OUR FORESTS AT RISK:

THE WORLD TRADE ORGANIZATION’S THREAT TO FOREST PROTECTION

Earthjustice Legal Defense Fund
Northwest Ecosystem Alliance

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The World Trade Organization ("WTO") – the international institution that promotes free trade – is at a crossroads. It will convene in Seattle in late November 1999 to decide on the agenda for a new round of negotiations. The world’s forests are likely to be on the chopping block.

The WTO threatens to fuel the destruction of the world’s remaining forests. This threat arises out of existing WTO rules, and a proposed "global free-logging agreement" that would expand those rules. The enclosed report describes what is at stake for forest ecosystems.

Existing Trade Rules Are Hostile to Forest Protection

The existing WTO rules could be devastating to countries’ attempts to protect their forests and to limit demand for unsustainable logging. New negotiations could lead to the dismantling of numerous protections:

Invasive Species Safeguards - Invasive species are the second leading threat to forest biodiversity. The most effective way to prevent bioinvasions of forests is to prevent the entry and spread of invasive species. Yet a ban or other restrictions on imports of wood products apt to harbor invasive pests would collide with restrictive WTO rules that require that regulations be based on definitive proof of a risk from each country, and that they use the least trade restrictive means of achieving the regulatory goal. Scientists have identified numerous pests that have a high risk of being introduced on wood imports that could devastate forests in the western United States.

Raw Log Export Bans - In the face of unsustainable logging rates, the United States and states in the western United States have banned the export of unprocessed (raw) logs from public lands. Such export bans reduce the demand for logging and enable domestic mills to reap the benefits of logging that is done. WTO rules prohibit such export bans. Japan has threatened to invoke these rules to challenge the export bans for public lands in the west.

Green Procurement - Through green procurement, governments use their purchasing power to decrease consumption of products from native and unsustainably managed forests and to increase demand for and use of recycled paper. Recycled content requirements are firmly in place for federal, state, and local government procurement. Under WTO rules, such rules are vulnerable to challenge on the ground that they discriminate against countries that log native forests. Government procurement preferences for products from sustainably managed forests, under consideration by many local governments, run afoul of WTO rules that prohibit different treatment of products based on the way the product is produced.

Eco-labeling and Forest Certification - Eco-labeling enables consumers to identify and purchase environmentally friendly products. Forest certification schemes disclose whether forest products have been produced in a sustainable and environmentally sound manner. Many forests throughout the west have obtained such certifications. WTO rules create obstacles for such “life cycle” eco-labeling because it is based on how the product is produced, not simply on the product’s characteristics.

Trade Liberalization Without Environmental Safeguards

The United States is leading the charge to further liberalize trade in forest products. It is currently spearheading negotiations to eliminate tariffs on forest products with the goal of reaching a worldwide tariff agreement by the Ministerial that will begin in Seattle on November 30, 1999.

If the WTO succeeds in increasing trade in forest products, the rate of deforestation will increase. However,
nothing in the WTO rules requires or seeks to ensure that the logging will be done in a sustainable manner, or that forest resources be subject to environmental safeguards. The elimination of national, state, and local protections will result in a void, leading to mounting deforestation and degradation of the world’s forests.

British Columbia forests are one casualty of globalization in the forestry sector. British Columbia is currently logging its forests at unsustainable rates and is exporting the overcut to the United States duty-free. This logging takes place in a regulatory vacuum. Neither Canada nor British Columbia has laws that protect endangered species or that adequately safeguard clean water. In the absence of species and habitat protections, the number of imperiled species in Canada continues to grow and salmon populations are in decline.

Proposed Free-Logging Agreements Would Impede Forest Protection

The United States is also a lead proponent of new trade rules and initiatives to remove what are called “non-tariff barriers” on trade in forest products. Unfortunately, what may look like a nontariff trade barrier to the WTO is often a forest protection. Some “barriers” that have been targeted for expanded trade constraints include:

- Government procurement preferences for recycled paper or products from sustainably managed forests.
- Eco-labeling that tells consumers whether wood products were produced sustainably and without harm to the environment.
- Environmental laws that protect forests but impose restrictions on how foreign investors may run their investments. New investor rights threaten to thwart forest protections because they seek money damages from governments that restrict their investments, even if through environmental regulations.

Many of these forest protections are under consideration for the new round of WTO negotiations.

The WTO Should Review and Repair the Damage Its Rules Cause to Forests Before Expanding

The WTO’s threat is magnified by what is not on the table. Trade negotiations are focusing on removing trade barriers, not on protecting forests. The WTO does not develop solutions to environmental threats. The WTO is not deferring to governments or international institutions that are developing forest protection strategies that respond to scientific evidence and political demands. Instead, the WTO is reaching out worldwide to prohibit a vast array of forest protections, without putting other protections into place.

This one-sided rush to establish trade promotion rules that displace forest protections is untenable. Governments have historically had control over the natural resources within their borders. They should retain full authority to protect their forests. The world’s forests should not be on a WTO chopping block.

The WTO’s accelerated push to negotiate a global free-logging agreement puts the cart before the horse. As leading U.S. environmentalist groups have demanded, it is time to slow down and take stock of the threat that the existing WTO rules pose before increasing their reach and severity. The WTO should review its rules to assess the extent to which they stand in the way of sustainable forest practices that protect native forest habitats. The WTO should then repair the damage its unbalanced rules and biased processes threaten to cause to world forests.

Ian McAllister
Introduction

The World Trade Organization ("WTO"), established in 1995, is the international institution that implements and enforces the rules that govern over 80% of world trade. The WTO’s goal is to increase international trade, not protect the environment or public health. The WTO rules define virtually all obstacles to trade as unfair trade barriers even if they are designed to protect the environment. While the WTO has exceptions for conserving natural resources, those exceptions have been construed so narrowly that most forest protections are not covered. It has not been surprising that the WTO has declared every challenged environmental or public health law to be a trade barrier.

As with all WTO trade negotiations, the discussions are shrouded in secrecy. The public has been kept in the dark about the precise proposals on the table. Prominent environmental groups and a bipartisan group of 48 members of Congress have asked the United States Trade Representative ("USTR") to prepare an environmental impact statement, which would let the public and government decision makers know the environmental effects of proposals to liberalize trade in the forestry sector, but the USTR has refused to do so. Despite this pervasive secrecy, the nature of the WTO’s threat to forests can be gleaned from its existing rules, its past or threatened trade challenges, and public criticisms by industry and government of restrictions on trade affecting forest products.

This report describes how the WTO’s past rulings and future agenda might negatively impact the world’s forests. In describing the WTO threat to forests, this report draws from the western United States and Canada because these are the forests our organizations have worked so hard to protect. However, the WTO presents a threat to forests worldwide. The examples described in this report are merely illustrative of that threat.

The WTO threatens the world’s forests in three ways.

- First, existing rules already in place under the 1995 WTO Agreements undermine forest protections. As described below, the existing rules...
the extent to which countries may:
(1) prevent the entry of invasive species on forest products;
(2) employ export bans to reduce demand for logging; and
(3) use government procurement and eco-labeling to promote sustainable forest management or to reduce excessive consumption of forest products.
Calls for reform of the existing rules from scientists, environmentalists, and public health advocates have been uniformly unheeded.

- **Second, the United States is currently negotiating what has been called the “global free-logging agreement,” which would further liberalize trade in forest products.** Negotiations began under the auspices of the Asia Pacific Economic Cooperation ("APEC"), a negotiating forum involving Pacific Rim countries. The APEC initiative sought complete elimination of tariffs on forest products. It also targeted the removal or reduction of non-tariff barriers, such as building standards, which are seen as restricting or distorting trade. The negotiations have since moved at least in part to the WTO with the goal of reaching a worldwide tariff agreement prior to the Ministerial that will begin in Seattle on November 30, 1999. The U.S. Trade Representative Charlene Barshefsky has heralded the initiative to conclude a WTO agreement by the end of 1999.

- **Third, the WTO is poised to embark on a new round of negotiations at the Seattle Ministerial meeting.** The forest sector is high on the list for some countries that seek to include in a new round the targeted removal of non-tariff barriers to forest products trade. Many of the other initiatives under consideration for a new round, such as government procurement, eco-labeling, and investment, would impede forest protections. In addition, if the expedited tariff elimination agreement is not completed prior to the Ministerial, it will likely be on the agenda for the new round.

  The WTO threat is also magnified by what is not on the table. The trade agreements and negotiations focus on removing trade barriers, not on protecting forests. Nothing in the WTO rules seeks to ensure that logging will be done in a sustainable manner or will be subject to environmental safeguards.

  The WTO does not develop solutions to environmental threats, nor does it defer to forest protection strategies developed by governments or international institutions in response to scientific evidence or political demands. Instead, the WTO is reaching out worldwide to prohibit a vast array of forest protections that reduce trade, without putting other protections into place.

  To give just one example, a country may have border restrictions on wood products to prevent entry of invasive species. If this requirement is judged to be a trade barrier by the WTO, it must be removed, or other countries whose trade is affected can impose retaliatory trade sanctions. However, if the inspection requirement is removed, no other protection takes its place. The result may be the spread of invasive species that wreak havoc with forest ecosystems and local economies. The elimination of national, state, and local protections will result in a void, leading to mounting deforestation and degradation of our forests.

  This one-sided rush to establish trade promotion rules that displace forest protections is untenable. The WTO should not be allowed to establish its preeminence over forestry practices worldwide. Governments have historically had control over the natural resources within their borders. They should retain full authority to protect their forests.

  As leading U.S. environmental groups have demanded, it is time to slow down and take stock of the threat that the existing WTO rules pose before increasing their reach and severity. The WTO should first review its rules to assess the extent to which they stand in the way of sustainable forest practices that protect native forest habitats. The WTO should then repair the damage its unbalanced rules and biased processes threaten to cause to world forests before embarking on any expansion.
The World Trade Organization promotes a free-market international trade system through a set of binding rules. The creation of the WTO in 1995 converted its predecessor, the General Agreement on Tariffs and Trade (“GATT”), into a recognized and powerful international organization and expanded the GATT rules beyond trade in goods to other fields of economic (and social) activities, including: agriculture, banking, telecommunications, government purchases, food safety, and intellectual property.

The WTO promotes trade by: (1) reducing tariffs; (2) prohibiting import and export bans and quotas; (3) eliminating discrimination against foreign products and services through its most-favored nation and national treatment principles, which prohibit treating “like products” differently based on how they are produced; and (4) eliminating other impediments to trade, commonly called “non-tariff trade barriers.”

The trade rules define virtually all obstacles to trade as unfair trade barriers, even if the measures are designed to protect the environment. The WTO authorizes one country to challenge another country’s laws before panels of trade experts operating in secret. If a law is found to be an unfair trade barrier, the WTO can authorize imposition of trade sanctions to force a change in the law. While the WTO has exceptions for conserving natural resources and for protecting human health, the regulating country bears the burden of proving that the exception applies. These exceptions have so many conditions and prerequisites that it is extremely difficult for any domestic protection to pass muster.

A Primer on the World Trade Organization

Location: Geneva, Switzerland
Established: January 1, 1995
Created by: Uruguay Round negotiations (1986-94) of the General Agreement on Tariffs and Trade (GATT)
Membership: 134 countries
Secretariat staff: 500
General Director: Mike Moore
Functions: Administration of WTO trade agreements; forum for international trade negotiations; and proceedings and panels for resolving trade disputes between member nations.

Clean Air Act’s reformulated gasoline requirements to be in violation of the WTO Agreements. After an appellate panel upheld this ruling, the Environmental Protection Agency changed its regulations to allow Venezuelan gasoline with higher concentrations of certain pollutants into the United States.

- A WTO dispute panel found a European Union (“EU”) ban on hormone-treated beef to violate the WTO Agreements because the EU had not definitively demonstrated that the beef would cause harm to consumers. While the EU argued that it had the right to protect its citizens against uncertain risks from the hormones, the panel concluded that the WTO rules require proof of such harm before trade can be restricted.

- A WTO panel found WTO violations in a provision of the U.S. Endangered Species Act prohibiting imports of shrimp from countries that do not require turtle excluder devices in shrimp fishing. All the countries involved acknowledged the sea turtles are endangered, that it is a legitimate goal to protect the turtles, and that turtle excluder devices are effective and inexpensive. Nonetheless, the United States could not prohibit imports of shrimp from countries that did not require turtle exclusion devices.

The WTO’s Anti-Environmental Track Record

Every environmental and public health measure challenged at the WTO has been found to violate the WTO agreements and not to satisfy the terms of the exceptions:

- A WTO dispute panel found regulations governing compliance with the U.S. Clean Air Act’s reformulated gasoline requirements to be in violation of the WTO Agreements.
excluder devices unless the other countries agreed to such a requirement.

The WTO Reaches State and Local Laws
While the federal government negotiates trade agreements and represents the United States in dispute settlement proceedings, the reach of the agreements is not limited to federal law. Once the United States enters into a trade agreement, it has bound the 50 states and local governments and subjected their laws to trade challenges.

Secrecy and Lack of Public Participation in WTO Disputes
Trade challenges are decided in secret by dispute settlement panels comprised of three individuals. The WTO has a list of eligible panelists who must have experience in trade matters and who generally are former trade officials. Few have any training or experience in health or environmental disciplines. Only WTO countries have a right to submit briefs and attend the panel proceedings. The public is entirely shut out of the process.

The WTO’s Potent Remedy: Authorized Trade Sanctions
If a dispute panel finds a law to be in violation of the WTO rules, it recommends that the law be changed. Generally, countries abide by this recommendation. However, if they do not, the WTO can, and generally does, authorize imposition of trade sanctions against the offending country. This has proven to be a potent device for forcing a change in the underlying law. The United States recently imposed such trade sanctions against the European Union in excess of $120 million because the EU has not repealed its ban on imports of hormone-treated beef. Often the mere threat of a challenge succeeds in derailing passage of an environmental law or weakening its domestic implementation.

The Shrimp-Turtle Dispute
The shrimp-turtle dispute provides a stark example of the inequities in the WTO dispute process. That dispute challenged a United States embargo on imports of shrimp from countries that did not require turtle excluder devices to protect endangered sea turtles. Turtle excluder devices are a highly effective and inexpensive way to minimize turtle fatalities from entanglements in shrimp nets and have been mandated for the U.S. fleet since 1987. The law at issue sought to extend the protections beyond the U.S. fleet by prohibiting shrimp imports from countries that did not have comparable protections. Although mandated by U.S. law, the United States imposed the embargo only after being compelled to do so by the Court of International Trade in a U.S. lawsuit brought by Earth Island Institute, the Humane Society of the United States, and Sierra Club. When Thailand, Pakistan, Malaysia and India challenged the embargo, it fell to the United States Trade Representative to defend it. Earth Island Institute and the other plaintiffs asked to be part of the defense team so that they could assist in mounting a defense and attend the WTO panel proceedings. The USTR refused the request. In a classic case of the fox guarding the chicken coop, the U.S. government continued to resist full enforcement of the embargo in Earth Island Institute’s domestic lawsuit while it acted as the embargo’s sole defender before the WTO panel.

The Seattle Ministerial Meeting
A WTO Ministerial meeting will be held in Seattle, Washington from November 30 through December 3, 1999, to decide whether to initiate a new round of negotiations to expand WTO rules. Because of great dissatisfaction with the WTO’s rules and operations, environmental organizations are advocating for an assessment round, as opposed to a negotiating round, to review and address the successes and failures of the WTO to date.

It is time to slow down and take stock of the threat that the existing WTO rules pose before increasing their reach and sovereignty.
Reducing Tariffs Without Forest Protections Increases the Rate of Logging and the Damage to Forest Resources from that Logging: The example of British Columbia

The WTO is poised to eliminate tariffs on forest products. The United States is spearheading the charge to reach a tariff phase-out agreement by the November 1999 Ministerial in Seattle.

Removing barriers to trading forest products will increase logging. In fact, a study commissioned by the American Forest and Paper Association estimated a 3-4% increase in the consumption of forest products from removal of tariffs alone.1

If the WTO succeeds in increasing trade in forest products, the rate of deforestation will likely increase. However, nothing in the WTO rules requires or seeks to ensure that the logging will be done in a sustainable manner subject to environmental safeguards for forest resources. Removing tariffs will undoubtedly accelerate the elimination of the world’s remaining primary forests and the species that depend upon them.

British Columbia is a vivid case in point. British Columbia is cutting its forests, which contain some of the rarest ecosystems on the planet, at the rate of 70 million cubic meters or 190,000 hectares (418,000 acres) every year. Only Brazil can boast a more frighteningly efficient logging regimen. It takes 2.5 million log trucks, enough to circle the globe twice, to carry these logs to market. The Ministry of Forests and the timber industry themselves admit that present logging levels are 40% higher than those considered sustainable just from an economic standpoint, irrespective of ecological concerns.2

The Canadian timber industry is driven primarily by exports. Canada does not have a domestic market large enough to consume the volume of wood products it produces. Consequently, more than 50% of the wood cut from ancient forests in British Columbia is exported to the United States.3 The percentage is even higher when considering Canada as a whole. The degree of dependency is demonstrated by the Softwood Lumber Agreement and the disputes that led up to it.

The Softwood Lumber Agreement

For the last two decades, U.S. lumber producers have argued that the logging industry of British Columbia has enjoyed unfair trade advantages due to its provincial stumpage system. Stumpage is the price that logging companies pay for trees from public lands. Stumpage rates are set administratively and are not subject to an open bidding process.

The U.S. lumber producers argued that stumpage rates are below market costs and therefore an unfair subsidy. They urged the U.S. Department of Commerce to impose countervailing duties on Canada to counteract the low stumpage fees. The countervailing duty process is the domestic mechanism through which the United States imposes border taxes on imported products that receive what are deemed unfair subsidies under trade rules.

In three separate proceedings during the 1980s and 1990s, the U.S. Commerce Department investigated Canadian stumpage rates and repeatedly found that as production costs, such as stumpage rates, decrease, it becomes more cost-effective to log otherwise marginal forested stands, creating incentives for logging levels to increase. For example, in its “Final Affirmative Countervailing Duty

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Determination” issued on May 28, 1992, the Commerce Department stated:

[At] any particular stumpage price, only certain categories of stands can be profitably harvested. As the price of stumpage drops, more and more stands become economically accessible, which allows the supply of stumpage to increase. . . . [W]ithin each stand, there are certain categories of trees that cannot be profitably harvested at a given stumpage price. If stumpage prices are lowered, the intensive margin is expanded so that the formerly unutilizable trees within a particular stand can be profitably harvested, thereby increasing the supply of timber.

In the countervailing duty proceedings the Commerce Department concluded, based on this effect, that low provincial stumpage fees in Canada constitute an unfair subsidy to the timber industry. It, therefore, imposed countervailing duties on imported softwood lumber to offset the Canadian stumpage subsidy and raise the price of Canadian lumber in the United States. Although not necessarily the purpose of the duties, the higher prices also would reduce U.S. consumer demand, which would in turn, lessen the incentives to cut vast amounts of Canadian old-growth forests.

To resolve the longstanding dispute Canada and the U.S. negotiated the Softwood Lumber Agreement (“SWLA”) in 1996. The SWLA allows Canada to export 35 million cubic meters (14.7 billion board feet) of Canadian softwood lumber products to the United States duty-free per year. Beyond that level export fees are charged on a sliding scale. Most of the quota under the agreement comes from British Columbia (9.8 billion board feet or 59%). The rest is divided among three other provinces.

The importance of the SWLA’s cap on duty-free imports is underscored by the industry’s attempts to evade the quota. Canadian lumber producers have repeatedly sought to avoid these fees and increase export volume by characterizing simple lumber products as value-added, which are exempt from the SWLA quota.7 Coastal lumber producers are clamoring for an end to the agreement because they are largely excluded from the quota, which is based on historical market share, because they did not historically export to the United States. Most of the quota is held by interior lumber producers. Therefore, the only way for coastal producers to gain access to U.S. markets is either to pay the border tax or to obtain the demise of the SWLA.

Timber companies in British Columbia are blaming the SWLA’s quota for their economic woes. In fact, the B.C. timber industry has repeatedly stated that its financial problems will evaporate if the SWLA is not renewed. Former B.C. Premier Glen Clark vowed not to sign on to an extension of the agreement when the deal expires in two years, saying it has cost British Columbia “tens of millions of dollars.”6

Because stumpage rates constitute the principal, indeed the near exclusive, production cost for the B.C. timber industry, the stumpage rates and the SWLA quota provide nearly the only constraint on B.C. logging levels. Stumpage rates have historically been low. In order to facilitate the signing of the Softwood Lumber Agreement, British Columbia agreed to raise these stumpage rates; however, the industry soon complained that it could not be profitable with the higher rates. British Columbia has reduced stumpage twice since then, leading to a currently ongoing arbitration under the SWLA.7 With stumpage rates low, the SWLA is the critical constraint on logging levels.

Unsustainable and Environmentally Destructive Logging for Export in the Absence of Environmental Safeguards

British Columbia operates its timber program without safeguards for clean water, intact fish and wildlife habitat, recreation, the rights of First Nations, and the aesthetic values that forests provide. This lack of protection for non-extractive forest values is reflected in the removal of tariffs will undoubtedly accelerate the elimination of the world’s remaining primary forests and the species that depend upon them.
growing list of at-risk species and plunging salmon populations, resulting, in part, from clear-cut logging and road building.

For decades, British Columbia has established an Annual Allowable Cut well above the long-term sustainable level, or long-term harvest level, in order to liquidate the vast old-growth forests of the province and convert these lands to second-growth plantations. Of the 36 provincial Timber Supply Areas (“TSAs”), 32 are being logged at a rate that exceeds the long-term harvest level. In 13 TSAs, the annual allowable cut exceeds the long-term harvest levels by more than 50%, and in four TSAs, the province is over-cutting its forests by 100% or more.8

This policy is explicit and can only be realized in such an unregulated forestry climate:

- Timber harvest in British Columbia is not conducted within a framework of sustained yield and species protection, which are cornerstones of U.S. forest policy. The determination of the Annual Allowable Cut in British Columbia is not based on logging levels the forests can sustain, but rather on the fiscal needs of the timber industry and provincial government and access to foreign markets. Logging plans are developed without any environmental assessment of forest practices and with only minimal opportunity for public participation in resource decision-making.9

- Streamside protection zones in British Columbia are only half as wide as those in U.S. federal forests in the Pacific Northwest, and only on waters of a specified width. Timber companies can log right up to the banks of smaller fish-bearing streams. Logging companies are also permitted to drag logs across streams, destroying salmon eggs.10

- Regulations that govern the size of clearcuts are extremely liberal compared to U.S. standards. One of the clearcuts southeast of Prince George covers 500 square kilometers, five times the area of the city of Toronto.11

- Neither Canada nor British Columbia has endangered species or clean water protection laws. British Columbia and the Yukon list over 300 species as being at risk of extinction, including numerous salmon runs. 124 species are already extinct.12

The rapid depletion of old-growth forests over extensive areas has devastated the habitat for the many species that depend on late-successional forests, such as woodland caribou, spotted owls, and marbled murrelets; and those that depend on undisturbed habitat, like salmon, grizzly bears, and bull trout. Thirty-four species were added to the list of at-risk species this year, bringing the total to 330, most listed by virtue of habitat loss. British Columbia shares a majority of its at-risk species with the United States, and is similarly economically, biologically, and spiritually dependent on Pacific Coast salmon runs.

In the absence of environmental protections, the B.C. timber industry is running roughshod over ecosystem values. For example, one of the largest known concentrations of marbled murrelet nests in the world occurs near Desolation Sound north of the Powell River. An extensive research project begun in 1994 located 32 nests in the Bunster Range, providing scientists with an unprecedented opportunity to learn about this elusive bird. Six cutblocks encompassing 14 of the nests were approved and logged, despite the strong objections from B.C.’s Ministry of Environment, which sought to have the area protected as a Wildlife Habitat Area.13

In the absence of environmental protections, the B.C. timber industry is running roughshod over ecosystem values.
Pleas to stop the logging and protect the murrelet nests fell on deaf ears. According to a leaked document from the Ministry of Environment, “in 1997, in spite of concerns from MELP [Ministry of Environment, Lands, and Parks] and Canadian Wildlife Service (CWS), Ministry of Forests (MOF) approved logging of forest known to be nesting habitat for Marbled Murrelet, a high profile Red listed species. The logging occurred in an area defined by the Marbled Murrelet Recovery Team as the most critical in the province.”

Long-term protection of forest ecosystems necessitates making sensitive areas unavailable for logging and prohibiting destructive practices, which will increase production costs. Although such protections provide innumerable public benefits, British Columbia has chosen to overlook both these benefits, and the costs of environmental destruction and species extinction, in favor of short-term profits and the maintenance of an industry rooted in subsidy and unaccountable to the public. The timber industry in British Columbia, unhampered by reasonable environmental standards protecting water quality and fish and wildlife habitat, continues to devastate its interior, boreal, and coastal forest ecosystems.

Canada’s low stumpage rates have made it economical to log environmentally sensitive areas. As the most accessible and high value trees disappear, B.C.’s timber industry has set its sights on more sensitive, remote, and low value, so-called “fin and feather” forests, mostly in the north coastal and interior regions or in steep and difficult terrain. The industry is also stepping up clearcut logging in contentious areas along the U.S. border, First Nations’ traditional lands, and rare lower mainland ancient forests like the Elaho basin. There is also increased pressure to gain access to parks for salvage logging.

British Columbia is but one example of a jurisdiction in which logging operates in an environmental regulatory vacuum. Without forest, species, and environmental protections, only production costs and restrictions on trade stand in the way of wholesale liquidation of B.C.’s invaluable primary forests. Removal of these barriers will eliminate a key constraint and cause logging levels to increase or remain excessively high, causing irreparable harm to forest ecosystems. The quest for the competitive edge under further trade liberalization in the forest sector may lead to environmental devastation and species extinction.

The quest for the competitive edge under further trade liberalization in the forest sector may lead to environmental devastation and species extinction.
The WTO Opens the Door to Invasive Species that Could Destroy Forest Ecosystems

The Spread of Invasive Species Spurred by Trade Can Be Devastating to Forest Ecosystems

Invasive species, such as pests, insects and diseases, have crossed oceans and borders to introduce disease and pestilence into healthy forest ecosystems. Indeed, the second leading threat to biodiversity, next to habitat loss, is invasion by alien species, which are often spread through traded goods. With the advent of the North American Free Trade Agreement (“NAFTA”) and the WTO, international trade is increasing, making it easier for pests to stow away on traded goods. It is no wonder Businessweek recently observed that “Bioinvasion is the dark side of globalization.”

History reveals the danger invasive species pose to our forests. North American forests have suffered severe ecological and economic losses from exotic pest infestations in the past:

- At the turn of the century, chestnut trees comprised approximately one-quarter of the hardwood trees in the eastern United States and approximately 40% of the lumber milled in eastern mills. Chestnut blight, caused by a fungus first discovered in 1904 and believed to be introduced from Asia, killed nearly all the chestnut trees in the United States in just 50 years. Extensive research uncovered no effective solutions. Today, mature American chestnut trees are a rarity in the United States, and the American chestnut is no longer used commercially for timber.

- Dutch elm disease is caused by a fungus introduced primarily on logs imported from Europe beginning in the 1920s. It has killed approximately 100 million elm trees and is now found in every state in the continental United States. By 1977, 75% of urban elms had been lost. Removal of elm trees devastated by Dutch elm disease previously cost about $100 million per year. Despite spending millions of dollars to control the disease, most of the majestic elm shade trees are gone from the northeastern and midwestern United States.

- The European gypsy moth, brought to the United States by an entomologist in the 1860s, feeds voraciously on new leaves and is considered the most destructive insect that attacks hardwood forests, shrubs, and urban shade trees. The species defoliated more than 12 million acres in the northeastern United States in 1981 alone, and the current infestation extends into portions of the Midwest and Canada. The U.S. Forest Service currently spends about $11 million annually on gypsy moth control, yet the moth’s range continues to grow.

- A particularly threatening recent introduction is the Asian Longhorned Beetle which has entered U.S. borders on such imports as solid wood packaging material from Northeast Asia. The Asian Longhorned Beetle has attacked hardwoods, such as maples, poplars, aspens, and willows, in New York City and Chicago. The Asian Longhorned Beetle has attacked hardwoods, such as maples, poplars, aspens, and willows, in New York City and Chicago. It also has been found in warehouses in more than two dozen other cities, including in California and Washington State. The Asian Longhorned Beetle is difficult to eradicate because it has no known natural enemies in this country, and pesticides are ineffective against the eggs that are laid and mature deep inside....
the affected trees, emerging only after the host tree has been damaged or killed. It cost an estimated $10 million in public funds to remove infested trees from two relatively small infestations in New York.20

Pest infestations have drastically altered and damaged forest ecosystems, destroyed stands of merchantable timber, and necessitated costly (and often largely futile) eradication programs. A recent study estimates that infestations of non-indigenous insects and fungi in United States forests cause the loss of over $4 billion in forest products each year.21 The introduction of a single pest, the larch canker, could cause direct timber losses of $129 million annually.22

The Trade Threat: The WTO’s Impact on Effective Invasive Species Safeguards

The WTO Rules – The WTO agreements put into place an elaborate series of tests that must be satisfied by bans, inspections, or other border controls to prevent the spread of invasive species. First, each country must base its safeguards on international standards and recommendations, where they exist. Any domestic standard that provides greater protection against invasive species than afforded by a relevant international standard must comply with a battery of tests in order not to be considered an unfair trade barrier.23

Second, such measures: (1) must be based on scientific principles, current scientific evidence, and a risk assessment; (2) may be applied only to the extent necessary to protect plant life or health; (3) cannot arbitrarily or unjustifiably discriminate against or between other countries where similar conditions prevail; and (4) cannot be applied in a manner that would constitute a disguised restraint on trade.24

Under these principles, the WTO effectively removes the ability of governments to take precautionary action to protect against risks suggested, but not conclusively proven, by scientific evidence. While the WTO rules purport to allow countries to establish their own level of human, animal, and plant health protection, WTO panel decisions have undermined this right by requiring definitive scientific evidence of harm before allowing regulations that restrict trade. The recent WTO decisions make it nearly impossible for the United States or other countries to protect against the spread of invasive species or diseases:

- **European Union Ban on Hormone-Treated Beef** – The United States challenged a European Union ban on beef treated with growth-inducing hormones that have been scientifically linked to cancer and other serious diseases. Although the EU asserted that the ban was necessary to achieve its chosen degree of protection – zero risk to consumers from exposure to hormone-treated meat – the WTO dispute resolution and appellate panels rejected an absolute right to prohibit all such risk. While the panels recognized that scientific studies demonstrated a risk from exposure to the hormones in question, they considered those studies insufficient because they did not specifically evaluate the potential risks when hormones are used to promote growth in meat. In other words, the fact that the hormones caused cancer – a scientific as well as common sense basis for suspecting risk to humans – was not a sufficient basis for a ban on their use in human food. When the EU failed to repeal its import ban on hormone-treated beef, the WTO granted the United States permission to impose retaliatory trade sanctions until the EU rescinds the ban. The United States recently imposed more than $120 million in trade sanctions for this year.25

- **Australian Pacific Salmon Ban** – Canada challenged Australia’s ban on imports of fresh, chilled, or frozen Pacific salmon. The ban was designed to protect Atlantic salmon raised in Australian waters from diseases that could be carried by Pacific salmon. The WTO dispute settlement panel and appellate body both found violations of WTO rules because Australia had adopted a zero-risk standard and had assessed the possibility of disease transmission from Pacific salmon, while the WTO rules call for an assessment of the probability of the entry or spread of a disease. The panels also faulted Australia because it had implemented protections against the entry and spread of diseases carried by Pacific salmon, but had not implemented equivalent measures to protect against similar risks presented by other types of fish.26

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**The WTO effectively removes the ability of government to take precautionary action to protect against risks suggested, but not conclusively proven, by scientific evidence.**
The Effect of WTO Rules on Invasive Species Controls – Because of its abundant forest resources, the United States historically imported only relatively small quantities of logs and lumber, with the notable exception of imports from Canada. The role of imports has grown in recent years, in part due to increasing demand for timber. The United States is now a leading importer of wood products.27 Growing trade has increased the risks of pest infestation necessitating more rigorous safeguards at the border.

The most efficient and cost-effective way to stop the spread of invasive species is to prevent them from becoming a problem. Once an invasive species begins to spread, it is costly, difficult, and often futile to try to eradicate it.

When it comes to invasive species, the greatest risks tend to be those that are not foreseen. In the United States, many pervasive pests were unknown before they established a foothold and began to spread uncontrollably. For example, the chestnut blight fungus had not been discovered anywhere on the planet prior to its epidemic spread throughout the United States.

Trade Clashes in the Emerging U.S. Regulation of Forest Products Trade that Could Introduce Alien Species

In mid-1990, an inspection of a test shipment of Siberian logs imported detected serious pests known to be a threat to western forests, including the Asian Gypsy Moth. Underscoring the globalization of the forestry sector, the test shipment came from a U.S.-based multinational timber company, Louisiana Pacific, which was exploring opportunities for logging operations in the Russian Far East. This episode sounded an alarm throughout the scientific, governmental, and environmental communities.31

In 1995, APHIS adopted regulations prescribing border measures to guard against pests on imports of logs, lumber, and other unmanufactured wood products.32 Several environmental organizations challenged the regulations and the environmental impact statement on which they were based. In February 1997, a U.S. district court held that APHIS had failed to conduct an adequate assessment of risks of invasive species infestations and the effectiveness of border control measures.33 The court enjoined APHIS from allowing certain wood products from Chile and New Zealand until it corrected the deficiencies.34

What had begun as a domestic lawsuit quickly evolved into an international trade controversy. The government of Chile and the Chilean Forest Products Association (Corporacion Chilena de la Madera) sought to intervene in the case because of the injunction’s alleged discriminatory treatment of Chile and interference with international trade.35 Chile also threatened to challenge the ban put into place by the injunction before the WTO and to raise it at APEC.36 The New Zealand Forest Industries Council criticized the injunction for its impact on international trade and lobbied the United States for a speedy resolution that would not involve any permanent ban on imports of New Zealand wood products.37 Subsequently, APHIS prepared a supplemental environmental impact statement and the district court lifted the injunction.38

A later alien species scare likewise triggered a clash between border safeguards and trade. In September 1998, APHIS inspectors found live larvae of extremely destructive wood-boring insects in wooden crates and pallets that serve as packaging material for imports from China.39 The Asian Longhorned Beetle also had been intercepted on numerous shipments of solid wood packaging material from China.40 In response, APHIS imposed emergency restrictions on imports of untreated wood packing materials from China, including those that come through Hong Kong.41 China and Hong Kong have accused the United States of erecting an unfair trade barrier.42 Although China is not currently a WTO member, Hong Kong’s threats could be translated into a WTO challenge.
development of invasive species safeguards. APHIS has already demonstrated its reluctance to adopt the most effective preventative measures because those measures also impose the greatest restrictions on international trade. And when APHIS has imposed stringent measures, threats of WTO challenges have followed.

APHIS and other regulators are only beginning to confront the invasive species threat from trade in wood products. Earlier this year, President Clinton issued an Executive Order creating an Invasive Species Council to develop a coordinated federal strategy to address the growing environmental and economic threat of invasive species. Moreover, APHIS recently proposed new rules on solid wood packaging material because its initial regulation requiring that solid wood packaging materials be completely stripped of bark proved inadequate. Deep wood-boring pests remained in the wood even after the bark had been removed and were difficult to detect.

Many scientists believe that no unprocessed wood products should be allowed to enter the United States unless they have been kiln-dried or treated with effective fumigants and chemicals. For some wood products particularly likely to carry pests, the safest approach may be to ban the imports altogether. However, a ban on imports of solid wood packaging materials or requiring onerous treatments of unmanufactured wood imports might well collide with WTO rules:

- **Geographical Overbreadth** – Border measures in place for all imported wood products, or for imports from a particular region, may be vulnerable in the absence of evidence that imports from each affected country are prone to carry pests. In the shrimp-turtle dispute, the WTO Appellate Body decided that the United States could not prohibit imports of shrimp from countries that do not require turtle excluder devices in shrimp fishing “without taking into consideration different conditions which may occur in the territories of those other Members.” Even if invasive species are found on wood imports from one country in a region, other countries might contend that their forests or forestry practices are different and require separate evidence of a pest threat before the regulation can affect their imports.

- **Excessive Trade Burdens** – Invasive species safeguards may be challenged on the ground that the restrictions are disproportionate to the risks. For many invasive species, the risk of an infestation is remote, but the consequences could be severe. If border measures restrict a large amount of trade as a safeguard against a remote risk of infestation, a country would likely challenge the measure as a disguised restraint on trade or an unjustifiable discrimination against imports.

- **Scientific Evidence of Risk** – If a regulation is designed to allow zero risk of invasive species entry, WTO rules would be an obstacle. According to the WTO rules, any restriction must be based on a risk assessment, and as evidenced by the hormone-treated beef and Australian salmon disputes, the risk assessment must prove a risk from a product before its import can be prohibited.

- **Least Trade-Restrictive Measures** – The border safeguards that are likely to be the most effective in preventing the spread of invasive species are also likely to be the most restrictive of trade. Yet WTO rules require countries to use the least
Past Pest Outbreaks in the West

The Port Orford Cedar root rot fungus was first discovered in a tree nursery near Seattle. It is believed to have been introduced from abroad. The fungus, which infects the trees’ root systems, thrives in moist soils and travels on the tires of logging trucks. Port Orford Cedar is one of the most valuable tree species in southwestern Oregon and northwestern California for commercial timber purposes and wildlife habitat. The root rot has nearly eliminated ornamental uses, although some commercial logging continues.

White pine rust fungus, introduced around 1900, attacks species of five-needle pines. The disease has hit the sugar pines in California and Oregon, the largest pines in the world. It also has attacked the whitebark pine. The mast seeds from the whitebark pine are a major food source for endangered grizzly bears in the northern Rocky Mountains. In Idaho, 40% of the forests were composed of western white pine at the turn of the century. Today, that percentage is down to about 5% due primarily to mortality caused by the rust and management decisions designed to favor other species because of the rust.

The WTO rules create numerous obstacles to effective and timely regulatory measures to prevent the spread of invasive species on imported wood products. While these rules could form the basis of another country’s WTO challenge to the measures that are put in place, they also play a strong deterrent role in the initial standard-setting process, as has been illustrated by APHIS’ built-in resistance to a zero-risk approach. The WTO rules could be devastating to attempts to prevent the spread of invasive species on traded goods by forcing a government to run the risk of importing a pest or disease until it has proven that there is a likelihood that such importation will occur.

What’s at Stake?
The current volume of trade amidst lax regulation presents ample opportunities for a new invasive species infestation in western forests. For example, in 1998, a shipment of logs from New Zealand arriving in Portland, Oregon, complied with APHIS’ regulations on removal of bark. However, upon further inspection, the Oregon Department of Agriculture found numerous eggs, larvae, and live insects, including ambrosia beetles which can bore into wood and serve as vectors to spread wood-borne fungi to adjacent forests.

In less than a six-month period later in 1998, the Oregon Department of Agriculture found numerous eggs, larvae, and live insects, including ambrosia beetles which can bore into wood and serve as vectors to spread wood-borne fungi to adjacent forests.

In September 1998, APHIS inspectors found live larvae of extremely destructive wood-boring insects in wooden crates and pallets that serve as packaging material for imports from China.

The pine wood nematode would pose the greatest threat to ponderosa pines and other hard
Pines. Ponderosa pines occupy nearly 5.7 million acres from British Columbia south to Mexico.

- Larch canker “could have a major impact on the 2 million acres of western U.S. forest with 50 percent or more larch cover.” Even though the western larch’s natural range is far from ports of entry (e.g., in Idaho), it could be spread on ornamental larches.

- The spruce bark beetle, which is distinct from the native spruce beetle already spread throughout western forests, could spread throughout the Pacific Northwest (including Alaska) and east along the boreal spruce forests to the Atlantic. If the beetle were accompanied by a virus, “it could . . . be as disastrous to North American spruce as the Dutch elm disease was to elms.”

- If an exotic species of Annosus root disease, which is already causing damage in dry areas in western North America, were introduced, it would have “a high potential to infest extensive areas of true fir and dry pine forests” with high mortalities.

- The Asian gypsy moth, which is even more aggressive than its European cousin that has spread through the northeastern United States and the Midwest, feeds on more than 500 plant species, including many conifers and hardwoods. It has a moderate potential to kill hardwood trees in healthy forests and a high potential in stressed forests. The female moth can fly up to 24 miles, carrying 600-700 eggs, thereby facilitating the spread of an infestation.

The Siberian risk assessment estimated potential economic losses of $24.9 to $58 billion from an infestation of the analyzed species. In terms of ecosystem damage, the authors concluded, “since the risk of spread of these pests is high, large-scale infestations and tree mortality are likely to occur. . . . Loss of a significant proportion of living trees within stands would trigger complex changes in food supply and habitat. . . . Food chains that depend on living trees would collapse unless the system recovered very quickly.” The authors predicted that salmon, spotted owls, flying squirrels, accipiter hawks, deer, and elk among others would decline under such habitat changes.

Pest infestations could have potentially devastating consequences for U.S. forests. For example, one scientist predicted that, “massive importation of untreated, or inadequately treated logs of Siberian larch would have a greater than 50% chance of introducing a fungal disease that would destroy Douglas fir forests as the Chestnut Blight fungus destroyed American chestnuts.” The forests environmentalists have worked so hard to protect could be devastated by pest infestations spread by traded goods, yet the WTO rules may leave us powerless to impose the safeguards needed to prevent such outbreaks.
The WTO Threatens Export Restrictions that Reserve Timber from Western Public Lands to U.S. Industries

In the face of unsustainable logging rates, the U.S. Forest Service and its state counterparts have had to curtail logging. One device used to reduce logging, yet minimize the harm to the local economy, is to ban the export of unprocessed (or raw) logs. Such an export ban enables domestic processing and manufacturing industries to reap the benefit from logging, while reducing demand from local timber communities for logging that contributes to unsustainable logging rates.

The Trade Threat
The WTO restricts a country’s ability to impose both export bans and quotas by prohibiting quantitative restrictions on exports. Export bans and quotas can pass muster only if they fall within one of the WTO exceptions.

To come within the WTO exception for “conservation of exhaustible natural resources,” the United States would need to prove that the export bans were “made effective in conjunction with restrictions on domestic production or consumption,” are not a disguised restriction on trade, and do not discriminate unjustifiably against other countries.

Given that an export ban by its very nature treats foreign countries differently and less favorably than domestic ones, export bans are unlikely to fare well under the current rules. After all, the WTO’s core mission is to ferret out such disparate treatment.

The WTO threat to export bans is not hypothetical. Already countries have threatened trade challenges against bans on raw log exports:

- The European Union went so far as to initiate consultations, the first stage in a formal trade challenge, against an Indonesian ban on raw log exports. If such a challenge were successful, Indonesia would be obligated to allow raw log exports, which would increase the rate of deforestation of its tropical forests.

- The United States imposed countervailing duties on imports of Canadian softwood lumber based, in part, on its conclusion that British Columbia’s raw log export ban constituted an unfair subsidy. The U.S. Department of Commerce reasoned that the export ban increased domestic supply, which, in turn, decreased domestic prices and allowed cheap Canadian wood products to compete unfairly with comparable U.S. products.

What’s at Stake?
In 1990, the United States adopted a ban on exports of raw logs from federal lands in the western United States, unless the timber is determined to be surplus to U.S. manufacturing needs. The ban is designed to promote conservation of national forests and to secure timber supplies for domestic industry in the face of declining logging rates spurred by such conservation. A 1993 Congressional Research Service report concluded that the U.S. raw log export ban violated the GATT prohibition on export bans and did not fall within the exception for conserving natural resources.

The Secretary of Commerce has issued an order prohibiting the export of raw logs from public lands in the western United States, unless the state institutes its own export restrictions. California, Oregon, and Washington are among the states that have adopted laws prohibiting exports of raw logs from their public lands. The Secretary’s order remains in effect for the other western states.

Japan has long claimed that these bans violate international trade rules. In its most recent submission to the WTO in preparation for the 1999 Ministerial, Japan reiterated its longstanding opposition to raw log export bans and other impediments to log exports. If Japan follows through on its threat to challenge these measures, western U.S. forests may be forced to supply raw logs to the timber industry worldwide.
Consumer purchasing power can be a powerful tool to compel changes in corporate and government behavior. The movement to divest investments in South Africa is a case in point. In the forestry context, purchasing power can be a critical mechanism to reduce the market for goods produced through excessive amounts of logging or unsustainable logging practices. Two such devices may be at risk from both current and expanded WTO rules: (1) government procurement preferences, and (2) eco-labeling.

**Government Procurement**

Under the WTO Agreement on Government Procurement, the United States cannot give foreign products less favorable treatment than it gives to domestic products. Government procurement must be based on any existing international standards and cannot have the effect of creating unnecessary obstacles to international trade. In addition, technical specifications must be based on performance rather than design or production methods. For example, a procurement requirement mandating or creating a preference for recycled goods could be characterized as a prohibited design rather than a permissible performance specification.

While the government procurement agreement incorporates some of the WTO exceptions, noticeably absent is the exception for conserving exhaustible natural resources. The agreement contains exceptions to protect national security, public morals, human health, and the use of the services of disabled persons, but not to protect the environment.

The agreement applies explicitly to procurement by the federal government. A series of annexes prescribe the extent to which the agreement applies to states, local governments, and public utilities. All executive branch agencies of California and Washington are covered by the agreement, as are the Oregon Department of Administrative Services and the Bonneville Power Administration. The United States excepted procurement of paper products in Washington, but not in the other states. Moreover, the United States conditioned the applicability of the agreement to states and utilities as follows: “Nothing in this offer shall be construed to prevent any state entity from applying restrictions that promote the general environmental quality in that state, as long as such restrictions are not disguised barriers to international trade.”

This U.S. attempt to write an environmental exception into the Government Procurement Agreement, while laudable in its goal, may be largely ineffectual in practice. First, it is limited to government procurement by states and utilities; it does not, and indeed cannot, change the text of the agreement which governs procurement by the federal government. Second, by its terms, it allows procurement restrictions that promote environmental quality in that state. It is highly questionable whether this condition would allow states to restrict their government procurement to protect rainforests in the Amazon or old-growth forests in Canada or even forests in another part of the United States.

The Agreement on Government Procurement is often mentioned as a likely prospect for expansion in the next round of trade negotiations.

**The Trade Threat**

The trade threat to government procurement preferences is not merely hypothetical. In 1996, Massachusetts adopted the “Burma Law” to protest human rights violations in Burma (now called Myanmar). Under the WTO rules already have been used to thwart eco-labeling initiatives.

Purchasing power can reduce the market for goods produced through excessive amounts of logging or unsustainable logging practices.
law, Massachusetts and its agencies may not contract to purchase goods or services with companies that engage in business in Burma unless their bid is ten percent lower than all other bids. The European Union and Japan have mounted a WTO challenge to the law because it effectively excludes companies dealing with Burma from the Massachusetts public procurement market. That challenge is currently on hold during pendency of a parallel challenge in U.S. court, which has led to a declaration that the Burma Law is unconstitutional on the ground that it intrudes into the federal foreign affairs power and the balance struck by Congress in exercising that power.

What’s At Stake?
So-called green procurement is a mechanism for promoting sustainable natural resource management and for reducing excessive or unsustainable demand for such resources, including forest products. Its effectiveness stems from the collective purchasing power of the federal, state, and local governments, which amounts to 18% of the gross national product of the United States.

In recent years, government procurement has increasingly been used not only to decrease consumption of products from native forests but also to reduce production of paper from virgin sources, which is the third largest industrial consumer of energy and a large contributor to both air and water pollution.

A 1993 Executive Order requires federal agencies to have 20% recycled content in their paper purchases by 1994 and 30% by 1998. Leading up to this Executive Order, the industry waged an intense but ultimately unsuccessful battle to lower the recycled content requirement, complaining that the new requirements would render U.S. mills vulnerable to foreign competition.

Many states and many local governments have extensive recycled paper requirements. For example, California and Oregon prescribe the percentages of government paper purchases that must be recycled, while Washington and the City of Seattle set goals for their paper purchases. Recycled purchasing laws typically define recycled paper by setting the percentage of recycled content that is required.

Apart from overall purchasing requirements or goals, California, Oregon, and Washington provide for preferential consideration of bids for recycled purchases and even for the product that contains the greatest percentage of post-consumer waste. While the United States appears to have protected the Washington paper procurement laws in its annex to the

![Canadian trees being prepared for their ultimate journey into the United States.](image)
Agreement on Government Procurement, it carved out no similar protection for the laws of California and Oregon.

Oregon has gone even further and imposed recycled content requirements for all newsprint consumption in the state, not simply government purchases. Under Oregon law, 7.5% of fiber content of newsprint must be composed of post-consumer waste paper, provided recycled newsprint is available and suitable. 82

Some states and local governments prohibit government purchases of wood from certain sources, such as tropical rainforests, as a means of reducing pressures on vulnerable forests. New York still prohibits state purchases of most tropical hardwoods unless they are from sustainably managed forests. 83 The cities of Bellingham, Washington; San Francisco, Santa Monica, Berkeley, Ventura, Santa Clarita, California; and Baltimore, Maryland likewise have banned government purchases of tropical hardwood products, with Berkeley’s ban extending beyond tropical hardwoods to redwoods as well. 84 Arizona prohibits the use of endangered wood species in any building projects financed by the state or its political subdivisions. 85 Endangered wood species are those listed under the Convention on International Trade in Endangered Species of Wild Fora and Fauna. Tennessee has a policy disfavoring purchases of endangered rain forest products. 86

Although not as prevalent, some state and local governments are pursuing government procurement preferences for wood products from certified and sustainably-managed forests. For example, the city of Los Angeles proposed an ordinance that would give a ten-percent government procurement preference to wood products that have received forest management certification, only to be met with trade objections from Canada. 87 The City of Seattle is currently investigating a government procurement ordinance that would require a “green certification” for wood products purchased by the City.

These government procurement laws are at risk from current WTO rules and any expansion of them. The WTO is also a threat to burgeoning initiatives, such as procurement rules disfavoring timber products from old-growth forests or those creating preferences for chlorine-free paper or paper produced from hemp. As can be seen from Minnesota’s response to Canada’s threatened challenge to its government procurement preference for recycled paper, governments often back down on environmental protections in the face of a threat without waiting for that threat to manifest itself as a formal trade challenge.

### Eco-Labeling

Consumers are increasingly choosing to use their purchasing power to promote environmentally sound practices. Eco-labeling is a policy tool used to distinguish between products based on their relative impact on the environment in an attempt to influence consumer purchasing decisions in favor of “environmentally-friendly” products. Twenty-eight countries have national eco-labeling programs to encourage market-driven environmental changes within industry. 88

Some labels disclose a product characteristic, such as whether a piece of fruit has pesticide residues. In the forestry context, eco-labels go much further and disclose whether the wood or paper product originated from a forest managed to specific standards.

One of the best known eco-labeling timber certification programs comes under the auspices of the Forest Stewardship Council (“FSC”), an international non-governmental organization. In 1993, the Forest Stewardship Council established the FSC Principles and Criteria for Forest Stewardship (“P&C”). In order for timber products to be eligible to carry the FSC Trademark, the timber must come from a forest certified as meeting the FSC’s P&C, and it must be tracked from the forest through all the steps in the production process until it reaches the end user. Both the forest management and the chain of custody tracking must be independently verified by a third-party certifier, which has been evaluated and accredited by the FSC. 89 The Arcata City Forest and the Hoopa Valley Tribe both in California and numerous privately owned forests have received FSC certifications. 90

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Governments often back down on environmental protections in the face of a WTO threat without waiting for that threat to manifest itself as a formal trade challenge.
The Trade Threat
A dispute is currently raging within the WTO over precisely which set of trade rules governs eco-labeling. On the one hand, labeling requirements based on product characteristics fall under the WTO Agreement on Technical Barriers to Trade (“TBT”). This agreement extends to governmental-sponsored product labeling, as well as to standards developed by a recognized international, national, or regional body that have some regulatory impact. Under the TBT rules, labeling, like other product regulations and standards, cannot be adopted or applied with the purpose or effect of creating unnecessary obstacles to trade.91 While protecting the environment is acknowledged to be a legitimate objective for domestic regulation, such regulations cannot be “more trade-restrictive than necessary to fulfill a legitimate objective.”92

On the other hand, if eco-labeling is not covered by TBT rules, it is subject to the general WTO rules, which are generally hostile to trade restrictions based on the way a product is produced. The WTO mandates that “like products” from different countries be accorded the same treatment. The WTO-accepted definition of “like product” begins from the product’s entry into commerce and ends when that product is retired from commerce. Where the attributes of two products are the same, the one produced in a manner that depletes natural resources or pollutes the air and water must be treated the same as the one that does not cause such pollution. By extension, many have argued that the WTO prohibits eco-labeling because the label is based on how a product is produced.

For instance, a threatened trade challenge emerged under GATT rules before the adoption of the WTO Agreement on Technical Barriers to Trade. In 1992, Austria passed a law requiring eco-labeling on imported tropical timber products. The law also would have taxed tropical timber at a 70% rate. The Association of Southeast Asian Nations (“ASEAN”), Japan, Canada, New Zealand, and Australia argued that the law discriminated against tropical timber because it did not extend to temperate forest products. ASEAN threatened to block $1.8 billion in Austrian exports to ASEAN countries in retaliation. In 1993, Austria repealed its mandatory tropical timber labeling provisions.93

In September 1998, Canada lodged its objections to a mandatory Dutch labeling requirement for wood products. Norway, Poland, and Ecuador also have raised concerns. The Dutch bill would require labels indicating whether forest products originated from an area with a sustainable management plan approved by the Dutch Council for Accreditation. Canada complained that the Netherlands was making a unilateral decision about what is sustainable forest management and that the law discriminated against countries like Canada that produce their wood products from old-growth forests.94

In 1994, the European Commission began developing an eco-label standard for office products, which would be voluntary but could be the basis for government procurement preferences. The U.S. industry objected vociferously to the proposed eco-label criteria. The U.S. Council for International Business opposed the EU eco-label because it was based on environmental effects of the production process.95 The Business Roundtable likewise contended that eco-labeling schemes “present a distorted and misleading characterization of the environmental attributes of competing products...” 96 Similarly, the American Forest and Paper Association argued that the eco-label standard makes arbitrary judgments.

Road densities are a threat to many species, such as salmon and grizzly bears.
concerning what is environmentally preferable. At the behest of the U.S. industry, the U.S. government argued that the EU had to take into account the impact of its eco-label on the U.S. share of the EU market, which is worth about $2 billion annually. The U.S. also argued that the EU criteria could not disproportionately disadvantage producers from various regions. In particular, the United States relies on virgin timber for pulp and paper production, while the EU criteria favored recycled content. In 1995, the EU responded to the U.S. attack by pulling back its proposed criteria. The American Forest & Paper Association celebrated the announcement, claiming that it “substantiates our long-standing criticisms with the EU scheme overall” and suggests that the United States will “not tolerate the use of a spurious environmental cover to disguise the attempt to erect a new generation of trade barriers to competitive U.S. products.”

What's at Stake?
Implementation of existing WTO rules and negotiation of new ones will remain the battleground for eco-labeling for some time to come. The lines have been drawn. The war will be waged over the fundamental legitimacy and features of eco-labeling:

- Whether governments will be permitted to mandate eco-labels;
- Whether eco-labels must take into account their impact on each foreign country’s market share;
- Whether eco-labels can prefer recycled paper or disfavor products from native or old-growth forests when such a label will disadvantage the products from certain exporting countries, as the United States and Canada have argued in the cases described above;
- How forest management standards will be defined and by whom;
- Whether and to what extent WTO rules will constrain voluntary labeling schemes.

The WTO rules already have been used to thwart eco-labeling initiatives. This type of regressive influence is certain to continue. Ongoing negotiations also may generate additional restrictive rules, interpretations, or initiatives to define the limits of eco-labeling.

Such initiatives are beginning to surface not only in trade negotiations but also in other international standard-setting bodies that are dominated by the affected industry. For example, in 1993, the International Standards Organization (“ISO”) established a committee on eco-labeling standards. The WTO Agreement on Technical Barriers to Trade provides the impetus for this flurry of standard-setting activities. Under this Agreement, where relevant international standards exist, they generally must be used as the basis for WTO countries’ regulations.
In recent years, the United States and other industrialized countries have entered into an increasing number of international agreements intended to protect foreign investments. The North American Free Trade Agreement ("NAFTA") contains the most recent and expansive such protections.101

In 1995, the Organization for Economic Cooperation and Development ("OECD") - which consists of 29 of the world’s wealthiest countries, including the United States - began negotiating the Multilateral Agreement on Investment ("MAI"), which was intended to globalize the kind of investment protections established in NAFTA. A draft text of the MAI included investment protections and dispute settlement provisions similar to NAFTA’s, although it defined the covered investments more broadly and contained additional restrictions. It is also an open question and a matter of great controversy whether the MAI would have exceptions for protection of health and natural resources like those in NAFTA and the WTO Agreements.

The OECD postponed its efforts to finalize the MAI amidst growing public opposition concerning, among other things, the agreement’s potential impacts on the environment. Despite being derailed at the OECD, many developed countries continue to push a global investment agreement. Some countries, including the European Union, have called for the inclusion of such an investment agreement in the agenda for a new round.

The NAFTA Investment Provisions

The NAFTA rules also lend themselves to blackmail-type claims by regulated industries seeking to avoid or weaken governmental health and environment regulations. NAFTA rules also lend themselves to blackmail-type claims by regulated industries seeking to avoid or weaken governmental health and environment regulations. Under NAFTA, foreign investors must be treated no less favorably than domestic investors, or investors from another country. Some investors have claimed that this entitles them to the best treatment given any domestic investor.103 NAFTA also establishes minimum standards of treatment for investors, requiring fairness, equitable treatment, and due process.104 In addition, NAFTA prohibits countries from imposing performance requirements that govern how an investor conducts its business, such as export directives or limits, preferences for domestic workers or purchases, and mandated technology transfers.105

Finally, NAFTA prohibits any direct or indirect expropriation and any measure that is “tantamount to expropriation,” unless it is nondiscriminatory, for a public purpose, carried out in accordance with due process, and by compensation paid to the investor.106 In a series of recent claims, foreign investors have argued that this concept of “tantamount to expropriation,” extends investor rights beyond the actions traditionally subject to compensation under both U.S. and international law to encompass regulation undertaken by governments to protect public health or the environment.

When a foreign investor believes that one of the NAFTA countries has violated any of the NAFTA investment rules, NAFTA gives the investor the right to seek monetary damages equivalent to the investment loss.107 This is a truly remarkable feature of the investment agreement since it is the only enforcement right given to a nongovernmental entity in NAFTA or any other trade agreement. The investor can force the government into binding arbitration to obtain such compensation. The arbitration proceedings are held in secret.

The Trade Threat: The NAFTA Case Study

The NAFTA track record illustrates the environmental threat posed by investment agreements. The NAFTA rules are already in place for the United States, Mexico, and Canada. They could be expanded to cover all WTO countries in a new round.

The NAFTA investment provisions have a broad scope. They apply to any measure, which is defined broadly to include any law, regulation, procedure, requirement, or practice relating to a foreign investment. And foreign investment is defined so broadly that it could include a decline in the market value of the shares held by a minority shareholder.102

In a series of recent claims, foreign investors have argued that this concept of "tantamount to expropriation," extends investor rights beyond the actions traditionally subject to compensation under both U.S. and international law to encompass regulation undertaken by governments to protect public health or the environment.

When a foreign investor believes that one of the NAFTA countries has violated any of the NAFTA investment rules, NAFTA gives the investor the right to seek monetary damages equivalent to the investment loss.107 This is a truly remarkable feature of the investment agreement since it is the only enforcement right given to a nongovernmental entity in NAFTA or any other trade agreement. The investor can force the government into binding arbitration to obtain such compensation. The arbitration proceedings are held in secret.

Foreign Investor Rights Threaten to Weaken Forest Protections
without any avenue for public participation. If the arbitral tribunal finds that the Party’s action violated any of the NAFTA rules, it may award the investor monetary damages, restitution of property, and the costs of bringing the claim.

Not only does NAFTA afford foreign investors a remedy that is unavailable to domestic investors, but the NAFTA rules also lend themselves to blackmail-type claims by regulated industries seeking to avoid or weaken governmental health and environmental regulations. The impact of such investor rights and remedies is best illustrated by the NAFTA challenges brought by foreign investors based on environmental regulations:

- In 1997, the U.S.-based Metalclad Corporation filed a claim against the Mexican government pertaining to a toxic waste facility with a history of contaminating groundwater that Metalclad had taken over two years earlier. The local government had decided that Metalclad could not operate the toxic waste facility because a geological audit revealed that the facility was located on an underground alluvial stream and could therefore contaminate the local water supply. The local Governor rezoned the area as an ecological zone in which the landfill could not operate. Metalclad filed an investor claim under NAFTA charging that the rezoning and the denial of permission to operate the facility constituted an indirect or creeping expropriation of its property. Metalclad sought $65 million in compensation from the Mexican government. Arbitration of this claim is ongoing.108

- In 1997, U.S.-based Ethyl Corporation filed a claim seeking $250 million for Canada’s ban on the fuel additive MMT (methylcyclopentadienyl manganese tricarbonyl), which is designed to prevent automobile engine knocking. Canada based its ban on studies showing that MMT could harm automobile on-board diagnostic systems, which in turn could lead to a failure to detect high levels of pollutant emissions, and that exposure to manganese compounds can cause neurological problems. Ethyl Corp., the sole manufacturer and distributor of MMT in Canada, argued that the ban discriminated against it because other fuel additives were not banned, was not supported by sufficient proof of health or environmental harm, and was excessively restrictive of trade. It sought compensation for lost sales and profits, damage to its reputation and good will including public statements made by government officials, future earnings, lobbying costs, and attorneys’ fees. Canada eventually settled with Ethyl, rescinding the ban and paying Ethyl $13 million, including approximately $4.5 million in legal fees.109

- In July 1998, U.S.-based SD Myers, Inc. sought $10 million for Canada’s 15-month ban on the export of PCBs. Canada imposed the ban after the United States loosened its own restrictions on transboundary trade in PCB waste, which would have permitted SD Myers to import Canadian PCBs for disposal at its Ohio facility. Canada based its ban in part on the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which it has ratified. The Basel Convention prohibits countries from exporting hazardous wastes, including PCBs, to nonparties like the United States without ensuring that they will be managed in an environmentally sound manner. Canada expressed concern that U.S. regulations would not require the PCBs to be disposed of in a manner that would prevent risk to health and the environment. After the United States issued more stringent PCB regulations in response to domestic litigation, Canada lifted the ban.110 SD Myers’ NAFTA challenge is still pending.

- On June 15, 1999, the Canada-based Methanex Corporation sought $970 million from the United States for losses, including a decline in stock prices, it attributes to a California law banning the use of the gasoline additive MTBE (methyl tertiary butyl ether) by the end of 2002. MTBE is a reformulated gasoline component made from methanol, which Methanex supplies to manufacturers in the United States. California’s ban arose out of the detection of MTBE in ground water supplies and studies indicating that ingestion may cause cancer and reproductive problems. Methanex claims that the ban expropriates its business interests, lacks definitive proof that MTBE is a human carcinogen, and is too restrictive on trade since other actions can be taken to try to prevent gasoline from leaking into groundwater.111

**What’s at Stake?**

A global investment agreement or investor rights written into a free-logging agreement could have a profoundly negative effect on forests. The concepts of fairness, due process, equitable treatment, and creeping expropriation are vague and subject to abuse. Already, investors have taken the broadest reading of these concepts to seek compensation for delays in obtaining governmental action, for a ban on a chemical that is costing taxpayers millions of dollars to eliminate from their drinking water, and for damage to a company’s reputation from a legislative debate. The reach of such investor rights is as broad as the investor’s imagination. Yet the consequences are far from imagined.

Given that foreign investments are generally long-term interests, the investor rights provisions raise the specter of requiring compensation
whenever new environmental regulations are imposed over the life span of an investment. In other words, environmental regulation could be frozen to coincide with investor expectations despite accumulating scientific knowledge, growing environmental problems, and changing public values. Two trade scholars point out that the Ethyl Corp. and SD Myers cases challenged the only two legally binding environmental measures with significant impacts on business operations that have been adopted by Canada since NAFTA came into force.112

Investor rights provisions give foreign investors what might charitably be called a bargaining chip or, less charitably, a device for blackmail. Such provisions give industry a powerful tool for opposing measures to protect the forests. Without strong and carefully crafted provisions to protect the environment, a global agreement giving foreign investors the power to force governments to defend forest protections - and possibly to pay huge fees to maintain them - could discourage governments from even attempting to implement environmental measures that may affect foreign investment.

The following provide examples of the threat such provisions present to forest protections:

- In the Pacific Northwest, various salmon stocks have been listed as threatened under the Endangered Species Act, in part because of freshwater habitat degradation due to logging. In the Pacific Northwest, various salmon stocks have been listed as threatened under the Endangered Species Act, in part because of freshwater habitat degradation due to logging. It is widely recognized that states need to restrict logging in riparian areas and on unstable slopes to prevent further aquatic habitat degradation and promote recovery. If Washington required 250-foot buffers on perennial streams, as advocated by environmental groups, and Oregon and Idaho called for 25-foot buffers, a foreign investor who owned land or interests in a logging company operating in Washington might claim that the Washington regulation did not provide it the best domestic treatment given to U.S. companies. Even the far smaller riparian buffers required under the industry-supported forest and fish legislation that recently passed over uniform opposition from the environmental community could be subject to such claims because the required buffers are generally larger than what is required in Idaho and Oregon. Or, if Washington required riparian buffers on non-fish bearing streams, as advocated by environmental groups, a foreign investor might argue that the buffer requirement was discriminatory for the reasons outlined above, or that it constitutes creeping expropriation because it lacks adequate scientific support and is more restrictive than necessary to protect fish, thereby thrusting an arbitration panel into the heart of the salmon debate.

- A moratorium was recently imposed on logging in the watershed that supplies drinking water to Whatcom County. The moratorium is a pilot project for protecting drinking water in Washington. A foreign investor could argue that these restrictions amount to creeping expropriation and unfair treatment because the investor’s logging operations cannot be shown to harm drinking water or because similar restrictions are not uniformly imposed in other watersheds.

- Another example can be drawn from the controversy surrounding the private logging of the Headwaters forest in northern California. Logging has been curtailed and delayed to protect the marbled murrelet, a seabird that nests on the limbs of old-growth trees and that has been listed as threatened under the Endangered Species Act. If a foreign investor had an interest in Headwaters, it might challenge the Endangered Species Act restrictions by arguing that marbled murrelets are plentiful in Alaska, and therefore safeguarding the California populations is unnecessary. Or, such an investor might challenge the delays and burdens imposed on it to prepare a habitat conservation plan that minimizes the harm to the murrelets and is a prerequisite to a permit under the Endangered Species Act to log the forest.

- Given the long-term nature of an investment, a foreign investor who purchased a mill prior to the late 1980s might argue that its investment has been expropriated or otherwise impeded by the restrictions on logging old-growth forests embodied in the President’s Northwest Forest Plan to protect the threatened northern spotted owl. The company might have purchased a mill equipped that can process only large-diameter old-growth trees relying on the then-current rate of old-growth logging and U.S. Forest Service representations that there would...
continue to be a steady supply of such trees from federal lands. The company could argue that the reduction in old-growth logging on federal lands violated its long-term expectations and due process.

- Road densities are a threat to many species, such as salmon and grizzly bears. For salmon, roads cause sedimentation and landslides that severely degrade aquatic habitat. For grizzly bears, roads create opportunities for conflict with people - a leading cause of bear mortalities. If private landowners are precluded from building new roads or are required to remove problematic roads, a foreign investor might claim the restrictions are discriminatory, unnecessary, or excessive. Given that road densities are already far too high, there almost certainly will be detrimental roads left in place on other lands that the foreign investor could identify in support of its claim of discrimination.

Like the NAFTA investment chapter, a global investment agreement would give foreign investors leverage to thwart environmental regulation. Investor arbitration claims provide a forum in which the regulated industry can challenge the science and policy decisions underlying forest protections under standards that are less deferential to the government regulators than domestic legal challenges. If investor rights are in place, an arbitration claim need not even be formally pursued to have effect. The mere threat of a costly investor claim could derail a much-needed regulatory initiative.

**Conclusion**

Current trade rules and initiatives to expand trade liberalization in the forestry sector seek to open markets to timber and paper trade without putting any environmental safeguards into place. To make matters worse, the current trade rules and their proposed expansion are hostile to laws, regulations, government procurement rules, and eco-labeling initiatives that create incentives or requirements to ensure that logging is sustainable and protective of forest ecosystems.

The U.S. industry repeatedly has claimed that forest protections will make it uncompetitive. Such claims were made, for example, in the industry lobbying against the Northwest Forest Plan and the Executive Order requiring recycled paper purchases by federal agencies.

As trade grows, cries of competitive disadvantage are likely to increase. Already, the American Forest and Paper Association has testified before the International Trade Commission that “the U.S. Endangered Species Act is the largest single burden on the competitiveness of American forest products.” Trade rules that are hostile to forest protections will almost certainly bolster industry pleas to level the playing field to the lowest common denominator.

Rather than go further down this path of forest deregulation, it is time to assess the reach and severity of the existing rules. Countries historically have had control over forests and other natural resources within their borders. They should retain full authority to protect their forests. The WTO should review its rules to assess the extent to which they stand in the way of sustainable forest management that protect forest ecosystems. The WTO should then repair the damage by reforming its rules and closed processes to promote forest protection and citizen participation before embarking on further trade liberalization in the forest sector.
Notes

Introduction
Letter to USTR Charlene Barsky from 16 National Environmental Groups (July 19, 1999); Letter to Vice President Gore from Environmental Groups (Feb. 12, 1999); Letter to President Clinton from 48 Members of Congress (July 28, 1999); Letter to USTR Charlene Barsky from Congressman Richard Gephardt (April 29, 1998). Instead of preparing such a statement, the U.S. Trade Representative and the Council on Environmental Quality are seeking public comment only on the general concept of tariff elimination in the forest products sector, without presenting or comparing the potential impacts of viable alternatives. 64 Fed. Reg. 34.304 (June 25, 1999).


3 In 1997, APEC launched a program to reduce tariffs in 15 sectors, including the forest products sector. The forest product sector initiative sought to eliminate all tariffs in the next five years. USTR Press Release Attachments (Nov. 15, 1998). To address non-tariff measures, such as building standards, APEC is coordinated by the United States, of non-tariff measures in the forest products sector to be completed by September 1999, which is to be followed by APEC recommendations for the voluntary elimination of measures deemed unjustified. APEC Request for Proposals: Study of Non-Tariff Measures in the Forest Products Sector (CTI 17/99T); Appendix I to the U.S. Trade Representative and the Council on Environmental Quality to proclaim duty modifications in wood products and other sectors.
4 USTR Press Release (Nov. 15, 1998). Under the initiative, called “Accelerated Tariff Liberalization,” countries subject to the Uruguay Round zero-for-zero agreement would accelerate tariff removal to January 1, 2001, and others would attempt to remove tariffs by that date, but developing countries could delay tariff removal until January 1, 2002 under certain circumstances.
5 Letter to USTR Charlene Barsky from 16 National Environmental Organizations (July 19, 1999).

Report
2 P. Marchak, S. Aycock, & D. Herbert. 1999. Measures Within the Forest Products Sector. Countries subject to the Uruguay Round zero-for-zero agreement. APEC Request for Proposals: Study of Non-tariff Measures, such as building standards, APEC is coordinated by the United States., of non-tariff measures in the forest products sector to be completed by September 1999, which is to be followed by APEC recommendations for the voluntary elimination of measures deemed unjustified. APEC Request for Proposals: Study of Non-Tariff Measures in the Forest Products Sector (CTI 17/99T); Appendix I to the U.S. Trade Representative and the Council on Environmental Quality to proclaim duty modifications in wood products and other sectors.
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4 Letter to USTR Charlene Barsky from 16 National Environmental Organizations (July 19, 1999).

9 The panel concluded that Japan did not have an adequate system for certifying the entry of the codling moth. The parties agreed to a ten-year extension of the agreements, with Japan reaffirming its commitment to the United States to adhere to its regulations for the importation of wood products. 64 Fed. Reg. 34.304 (June 25, 1999). In September 1999, the infestation was eradicated, but this would be ineffective on other varieties and a ban on imports until the United States conducted the additional tests was more trade restrictive than necessary to achieve Japan’s goals. Report of Panel, Japan – Measures Affecting Agricultural Products (Oct. 27, 1998).
10 FSEIS at 1.
11 FSEIS at § 319.40.
13 While the district court did not embrace APHIS’ reading of the WTO rules, it upheld APHIS’ authority to consider international trade agreements in devising the regulations, including the acceptable level of risk. ORNC v. APHIS, Order at 31-32 (N.D. Cal. Feb. 27, 1997).
14 The district court decided the injunction was not broader than necessary to protect U.S. forests, thereby rejecting the premise underlying APHIS’ argument. 1997 U.S. Dist. LEXIS 9521.
15 Goheen & Tkacz, Pest Risks Associated with Importing Unprocessed Russian Larch Logs into the United States, 8(3) WJAF (1993). In September 1990, in response to the test shipment inspection, APHIS temporarily banned Russian log imports until the U.S. Forest Service could conduct a risk assessment and adopt regulations.
16 7 C.F.R. § 319.40.
19 Declarations of Roberto Matus and Fernando Leniz (April 1997).
29 Pimental, supra.
30 Cobb Declaration, ¶ 7
33 Pimental, supra; Declaration of Field W. Cobb, Jr. ¶ 4 (Oct. 3, 1996), in ORNC v. APHIS, No. 95-4006-CW (N.D. Cal.).
34 Pimental, supra.
35 Cobb Declaration, ¶ 7
37 Letters to APHIS from Oregon Dep. of Agriculture (July 8, 1998).
38 Goheen at 2, 4.
40 40 C.F.R. part 182.
45 FSEIS at § 4.
47 FSEIS at 2-3.
48 Goheen at 2, 4.
49 APHIS found the spruce bark beetle 189 times in shipments from Europe during the twelve-year period 1985-1996.
50 The Asian gypsy moth reached several Pacific ports in 1991 on ships transporting Siberian grain. It was discovered in Oregon, Washington, and British Columbia. After a $27 million effort in 1992, the infestation was eradicated, but this...
success story is a rarity in the attempts to suppress and eliminate exotic pests. FSEIS at 5.


82. Article XL, GATT.

83. Article XX & XX(g), GATT.


85. Forest Resources Conservation & Shortage Relief Act, 16 U.S.C. § 620a. The ban applies to all federal lands west of the 100° meridian in the contiguous United States, which runs from central North Dakota through central Texas. It may be overridden if the timber is surplus to domestic manufacturing needs. The law also prohibits the purchase of timber from federal lands to substitute for private timber exported in unprocessed form. Id. § 620b.

86. Id. § 620c.


90. This agreement materialized late in the last round of negotiations and, in contrast to other WTO Agreements, not all WTO countries are parties to the government procurement agreement. The United States, European Union, Japan, and Canada are among the signatories.

91. Article VI.

92. Article XXIII.


100. Artz, Rev. Stat., § 34-201.


105. Id.

106. Agreement on Technical Barriers to Trade, Articles 2.1-2.3. Id. Article 2.2.


110. Fax from Don Elliott to David von Hoogstraten, EPA at 4 (Oct. 10, 1995).

111. Letter from Maureen Smith, Int’l VP, AF&P to Marris Enthoven, Director-General Environment, Nuclear Safety & Civil Protection, EU (Nov. 18, 1994).

112. 11 J. Envtl. L. & Litig. at 185.

113. Letter from W. Henson Moore, President & CEO, AF&P, to Ambassador Michael Kantor, USTR, at 1-2 (May 30, 1995). The EU eventually adopted eco-label criteria, but those criteria are currently undergoing revision.

114. Article II 2 (vii). To give a sense of the breadth of the NAFTA investor protections, in one case, the investor argued that statements made by government officials in public debates damaged the company’s reputation and goodwill. In another case, the investor brought a claim based on a civil damages award and appeals court decision upholding the award. ISDS, supra at 22.

115. NAFTA Articles 101-1103.

116. NAFTA Article 1105. Note that these minimum standards apply to domestic investors, although domestic investors have no recourse to the damage remedies afforded foreign investors under NAFTA.

117. NAFTA Article 1106. NAFTA has one hortatory provision that encourages countries not to lower health or environmental standards to attract foreign investment, but violations of that provision are not subject to the NAFTA dispute settlement process; violations give rise only to consultations that have no enforceable remedy. Article 1114.

118. NAFTA, Chapter 11, ¶ 1110.

119. NAFTA Chapters 1116-1117.


121. Wagner, supra, ISDS, supra.

122. Wagner, supra, Sierra Club v. Environmental Protection Agency, 118 F.3d 1324 (9th Cir. 1997) (overturning EPA’s 1996 regulations allowing importation of PCBs).

123. ICTSD, 5 Bridges 12 (June 1999); In another claim, U.S. based Sun Belt seeks compensation for lost business opportunities arising out of British Columbia’s ban on the export of water. B.C. Water Protection Act, R.S.B.C. 1996 ch. 484. In 1996, British Columbia settled with a Canadian company for the amount it had spent creating an infrastructure to export water. In 1998, Sun Belt brought a NAFTA claim for $219 million, claiming discrimination and violation of due process because British Columbia had not settled Sun Belt’s claim. ISDS, supra., at 69; Sun Belt Filing, 5 America’s Trade 13 (Dec. 24, 1998).

124. ISDS, supra., at 46.

WTO: But what are we trading away?

Our Forests?