement directs governments to take into account risk assessment techniques developed by international organizations, the agreement does not prohibit governments from considering any other factors or methods they deem appropriate.

The same analysis would appear to protect California Proposition 65²² from challenge. Proposition 65 requires that businesses that expose consumers to listed substances provide an effective warning. Because a chemical is only listed by California as subject to Proposition 65 after California determines there is a reasonable basis for concluding the chemical causes cancer or reproductive harm, the statute would comply with the science requirement. And because the chemical is listed based upon an assessment of risk, the statute would comply with the risk assessment requirement. Moreover, there is nothing to indicate that Proposition 65 was adopted to protect domestic industry.

Where scientific evidence is insufficient to objectively assess risk, the S & P Agreement provides that a government may adopt a provisional standard, to be revised within a reasonable time frame.²³ This provision could be used for cutting-edge regulations where there is not yet any information regarding the existence of the perceived risk. An example of such cutting-edge regulations would be food irradiation regulations.

Thus, the S & P Agreement clearly does not prohibit governments from selecting the risk level they deem appropriate

22. The S & P Agreement does not require states to use the same standards as the federal government, so that states are free to adopt standards as long as those standards are not inconsistent with the S & P Agreement (or other provisions of the URA).

23. S & P Agreement, *supra* note 5, art. 22 ("[i]n cases where relevant scientific evidence is insufficient, a member may provisionally adopt [S & P] measures on the basis of available pertinent information . . .").

and, even in the face of insufficient evidence of harm, permits governments to adopt S & P measures. Because regulations in the U.S. are based upon a political choice of what level of risk is appropriate and a scientific determination regarding whether the risk exists, U.S. food and sanitary standards should not be negatively impacted. In fact, to the extent that the S & P Agreement causes governments to evaluate risks on a rational basis, evaluating the science, the cost and the actual impacts of the proposed measure, the S & P Agreement could have a positive impact on U.S. and California regulations.

C. *International Standards*

Critics contend that the S & P Agreement will require the U.S. to relax its food and safety standards in order to be consistent with less stringent international standards, even where the U.S. deems the risks posed by those international standards to be unacceptable. Article 3 provides in relevant part:

To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, *except as otherwise provided for in this Agreement, and in particular in paragraph 3.* . . . Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, *if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate* in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.n.2.²⁴

The S & P Agreement could not be more clear: even though it encourages harmonization with international standards, each government retains the right to use a more stringent standard if it deems the international standard inadequate. First, a government may impose a measure that is more stringent than an international standard "if there is sci-

24. S & P Agreement, *supra* note 5, art. 6 (emphasis supplied).

entific justification.”²⁵ The S & P Agreement provides that “scientific justification” exists if a government concludes that the international standard is “not sufficient to achieve its appropriate level of . . . protection” based on “an examination and evaluation of available scientific information in conformity with the relevant provision of this Agreement.”²⁶

Second, the S & P Agreement authorizes standards that are more stringent than international standards where “the measure is adopted as a consequence of the level of . . . protection a [government] determines to be appropriate.”²⁷

Third, the preamble confirms the desire of the WTO members to promote the use of international standards “without requiring members to change their appropriate protection of human, animal or plant life or health.”²⁸

Lastly, while a limited number of international standards are less stringent than their U.S. counterparts,²⁹ the U.S. is an active participant in the international standard-setting organizations. Because those organizations make decisions by consensus, the U.S. will have authority to veto any standard it deems unacceptable. Moreover, the chief standard-setting organization for S & P measures, Codex Alimentarius, has increased the transparency of its standard-setting process. For example, it now allows participation by non-governmental organizations, and most of its meetings are open to the general public and the press. Therefore, future standards are likely to be more stringent.

D. *Trade-Restriction Test*

The S & P Agreement provides that a government “shall ensure that [S & P] measures are not more trade restrictive than required to achieve their appropriate level of . . . protec-

25. S & P Agreement, *supra* note 5, art. 3.

26. S & P Agreement, *supra* note 5, art. 11, n.2.

For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

27. S & P Agreement, *supra* note 5, art. 11.

28. S & P Agreement, *supra* note 5, Preamble.

29. For substances in the U.S., approximately 85% of international standards used are more stringent than or equivalent to their U.S. counterparts.

tion."³⁰ A measure will not be considered more trade-restrictive than required "unless there is another measure, *reasonably available*, taking into account technical and economic feasibility, that achieves the appropriate level of . . . protection and is *significantly less restrictive* to trade."³¹

Critics of the S & P Agreement claim that U.S. S & P measures would be vulnerable under this test because a trade panel could determine that hypothetical measures exist that are less restrictive to trade. For example, taxes are often less trade-restrictive than bans, and voluntary labeling is less restrictive than mandatory labeling. Environmental groups also argue that the S & P Agreement precludes a panel from considering political feasibility in determining whether a measure is "reasonably available."

Except in rare cases, U.S. regulations will not be successfully challenged under this multi-level test. First, the other measure must be reasonably available and not merely a hypothetical possibility. While environmental groups argue that a panel would be precluded from considering political feasibility in determining whether a measure is reasonably available, the S & P Agreement is silent on that issue. Moreover, in many cases, economic feasibility is integrally related to political feasibility. Thus, political feasibility could be considered in determining whether a measure is reasonably available.

Even if another measure may be reasonably available, that measure must be both *significantly* less restrictive to trade *and* provide the same level of protection. The S & P Agreement therefore places a high standard on governments seeking to challenge another government's S & P measure.

The recent GATT panel decision on the U.S. Corporate Average Fuel Economy ("CAFE") also indicates that a measure will not be subject to challenge simply because a hypothetically more economically efficient alternative is available. In that dispute, the European Union challenged the U.S. CAFE standards in part based upon a claim that use of a fuel tax could more effectively encourage fuel efficiency. The GATT panel indicated that, as long as the purpose of the standard is legitimate, a measure would not be held invalid simply because a more efficient measure that may be less re-

30. S & P Agreement, *supra* note 5, art. 5(6).

31. S & P Agreement, *supra* note 5, art. 5(6) n.3 (emphasis added).

strictive is available. While the panel decision involved an analysis of GATT Article XX(g), the panel decision indicates that panels will not second-guess policy implementation decisions by governments as long as those decisions are not disguised barriers to trade.

E. *Consistency in Levels of Protection*

Article 5(5) of the S & P Agreement provides:

With the objective of achieving consistency in the application of the concept of appropriate level of [S & P] protection . . . each member shall avoid arbitrary or unjustifiable distinctions in the levels [of protection] it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.³²

Environmental groups contend that this provision requires a government to adopt risk levels that are consistent for all situations, but that in many instances the U.S. risk levels are not consistent. For example, the U.S. imposes a zero-risk standard for carcinogenic pesticide residue in processed food, compared to a one-in-a-million cancer risk for most unprocessed foods. Different states also impose different risk levels for similar situations. These inconsistent levels, the argument goes, will subject U.S. laws to challenge.

This interpretation misses the mark. First, the S & P Agreement does not require consistency of risk levels, but simply sets consistency as one goal for such measures. Secondly, the express purpose of Article 5(5) is to avoid risk levels *being adopted for the purpose of protecting domestic businesses*. The S & P Agreement only requires governments to avoid arbitrary or unjustifiable distinctions if they result in discrimination or a disguised restriction on international trade. Differences in protection levels resulting from other reasons, such as federalism or a policy decision by an agency to apply different levels in different risk circumstances, would not be a basis for challenge. Thus, U.S. regulations would not be subject to challenge simply because different levels of risk are utilized in different situations.

32. S & P Agreement, *supra* note 5, art. 5(5).

F. *Equivalence of Foreign Standards*

Pointing to Article 4(1), critics contend that the S & P Agreement will impair the ability of the U.S. to apply its own standards to imported foods.

Article 4(1) provides:

Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.³³

While this provision does encourage governments to accept S & P measures of other countries when the standard is equivalent, the U.S. retains the right to reject food imports that do not meet U.S. food safety standards. As discussed above, the U.S. may choose the level of risk it believes is appropriate.

G. *Impact on State and Local S & P Measures*

The analysis of the impact of the S & P Agreement on state and local regulations does not differ from the analysis outlined above. *Nothing in the S & P Agreement or other provisions of the URA restricts the authority of state or local governments to adopt measures that are more stringent than those of the federal government.* Thus, claims that the WTO will cause state laws that are more stringent than their federal counterparts to be deemed illegal under GATT are simply not true.

Some critics contend that the S & P Agreement will impair the ability of state and local governments to adopt S & P measures because local governments do not have the resources available to conduct risk assessments or to base measures on science.

As discussed above, the requirements imposed by the URA are minimal. The science requirement is not stringent. Governments are free to select the level of risk they deem ap-

33. S & P Agreement, *supra* note 5, art. 4(1).

propriate. Where there is insufficient scientific evidence, governments may adopt a provisional measure. Moreover, state and local regulatory decisions are already subject to judicial review under an "arbitrary and capricious" standard. Therefore, the requirements of the URA should not impose any additional burdens. If a measure, however, was adopted as a disguised barrier to trade with the intent of protecting a state or local industry, then the measure may properly be subject to challenge under the S & P Agreement.

III. AGREEMENT ON TECHNICAL BARRIERS TO TRADE

The TBT Agreement addresses product standards, technical regulations, and conformity assessment procedures. Consistent with other provisions of the URA, the TBT Agreement is designed to distinguish between technical requirements that are meant to achieve legitimate objectives and those that are disguised trade barriers. For the most part, the substantial provisions of the TBT Agreement have been in place since 1980, although several provisions were recently added to ensure a government's right to adopt environmental and health measures.

In many ways, the TBT Agreement is more limited than the S & P Agreement. For example, the TBT Agreement does not impose a requirement that technical measures be scientifically based. Moreover, many environmental laws are not subject to the TBT Agreement because it applies only to "technical regulations."³⁴ The TBT Agreement defines "technical regulation" as one that "lays down product characteristics."³⁵ A technical regulation "may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method."³⁶ This definition shows clearly that only regulations impacting product *characteristics* are covered by the TBT Agreement. Therefore, the TBT Agreement would apply to a standard for vehicle air pollution equipment, but

34. See TBT Agreement, *supra* note 6, art. 2.

35. The definition also includes the phrase "or their related processes and production methods." TBT Agreement, *supra* note 6, annex 1.1. These additional terms modify the plural word "characteristics," and this language has historically been limited to process and production methods that affect product characteristics only.

36. *Id.*

not a standard for air pollution from stationary facilities within the U.S. Therefore, most provisions of the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act ("RCRA") would not be affected.

The TBT Agreement permits governments to adopt environmental health and safety measures based on protection levels they deem appropriate. In the preamble to the TBT Agreement, members expressly recognize:

No country should be prevented from taking measures . . . for the protection of human, animal, or plant life or health, or the environment . . . at levels it considers appropriate . . . [provided] that the measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination³⁷

Article 2.2 expressly recognizes protection of human health or safety, animal or plant life or health as a legitimate objective of technical standards. Thus, under the TBT Agreement, governments are free to adopt measures based on the protection levels they deem appropriate.

Despite these provisions, critics of the URA contend that the TBT Agreement will subject a host of U.S. environmental laws to challenge as being inconsistent with the TBT Agreement and will require the U.S. to harmonize its standards with less stringent international standards. As discussed below, these concerns are not justified.

A. *Trade Restrictiveness Test*

The TBT Agreement requires that governments ensure that "technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade."³⁸

Article 2.2 does not contain a footnote similar to footnote 2 in the S & P Agreement defining "unnecessary." However, according to a December 15, 1993 letter from the Director General of GATT to the Chief U.S. Negotiator, the requirements of this provision are the same as Article 5(6) of the S & P Agreement. The provision requires a challenging government to show that another measure: (1) is reasonably avail-

37. TBT Agreement, *supra* note 6, Preamble.

38. TBT Agreement, *supra* note 6, art. 2.2.

able to the member; (2) fulfills the legitimate objectives of the member; and (3) is significantly less restrictive to trade.

As discussed above, the criteria place a heavy burden on a government seeking to challenge a technical standard. The alternative standard must be at least as protective *and* significantly less restrictive to trade.

B. *Use of International Standards Not Required*

The TBT Agreement, like the S & P Agreement, encourages use of international standards where appropriate. Article 2.4 directs members to use international standards:

as a basis for their technical regulations except when such international standards or relevant parts would be an *ineffective* or inappropriate means *for fulfillment of the legitimate objectives pursued*, for instance, because of fundamental climactic or geographic factors or fundamental technical problems.³⁹

Because protection of the environment is a "legitimate objective" under the TBT Agreement,⁴⁰ environmental protection provides a basis for deviating from international standards.

As discussed above in Section III, the preamble also confirms the intent of the members to leave governments free to select the level of protection they deem appropriate to fulfill a legitimate objective.

Some have argued that the two examples listed as reasons to depart from an international standard—fundamental climactic or geographical factors and fundamental technological problems—are unreasonably narrow. However, the term "for instance" makes it clear that these are not limitations but are given by way of example only; therefore, they are not the only bases for departing from international standards. Moreover, other provisions of the URA make it clear that environmental protection is a factor comparable to fundamental climactic or geographical factors and fundamental technical factors.⁴¹ In addition, the TBT Agreement merely directs members to use international standards "as a basis" for a

39. TBT Agreement, *supra* note 6, art. 2.4 (emphasis supplied).

40. TBT Agreement, *supra* note 6, art. 2.2.

41. See TBT Agreement, *supra* note 6, art. 5.4; annex 3.F (both listing environmental protection along with fundamental climactic or geographical factors and fundamental technical factors).

technical measure. Such standards need not be the *only* basis for the technical measure.

Thus, the TBT Agreement does not impair the ability of the U.S., state or local governments to adopt stringent technical measures, even if more stringent than international standards, unless those measures constitute a disguised restriction on trade.

C. *Equivalent Technical Regulations*

Article 2.7 of the TBT Agreement provides:

Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided that they are satisfied that these regulations adequately fulfill the objectives of their own regulations.⁴²

Critics contend that this provision could impair the ability of the U.S. to reject imports that do not comply with U.S. technical standards. Similar to the provision in the S & P Agreement, Article 2.7 of the TBT Agreement makes it clear that, although governments are encouraged to accept the technical standards of other countries as equivalent, a country is free to reject foreign regulations if it deems that the regulations do not adequately fulfill the objectives of its own regulations. The regulations include those with objectives of environmental protection, human health, safety, or animal or plant life or health. Therefore, Article 2.7 does not impair a government's ability to reject goods from another country based on differing standards.

IV. DISPUTE RESOLUTION

Another important change between GATT and the WTO that could impact environmental health and safety provisions is the development of improved dispute resolution procedures. While maintaining the traditional emphasis on negotiated resolution of international disputes, the DSU provides for a more rule-based resolution of disputes that cannot be resolved through negotiation.

The post-Uruguay Round system of dispute resolution shares several essential features with the GATT. Under Article 15 of the DSU, the preparation of panel reports is essen-

42. TBT Agreement, *supra* note 6, art. 2.7.

tially the same as under the existing GATT system. The panel submits the descriptive part of its report to the disputing parties for comment in writing. Once those comments have been received, the panel issues an interim report which contains a descriptive section as well as the findings and conclusions of the panel. The parties then have further opportunity to comment on the interim report. Upon the conclusion of this second comment period, the interim report is amended to include a response to the arguments of the parties and becomes a final report that is circulated to the members.

Despite its similarities to the existing dispute resolution system, the DSU contains a number of distinct, new features. For example, the DSU provides greater transparency for dispute resolution by authorizing members to publish their own submissions and by requiring a party to produce a summary of its panel submissions on request. Another important improvement is the establishment of a process for appeal to a standing appellate body. This appellate process will help to ensure that the covered agreements are not misinterpreted by a panel.

The DSU also integrates the dispute resolution process by establishing a single body, the Dispute Resolution Body ("DRB"), to implement the dispute resolution procedures under the post-Uruguay Round GATT system. The DRB will have authority to establish panels, adopt panel and appellate body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.⁴³ Under GATT, each agreement involved a separate process for dispute resolution.

Another change is that the DSU seeks to ensure timely completion of the dispute settlement process and a reliable means of enforcement of panel reports. Deadlines and procedures outlined in the DSU ensure that a challenged party cannot pursue procedural mechanisms to block the process. For example, adoption of panel reports will become automatic, no longer subject to the rule of consensus. In fact, the DSU provides that all panel reports will be adopted unless a consensus of members opposes adoption; for example, all parties agree not to support adoption. The practical effect will be

43. DSU, *supra* note 7, art. 2.1.

that all panel reports will be adopted. After passage of a prescribed period during which an offending country fails to comply with a panel report, the injured party would be able to compensate itself through retaliation, unless the DRB members were to oppose such compensation by consensus. Like disputes under GATT, nothing in the URA authorizes the WTO or a panel to require a party to pay compensation to another member. Members are free, however, to negotiate voluntary payments for violations of the URA.

While the DSU creates a more integrated system of dispute resolution that is intended to streamline the dispute resolution process, Article 19.2 of the DSU limits the judicial nature of panels and of the new "appellate body" by making their decisions susceptible to challenge when they add to or diminish the rights of members. In this respect, the dispute resolution process in the post-Uruguay GATT process shares the essential features of the existing GATT process. For example, Article 3.9 of the DSU states: "The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision making under the (WTO agreement) or a covered Agreement." Thus, the ultimate decision-making power in the post-Uruguay system still resides with the General Council, which in the context of dispute resolution makes its decisions by consensus.⁴⁴

Critics of the DSU contend that the dispute resolution provisions are overly secretive, that panel decisions will infringe upon the sovereignty of the U.S., and that panels will not have adequate expertise in environmental issues. Each of these concerns is discussed below.

A. *Transparency*

As discussed above, the DSU greatly improves public access to information in the dispute settlement process. Parties to a dispute must provide to the public either their panel submissions or non-confidential summaries of their panel submissions. The DSU also expressly permits parties to provide their own panel submissions to the public at any time. In addition, the implementing legislation passed by the U.S. Congress helps to ensure that the public will have ample opportu-

44. DSU, *supra* note 7, art. 2.4.

nity to participate in panel disputes. For example, the U.S. legislation established a special commission comprising members of the public, environmental groups, and industry, to assist the U.S. Trade Representative ("USTR") on trade and environment issues.⁴⁵

Pointing to the emphasis on public participation in dispute resolution in the U.S., critics assert that the dispute settlement process ought to provide for additional transparency and public participation. These objections, however, are based upon a misperception of the international dispute resolution process, which is more appropriately analyzed as high-level diplomatic negotiations than as a trial in a common-law court.⁴⁶

One of the overriding interests in dispute resolution procedures in international trade as well as international environmental agreements is to foster confidential negotiations between the parties, making demands for full public participation inappropriate. The DSU strongly emphasizes consensus and private consultations, placing a higher value on collaborative effort and confidentiality than on the speed of the resolution and public participation.⁴⁷ The emphasis results in part because there is no international marshal to enforce a judicial determination. Therefore, negotiated solutions are more likely to be carried out.

The emphasis on negotiated settlements in the DSU is consistent with other international agreements. For example, the Charter of the United Nations lists a set of peaceful techniques for dispute settlement, to be applied by member states:

The parties to any dispute . . . shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation,

45. See H.R. 5110 Sec. 128 (Pub. L. 103-465) (1994).

46. The debate over transparency is really a dispute over process rather than a dispute over a direct impact of the URA on U.S. and state environmental laws. However, the concern regarding transparency has been a central tenet of environmental groups' arguments against the URA. It therefore appears appropriate to discuss the issue in the context of the impact of the URA on U.S. environmental laws.

47. See DSU, *supra* note 7, art. 4 (relating to consultation), art. 5 (relating to Good Offices, conciliation and mediation), art. 7 (mutually acceptable solution "is clearly to be preferred"), art. 11 ("Panels should consult regularly with the parties to the dispute and given them adequate opportunity to develop a mutually satisfactory solution"), art. 22.2 (regarding negotiation for voluntary compensation).

arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.⁴⁸

Numerous other agreements utilize this scaled resolution process which emphasizes negotiation and consultation rather than confrontation, including GATT, the North American Free Trade Agreement ("NAFTA"), the 1992 Framework Convention on Climate Change, the 1992 Convention on Biological Diversity, the 1991 Protocol on Environment Protection of the Antarctic Treaty, the 1982 U.N. Convention on the Law of the Sea, and the 1985 Vienna Convention for the Protection of the Ozone Layer.

These agreements show clearly that diplomacy plays a critical role in resolving disputes. Nonetheless, it is likely that the dispute resolution process will continue to evolve, leading to increased public participation in resolving trade and environment disputes. This trend is clear both from the improved transparency provisions included in the DSU and from the creation of the Trade and Environment Commission established by the URA.

B. *Sovereignty*

Critics of the URA claim that the WTO will diminish U.S. sovereignty by expanding the power and reach of the dispute resolution process.⁴⁹ This concern arises because the U.S. will no longer be able to unilaterally block the adoption of decisions that it does not like.

48. U.N. Charter Article 33.

49. A few critics also claim that the U.S. is ceding sovereignty by permitting decisions of the WTO to be made by less than full consensus. However, because all legislative decisions of the WTO are made by consensus, the U.S. will have the ability to veto decisions that are not acceptable. See WTO Agreement, *supra* note 11, art. IX. While some decisions (such as temporary waiver of specific requirements of the URA) may be made by a two-thirds or three-fourths majority, those decisions do not impact important provisions of the URA. In other instances where less than a consensus is required, only members supporting those housekeeping measures are bound by them. See *id.* at 3. Moreover, it is highly unlikely that a two-thirds or three-fourths majority could be reached if the U.S. opposed the measure. In any event, it is fully anticipated that the WTO will continue to operate by consensus. Another "sovereignty" argument made by critics is that the U.S. will be required to conform its laws with the obligations imposed by the URA. However, this obligation simply reflects the basic requirement that governments abide by the obligations to which they have agreed. In fact, the Tokyo Round Agreements, approved by Congress in 1979, contain even stronger conformity language than the URA does.

First, it is axiomatic that a country relinquishes at least some measure of sovereignty upon entering into an international agreement. Therefore, the critical question is not whether the U.S. is relinquishing any sovereignty (for it that were the test, the U.S. would never enter into international agreements), but whether the U.S. is inappropriately relinquishing sovereignty. A careful examination of the DSU shows that the relinquishment of sovereignty is minimal. In fact, the sovereignty of the U.S. will be enhanced by the improved dispute resolution procedures because the U.S. will be able to enforce its legal rights more effectively. In any event, the U.S. retains its right to withdraw from the WTO at any time, and in fact, the implementing legislation established a special panel to evaluate at the end of three years whether the U.S. should withdraw from the WTO.⁵⁰

While the U.S. will no longer be able to unilaterally block panel decisions, use of this authority under GATT by the U.S. has been minimal. More importantly, the effect of the panel decisions on U.S. law is the same under the URA as it was under GATT. Nothing in the DSU provides the dispute settlement panel with authority to repeal U.S. laws or otherwise require the U.S. to take specific steps to come into compliance with its obligations under the URA. If a panel decided that a U.S. regulation violated the URA, the U.S. would have the right to appeal the legal conclusions of the panel to a standing appellate committee. If the U.S. lost the appeal, it would be up to the U.S. to decide how to respond. Options would include changing the federal legislation, disregarding the panel decision and allowing sanctions to be imposed, negotiating a settlement with the other party or taking some other action. While another member could impose trade sanctions as a last resort in the event the U.S. elected not to change its laws, the same political and economic pressure also exists under the current GATT regime. For example, the U.S. has adopted unilateral trade sanctions against other GATT members in several instances during the past ten years alone. Therefore, in real terms, concern over the loss of sovereignty to dispute resolution panels should be minimal because the dispute resolution panels under the WTO will have no

50. See H.R. 5110 sec. 128 (Pub.L. 103-465)(1994).

greater authority than they do under the current GATT regime.

C. *Environmental Expertise*

Critics contend that the panels do not have adequate expertise to deal with environmental and public health or safety issues. However, the DSU establishes procedures for panels to seek advice and to form expert review groups to advise them on scientific or other technical issues of fact.⁵¹ The DSU expressly states that parties to a dispute may request that the panel utilize such a review group.⁵² Moreover, in disputes involving the U.S., the panelists will be advised by the USTR, who will be assisted by the Environmental Protection Agency ("EPA"), the general public and a new private sector advisory committee created to assist the trade office with trade and environment issues.

V. USE OF TRADE MEASURES TO FURTHER ENVIRONMENTAL OBJECTIVES

One issue that is not expressly addressed in the URA is the use of trade measures to further environmental protection objectives. Such measures are taken either multilaterally through a multilateral environmental agreement ("MEA") or unilaterally through domestic initiatives. MEAs are directed at protecting the global commons, such as the atmosphere, wildlife or the oceans, while domestic measures are directed at either protecting the global commons or protecting domestic industry from perceived unfair competition that results from the lower environmental compliance costs of foreign producers.

A. *Trade Measures in MEAs*

Several MEAs utilize trade measures that are directed at protecting the global commons.⁵³ For example, the Montreal

51. DSU, *supra* note 7, art. 13.

52. *Id.*

53. See Convention on Biological Diversity, June 5, 1992, U.N. Doc. DPI/130 7 (1992); Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, S. Treaty Doc. no. 9, 99th Cong., 1st sess. (1985); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, U.N. Doc. UNEP/IG. 80/3 (1989); Convention of International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 93 U.N.T.S. 243 (1976).

Protocol bans the importation of some goods made in a manner that harms the ozone, even if the product itself does not contain an ozone-depleting substance. The banning of a product based upon its process of production would normally violate the GATT principle, carried forward in the URA, that a government cannot distinguish between two like products. For example, two computers could be exactly the same except that one computer was manufactured in a manner that emits ozone-depleting substances into the atmosphere. Under the URA, these products should not be treated differently. However, under the Montreal Protocol, a government is authorized to ban the importation of the computer if it is made in a manner that harms the ozone.

Neither the GATT nor the URA contains an exception for trade measures adopted pursuant to MEAs. While no country has yet challenged the MEA trade measures under GATT, the GATT Secretariat has indicated that, at least under GATT, such MEAs would not violate GATT due to the exemption for trade restrictions "necessary to protect human, animal or plant life or health."⁵⁴

Similarly, it is likely that MEAs will be deemed not to conflict with the URA. Both the S & P Agreement and the TBT Agreement contain provisions similar to GATT Article XX(B).⁵⁵ In fact, the URA recognizes protection of the environment and sustainable development as objectives of the parties in entering the agreements:

Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living . . . 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 the means for doing so* in a manner consistent with their respective needs and concerns at different levels of economic development⁵⁶

Moreover, Article 3.5 of the DSU provides that dispute settlement "shall not nullify or impair benefits accruing to any capitalized member under the [URA and associated

54. General Agreement on Tariffs and Trade, 61 Stat. A3, 55 U.N.T.S. 187.

55. See S & P Agreement, *supra* note 5, art. 11; TBT Agreement, *supra* note 6, art. 2.2.

56. WTO Agreement, *supra* note 11, Preamble (emphasis supplied).

agreements], nor impede the attainment of any objective of those agreements." Thus, because environmental protection is an objective of the parties in entering the URA, it would seem likely that the URA should not be interpreted in a manner that impairs the objective of Members to pursue environmental protection or sustainable development, especially where those measures are the result of a multilateral agreement.

B. *Unilateral Measures to Protect the Global Commons*

While trade measures taken pursuant to an MEA would not violate the URA, it is possible that *unilateral* measures taken to protect the global commons or to protect domestic industry from perceived competitive disadvantages created by the higher cost of environmental compliance in the U.S. could be subject to challenge. Although the URA does not distinguish between unilateral measures and multilateral agreements, previous GATT panels put into question the right of governments to adopt unilateral measures that regulate process methods outside the jurisdiction of the adopting country.

The most well-known example of this type of unilateral measure is the U.S. import ban on tuna caught in a manner that harms dolphins. Under the Marine Mammal Protection Act, the U.S. bans tuna not only from countries that catch tuna in a manner unacceptable to the U.S. (even if in full compliance with international law and the law of the flag-ship), but also from countries that import tuna from a country that uses the objectionable fishing method. Two GATT panels have determined that the U.S. tuna ban violates GATT, but neither panel decision has been adopted.⁵⁷ The more recent tuna/dolphin panel decision emphasized the unilateral nature of the U.S. action. Because nothing in the

57. The panel decision involving Mexico was resolved through negotiations. In response to the GATT decision, the U.S. Congress passed the International Dolphin Conservation Act of 1992. The Act provides for the Secretary of State to enter into international agreements to establish a global moratorium on harvesting tuna through the use of seine nets deployed to encircle dolphins. International Dolphin Conservation Act, 16 U.S.C.S. 1361 (1995). Mexico entered into such agreements, and it now allows U.S. observers on tuna boats to monitor the dolphin capture and uses dolphin-safe measures to harvest tuna. However, an estimated 30,000 Mexican fishermen will lose their jobs because of this compromise.

URA authorizes a government to unilaterally impose its own environmental measures on another country by requiring imports to be processed in a certain manner, it is possible that such unilateral measures would violate the URA. If use of the product has an adverse environmental impact on the U.S., then the measure may be justified under the TBT Agreement. However, unilateral measures based upon environmental impacts outside the adopting country will likely violate the URA.

While many environmentalists in the U.S. find the restriction on unilateral environmental measures completely unacceptable, it is important to keep in mind that the U.S. practically stands alone in its insistence on using unilateral trade measures for the purpose of protecting the global commons or protecting domestic industry from lower environmental compliance costs of foreign competition. Almost every other country believes that it is more appropriate to proceed on a multilateral basis. In fact, during the period of the Uruguay Round negotiations, seven global environmental agreements were reached. If the URA authorized unilateral measures, the incentive for the U.S. to enter such multilateral negotiations could decrease.

Many in the U.S. believe that the U.S. is the leader in global environmental protection and that the U.S. should therefore be entitled to take unilateral action to protect the global commons, including measures that would require companies operating outside the U.S. to comply with U.S. standards. Implicit in this position is the notion that the U.S. should act as the unelected international environmental police and the moral guardian for the less developed nations. People in less developed nations characterize the U.S. position as eco-colonialism, perpetrating the cycle of debt and poverty in less developed nations, or at a minimum, anti-democratic. Ironically, environmentalists also decry the URA as anti-democratic.

Some take the position that the U.S. should be able to dictate the standards of production in another country, however, such authority would appear to infringe upon the sovereign right of each country to regulate activities within its own borders. Moreover, unilateral measures are often completely

ineffective,⁵⁸ and where those measures have the effect of protecting domestic industries, it is likely that they will be overused.

While these political and philosophical problems are profound, the practical hurdles pose the biggest problems for advocates of unilateral environmental measures. For example, the U.S. controls pollution in large part by setting discharge limitations or by requiring certain types of pollution control equipment; the type of discharge permitted or the type of equipment required, however, varies with the age and technical sophistication of the facility, the type of industry and the ambient conditions around the facility.⁵⁹ Moreover, many environmental laws set long-term compliance schedules intended to facilitate or to ease the burdens of complying with the standards.⁶⁰ Depending on a variety of cultural and budgetary factors, governments vary their emphasis on enforcement. Determining whether the standards are imposed by another government are equivalent to this multi-faceted approach to controlling pollution is an impossible task.

Additional problems associated with unilateral process-of-production standards exist. First, requiring immediate compliance with U.S. pollution control technology would be overwhelmingly disruptive at best, impossible at worst, in developing countries. Moreover, imposing stringent U.S. emission standards on a developing country may divert resources away from more basic environmental needs, such as wastewater treatment plants or hazardous waste disposal facilities. Second, many standards are based on ambient conditions, which may not be present in other countries or geographical locations. For example, restrictions imposed in the Los Angeles air basin would not be appropriate for a facility operating on an island where air quality problems are

58. For example, increasing tariffs may cause another government to lower environmental standards to enable domestic industry to compete. Alternatively, a country may simply sell its goods somewhere else.

59. For example, the Clean Water Act requires that industrial facilities meet four different standards, depending on the age of the facility and the nature of the pollutants involved. The first standard became effective July 1, 1977; the second, July 1, 1984; the third, between 1984 and 1989; and the fourth applied a new set of standards to new facilities and to specific modifications of existing facilities. Clean Water Act, 33 U.S.C. § 1251 (1988).

60. Under the Clean Air Act amendment of 1990, compliance schedules are stretched out for as long as 20 years, and it is possible that even these deadlines will be extended. Clean Air Act Amendments of 1990, 42 U.S.C.S. 6921 (1990).

nonexistent. Third, assumptions regarding environmental impacts are not appropriately applied in different geographic locations. For example, to limit the emission of greenhouse gasses, a country may differentiate between products based upon the quantity of energy consumed in making them. This distinction would be completely inappropriate in comparing a product made in a coal-burning country (extensive greenhouse emissions) with a product made in a country using only hydropower (zero greenhouse emissions). Further, U.S. companies operate with the burden of joint and several liability for cleaning up past contamination based on mere property ownership, a policy decision based on political choice rather than one requiring internalization of pollution costs. Imposing this political choice on other countries would be impractical and difficult to enforce.

Thus, there exist a whole host of problems associated with imposing U.S. production methods on facilities operating outside the jurisdiction of the U.S. These problems are likely to be among the issues addressed by the trade and environment working group established by the URA and are most appropriately addressed through multilateral negotiations.

While the URA appears to restrict the ability of the U.S. to adopt unilateral measures directed at protecting the global commons, the impact of this restriction on current U.S. laws will be minimal. As a practical matter, very few current U.S. regulations address the process of production in foreign countries.

In any event, the U.S. remains free to adopt and enforce such unilateral trade measures based on the process of production in other countries, provided that it is willing to accept the consequences, such as, the potential for trade sanctions. Therefore, if protecting the global commons is an important value to the U.S., the U.S. may seek that policy objective through unilateral means. If that measure injures another country, then it should be the U.S. that pays the cost of its own policy.

VI. CONCLUSION

The impact of the URA on U.S. environmental laws and regulations will be minimal. The S & P Agreement and the TBT Agreement allow governments to adopt environmental,

health and safety regulations based upon whatever risk level they deem appropriate. The URA will not require the U.S. to lower its standards to international levels, except where the U.S. finds the risk level of the international standards acceptable. Although the URA imposes certain restrictions on S & P and technical measures, such as requiring that S & P measures be based on scientific principles, that measures be no more trade-restrictive than necessary, and that measures not be disguised protectionist measures, these are criteria that will not pose a problem for legitimate U.S. state and local regulations.

Criticism regarding the new dispute resolution procedure is also unjustified, especially because the DSU provides for greater transparency and a greater emphasis on the rule of law. As with other international dispute resolution mechanisms, the primary focus remains on negotiation and consensus-building.

Lastly, while the URA may not authorize unilateral trade measures aimed at imposing U.S. process standards on facilities in other countries, very few U.S. laws will be affected by that restriction, and the U.S. is still free to seek to address those problems through MEAs.