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THE RELATIONSHIP BETWEEN TRADE AND EFFECTIVE ENFORCEMENT

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I. FREE TRADE AND ENVIRONMENTAL ENFORCEMENT

A. Trade Agreements to Achieve High Levels of Environmental Protection

There is a worldwide movement toward greater liberalization of international trade. This is seen at a global level through the Doha round of negotiations of the World Trade Organization. Regional examples include the North American Free Trade Agreement (NAFTA)¹ between the United States, Canada, and Mexico, the agreement between five countries in Central America, the Dominican Republic, and the United States (CAFTA-DR),² and trading agreements between countries in other regions such as the Association of Southeast Asian Nations (ASEAN) and the Southern African Customs Union (SACU).³ The United States has established bilateral agreements with Israel, Jordan, Chile, Singapore, Australia, Morocco, Bahrain and Oman, and continues negotiations or is in the approval process with South Korea, Peru, Panama, Colombia, Thailand, and the United Arab Emirates. The United States also is working toward comprehensive agreements that will create the Free Trade Area of the Americas.⁴ It is a busy time at the Office of the U.S. Trade Representative and the associated agencies involved in these negotiations. The United States Environmental Protection Agency (USEPA) continues to be an active part of the negotiating team to ensure that environmental issues are appropriately addressed.

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1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993), available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 [hereinafter NAFTA].

2. Dominican Republic – Central America – United States Free Trade Agreement, May 28, 2004, 119 Stat 462, available at http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html [hereinafter CAFTA].

3. Association of Southeast Asian Nations Declaration, Aug. 8, 1967, 236 U.N.T.S. 1983; Customs Union Agreement Between the Governments of Lesotho, Botswana, South American and Swaziland Treaty, Dec. 11, 1969, 70 U.N.T.S. 1973.

4. United States-Israel Free Trade Area Implementation Act, 110 Stat. 3058, 19 U.S.C. § 2112 (2008); Implementation of Trade Agreements, 19 U.S.C. § 3805 (2008).

The purpose of these agreements is to increase trade by reducing tariffs on traded goods and services and reduce non-tariff trade barriers that could include regulatory activities designed to protect or give advantages to domestic companies over foreign investors. Pursuant to executive order, the United States is obligated to level the economic playing field in a way that does not allow environmental protection to be imperiled by increased trade. The United States also may not allow low levels of environmental protection to create havens for polluting industries seeking to create competitive advantages by escaping the stringent American environmental rules.⁵

B. Effective Enforcement of Environmental Laws

There are significant enforcement concerns with the various environmental provisions of our free trade agreements (FTAs) and there have been a number of challenges to U.S. regulatory decisions. Other countries can challenge USEPA regulatory actions for violating trade rules, and investment provisions allow challenges from foreign investors that are allegedly locked out of the U.S. market by environmental rules.⁶ Other provisions are included in FTAs to ensure that the lack of environmental enforcement is not used as an incentive for environmentally devastating activities. The USEPA and other government agencies have focused on capacity-building activities to improve the environmental governance of U.S. trading partners.⁷

In all of its recent FTAs, the United States has included environmental chapters that contain core obligations to provide for high levels of environmental protection. These chapters ensure effective enforcement of environmental laws, as well as recognition that it is inappropriate to derogate from these laws to encourage trade or investment.⁸ These provisions recognize that an environmental legal regime can only reach its goal of protecting human health and the environment if the regulated entities put the requirements in practice and comply with those requirements. Compliance cannot be achieved if there is not an effective compliance program to motivate people to change their behavior. Compliance programs use compliance incentives and compliance assistance together with compliance monitoring, sanctions and legal remedies when the regulated community fails to meet its obligations under the law.

All recent FTA environment chapters include provisions to promote public participation, provide appropriate remedies for violations of environmental laws, and promote measures to enhance environmental performance.⁹ CAFTA-DR

5. Exec. Order No. 13141, 64 Fed. Reg. 63,169 (Nov. 18, 1999).

6. NAFTA, *supra* note 1, at arts. 1115-17.

7. CAFTA, *supra* note 2, at annex 17.9.

8. Press Release, U.S. Trade Representative, U.S., CAFTA-DR Countries Sign Environmental Provisions (Feb. 18, 2005), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2005/February/US_CAFTA-DR_Countries_Sign_Two_Supplemental_Agreements_to_Facilitate_Implementing_the_FTAs_Environmental_Provisions.html. Chapter Seventeen of the CAFTA-DR agreement provides a good example. CAFTA, *supra* note 2, at art. 17,

9. U.S. Trade Representative Press Release, *supra* note 8.

establishes a public submission process similar to that established under NAFTA, and this has been a significant concern for the Central America and Dominican negotiators where there are recognizable gaps in their compliance and enforcement programs.¹⁰ To quote from CAFTA-DR Article 17.2.1(a), “A Party shall not fail to *effectively enforce* its environmental laws....”¹¹ Further, Article 17.7 outlines an enforcement procedure to follow if that clause is violated: “Any person of a Party may file a submission asserting that a Party is failing to *effectively enforce* its environmental laws.”¹²

The Humane Society International (HSI) filed the first of these submissions under CAFTA-DR on May 8, 2007, alleging that “by failing to complete a comprehensive inventory of products made from sea turtles as required by domestic law, the Dominican Republic is failing to effectively enforce sea turtle protection laws prohibiting the sale of products manufactured from endangered sea turtles that were captured and killed in the country after July 31, 2001.”¹³ On December 5, 2007, the CAFTA-DR Secretariat for Environmental Matters (SEM) determined that HSI’s submission met the terms of the citizen submission requirements in Article 17.7.4, and formally requested that the Dominican Republic submit a response to the points raised in the submission.¹⁴

II. WHAT IS EFFECTIVE ENFORCEMENT

A. U.S. Free Trade Agreements Do Not Clearly Define “Effective Enforcement”

What is meant by “effective enforcement?” The alleged failure to enforce Dominican laws protecting endangered species cited above and submissions filed under NAFTA regarding specific activities in the U.S., Canada or Mexico all address specific examples where environmental laws have not been enforced in a particular instance or at a particular facility or industry. But what about systemic, programmatic shortcomings that cause widespread failure to effectively enforce environmental laws that extend beyond a particular situation?

The definitions contained in the trade agreements are limited and do not adequately recognize the full range of activities necessary to ensure compliance with environmental laws. Article 17.13 of the CAFTA-DR defines “environmental law,” “statute and regulation,” and “judicial or administrative proceedings,” but

10. UNITED STATES TRADE REPRESENTATIVE, FINAL ENVIRONMENTAL REVIEW OF THE DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES FREE TRADE AGREEMENT 16-17 (2005), *available at* http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/asset_upload_file953_7901.pdf.

11. CAFTA, *supra* note 2, at art. 17.2 (emphasis added).

12. *Id.* at art. 17.7 (emphasis added).

13. MARTA M. PRADO, ON BEHALF OF THE HUMANE SOCIETY INTERNATIONAL, SECOND SUBMISSION TO THE SECRETARIAT FOR ENVIRONMENTAL MATTERS FOR THE CENTRAL AMERICA - DOMINICAN REPUBLIC UNITED STATES FREE TRADE AGREEMENT 1 (2007), *available at* http://www.saa-caftadr.sieca.org.gt/comunic_activas/tortugas/Revised%20Submission.pdf.

14. CAFTA-DR SECRETARIAT FOR ENVIRONMENTAL MATTERS, DETERMINATION ACCORDING TO ARTICLES 17.7.2 AND 17.7.4 OF THE FREE TRADE AGREEMENT BETWEEN THE DOMINICAN REPUBLIC, CENTRAL AMERICA AND THE UNITED STATES OF AMERICA 9 (2007), *available at* http://www.saa-caftadr.sieca.org.gt/comunic_activas/tortugas/Determinacion%20OriginalEng.pdf.

does not define “enforcement” or “effective.”¹⁵ Parties should know with greater clarity what they are supposed to be effective at doing before agreeing to potential trade sanctions or penalties for violating a provision of the agreement to which they become a party.

CAFTA-DR outlines that there should be judicial, quasi-judicial, or administrative proceedings in place to sanction and remedy violations.¹⁶ Those proceedings shall be fair, equitable and transparent, and appropriately and effectively prescribe remedies or sanctions for violations.¹⁷ The public should be able to request that the government investigate violations, and the public should be able to take action against violators themselves or the government if the government fails to act. The agreement also recognizes the role that voluntary mechanisms and incentives have in enhancing environmental performance.¹⁸ While very important, these are only a small part of an effective enforcement program. Of course, these comprise the enforcement sandbox where mostly lawyers play, but it fails to recognize other aspects of a compliance program, which are equally important to effectively achieve high levels of protection.

B. Enforcement Cycle Must Include a Full Range of Activities

A fully functioning compliance and enforcement program is cyclical in nature. The process begins with the awareness and understanding of the problem, and continues with the planning and implementation of a program to address the causes of that problem. The final phase is the evaluation of the effectiveness and results and the determination of whether or not the goals have been achieved. Part of that evaluation includes recommendations for changes along the way to improve the various components of the cycle.

The initial step sets environmental goals that will help recognize and resolve the problem. Those goals may be to reduce risks posed by particular activities to human health and the environment, to attain higher levels of environmental quality such as cleaning the water in a watershed, or reducing urban air contamination. Prospective goals for pollution prevention or sustainable development may be set as well as retrospective goals to correct past problems. Extensive information on the problem is required in order to fully understand what goals may be achievable given applicable technologies.

Once the goals have been established, management approaches are selected which will be most effective to reach the goals. These may be regulatory, voluntary measures, or a liability scheme that relies on individual actions in the courts, but less on government intervention. Approaches such as the traditional command and control mechanisms and economic or market based systems usually have a strong regulatory component, and many voluntary schemes may require additional laws to be effective.¹⁹

15. CAFTA, *supra* note 2, at art. 17.13.

16. *Id.* at art. 17.3.

17. *Id.*

18. *Id.* at art. 17.4.

19. *Id.*

If a regulatory approach is utilized, the legal requirements may be implemented through a variety of methods stemming from constitutional provisions, laws, regulations, individual permits or licenses, and even judicial determinations that interpret the laws. Developing countries often look to the United States for examples of these laws, but should be careful as most of the U.S. laws could be improved or will not work in other contexts.

Once the rules are in place (or ideally, as they are being developed), strategies and programs must be designed and implemented which program managers will use to ensure compliance with the requirements. The development of these rules is not usually considered part of the enforcement scheme, but without thinking of the enforcement consequences, the laws may be impractical or impossible to implement. Examples abound where countries have adopted regulations from other countries that relied on laboratory or field measurement procedures that were not readily available when the law took effect.²⁰ As a result, the regulated community could not determine their own compliance, and the government could not prove a violation. This can severely damage the credibility of the entire regulatory structure. Instead of wholesale adoption, countries must adjust foreign regulations to meet their specific situation and needs.

Programs must set priorities, especially given limited resources, to address enforcement. The government must decide what industrial sectors or areas to pursue first and how to efficiently dedicate resources for the greatest return. Part of the efforts must be dedicated toward educating the regulated community and the public about the environmental laws and why they should comply through compliance assistance and compliance promotion. The regulators must develop strategies to effectively monitor compliance, through government inspections, industrial self-monitoring, or citizen monitoring and reporting.

Governments should also consider the punitive activity considered so important to trade negotiators: responding to violations in a consistent, fair, and appropriate manner. The response should follow standardized and transparent national policies, yet take into consideration individual factors such as the appropriate remedy of the violating situation, the economic benefit of the violation, the gravity of the violation, and compensation for any harm caused.

Finally, the compliance program should be internally and externally evaluated to determine if it is achieving the behavioral change that leads to environmental results. Environmental Compliance and Enforcement Indicators²¹ can help demonstrate how resources have been utilized and the resulting benefits to the environment. Demonstration of these results is crucial to show that the regulatory authorities are properly using the public's resources and to establish the credibility of the enforcement agencies. These results, or lack thereof, allow for the program evaluation necessary to restart the cycle. The indicators point out whether the

20. Kal Raustiala, *The Architecture of International Cooperation*, 43 VA. J. INT'L L. 1, 69 (2002).

21. THE INTERNATIONAL NETWORK FOR ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT, MANAGING RESOURCES, MEASURING PERFORMANCE, IMPROVING DECISION-MAKING 2 (2006), available at <http://inece.org/indicators/brochure.pdf>.

goals need to be changed, whether failures to achieve those goals may be a result of bad law, or whether changes in our implementation strategies are necessary. Without that type of program evaluation, the same mistakes will continue or society will fail to make the innovations needed to solve our environmental problems.

III. CONCLUSION

The “enforcement response,” including sanctions and judicial determinations, is only a small part of a larger program. For a compliance program to be effective, every link in the chain must function together,²² and the program must evolve to achieve continuous improvements. In recognition, each recent FTA now includes side agreements for environmental cooperation, and the State Department, United States Agency for International Development (USAID), USEPA and other partners have expanded long term capacity building programs with trading partners to help bolster their Environmental Compliance and Enforcement programs. These programs do not only support the “enforcement response,” but also address each of the different components of the cycle with training on the development of law and regulations, institutional strengthening, enforcement program design, inspections and criminal investigations, prosecution of environmental crimes, training for the judiciary, and the use of indicators for program management.²³

It took USEPA over thirty years to evolve into the existing Compliance and Enforcement program. Through cooperation with trading partners, the U.S. government can use its experience in environmental control to share successes and failures and accelerate the program development in countries worldwide to ensure that everyone effectively enforces their environmental laws, achieving high levels of environmental protection.

22. ANITA SUNDARI AKELLA & JAMES B. CANNON, STRENGTHENING THE WEAKEST LINKS 3 (2004), *available* *at* http://web.conservation.org/ImageCache/CIWEB/content/programs/policy/ccgenforcementreport_2epdf/v1/ccgenforcementreport.pdf

23. U.S. DEPT. OF STATE, CAFTA-DR LABOR AND ENVIRONMENTAL PROJECTS FACT SHEET (2006), *available at* <http://www.state.gov/r/pa/prs/ps/2006/73328.htm>.