A Critical Guide to the WTO's Report on Trade and Environment [Article]

A CRITICAL GUIDE TO THE WTO'S REPORT ON TRADE AND ENVIRONMENT

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I. INTRODUCTION

During the 1990s, there has been an increased recognition of the linkages between international trade and environmental protection.[1] These linkages spring from economic globalization and from the ecological impact on countries when pollution and waste permeate national borders. The Uruguay Round trade negotiations intensified environmentalists' concerns that greater trade might degrade the environment.[2] At the same time, business groups began to worry that new environmental laws might impede commerce.[3] To address these concerns, the new World Trade Organization (WTO) established a Committee on Trade and Environment (CTE) in 1995.[4]

Initial hopes for the CTE were high. The Clinton Administration promised that the WTO and the CTE "will assist efforts to reach international agreements on environmental issues that affect the entire world, such as ozone depletion, global climate change and biodiversity."[5] The Global Legislators Organization for a Balanced Environment called for "the resolution of all outstanding trade and environment matters within two years of the entry into force of the WTO . . . ."[6]

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1. *See generally* THOMAS ANDERSSON ET AL., TRADING WITH THE ENVIRONMENT (1995); DANIEL C. ESTY, GREENING THE GATT (1994); LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 559–95 (John H. Jackson et al. eds., 3d ed. 1995); DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN THE GLOBAL ECONOMY (1995); Duncan Brack, *Balancing Trade and the Environment*, 71 INT'L AFF. 497 (1995); Douglas F. Brennan, *Trade and Environmental Goals at a Crossroads: Challenges for Global Treaties and National Environmental Regulation*, 20 INT'L ENV'T REP. 133 (1997); Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L. J. 459 (1994).

2. The Uruguay Round negotiations began in 1986 and concluded in 1993. *See generally* JEFFREY J. SCHOTT, THE URUGUAY ROUND: AN ASSESSMENT (1994).

3. *See, e.g.*, STEPHAN SCHMIDHEINY, CHANGING COURSE 69–76 (1992).

4. The World Trade Organization is an inter-governmental organization that administers rules on government trade practices. It does not generally deal with questions of private international law. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND VOL. 1 (1994), 33 I.L.M. 1125 (1994).

5. OFFICE OF THE U.S. TRADE REPRESENTATIVE, URUGUAY ROUND–JOBS FOR THE UNITED STATES, GROWTH FOR THE WORLD 19 (1994).

6. *Action Agenda: Trade and the Environment, Resolution Adopted Unanimously by the 8th GLOBE International General Assembly* (Mar. 2, 1994).

These hopes were dashed. When the CTE issued its report in November 1996, it became clear that two years of inter-governmental deliberations had yielded little output. In response, there is renewed interest in using regional fora to address trade and environment links.

This Article examines the CTE Report and discusses its implications. Part II presents the CTE's findings and evaluates them. To provide context for the reader, the author provides background information on key issues. Part III considers regional solutions to trade and environment problems in the face of continuing inaction at the international level. This Article considers the North American Free Trade Agreement (NAFTA) as a possible model.[7]

II. REPORT OF THE WTO COMMITTEE ON TRADE AND ENVIRONMENT

In April 1994, the GATT Ministerial Conference at Marrakesh approved a Decision on Trade and Environment.[8] This Decision established an interim subcommittee on trade and environment to be utilized by the official CTE when, in 1995, the WTO came into force. The subcommittee met five times over eight days in 1994.[9] The CTE met thirteen times over twenty-eight days in 1995–96.[10] There were eleven items on the agenda:[11]

1. Multilateral environmental agreements;
2. Environmental policies and the trading system;
3a. Environmental taxes and the trading system;
3b. Packaging, labeling, and recycling;
4. Information regarding trade-related environmental measures;
5. Dispute settlement in the WTO and environmental agreements;
6. Market access, trade restrictions, and trade distortions;
7. Domestically prohibited goods;

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7. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993) [hereinafter NAFTA].

8. Decision on Trade and Environment, Apr. 14, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND VOL. 1 (1994); 33 I.L.M. 1267 (1994) [hereinafter Decision on Trade and Environment].

9. Letter from Hector Torres, Counsellor, Argentina Mission to WTO, to Steve Charnovitz (Jan. 7, 1997) (on file with author).

10. *Id.* For discussion of the CTE, see generally Michael Reiterer, *The WTO's Committee on Trade and the Environment, in* ASIAN DRAGONS AND GREEN TRADE 109–27 (Simon S.C. Tay & Daniel C. Esty eds., 1996); Kristin Woody, *The World Trade Organization's Committee on Trade and Environment*, 8 GEO. INT'L ENVTL. L. REV. 459 (1996).

11. The official terms of reference are lengthy; these are shortened versions. This listing follows the numbering system (*e.g.*, 3a and 3b) used in CTE deliberations.

8. Intellectual property rights;
9. Services; and
10. Involvement of non-governmental organizations in the WTO.

On November 7, 1996, the CTE issued its Report.[12] This Article discusses this Report and these eleven agenda items.

A. Multilateral Environmental Agreements[13]

Perhaps the most important issue before the CTE was the relationship between Multilateral Environmental Agreements (MEAs) and WTO rules.[14] This connection is important for two reasons. First, a conflict between an MEA and the WTO can undermine the operation of both agreements. It would also call into question the statement in the Uruguay Round Decision on Trade and Environment that "there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other."[15] The second reason this issue is important is political. Resolving the MEA problem can help the WTO build a bridge to environmentalists worried about the impact of trade rules on environmental protection.[16] Before discussing the CTE's deliberations, it may be helpful to provide some background.

Background on MEAs

So far, MEAs have used mainly one type of trade measure—a trade ban, either on imports or exports.[17] There has been no utilization of tariffs,

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12. World Trade Organization, *Report (1996) of the Committee on Trade and Environment,* WTO Doc. WT/CTE/W/40 (Nov. 7, 1996) [hereinafter CTE Report] <http://www.wto.org>.

13. *See id.* ¶¶ 5–31. The CTE Report groups together Item 1 and Item 5 of its agenda. Item 1 covers the relationship between WTO rules and the use of trade measures for environmental purposes, including those pursuant to MEAs. Most of the discussion at the CTE concerned trade measures taken in conjunction with MEAs rather than trade measures taken unrelated to MEAs. Item 5 concerns the relationship between dispute settlement provisions in MEAs and WTO dispute settlement. *Id.*

14. JEFFREY J. SCHOTT, WTO 2000: SETTING THE COURSE FOR WORLD TRADE 36 (1996).

15. Decision on Trade and Environment para. 2.

16. Daniel C. Esty, *Greening World Trade, in* The WORLD TRADING SYSTEM: CHALLENGES AHEAD 70 (Jeffrey J. Schott ed., 1996).

17. *See* 1 INTERNATIONAL TRADE 1990–91, at 45–47 (1992) (surveying 17 MEAs with trade measures). Quotas have occasionally been used. *See also* Martijn Wilder, *Quota Systems in International Wildlife and Fisheries Management,* 4 J. ENV'T & DEV.

countervailing duties, or sanctions on parties adjudged to be out of compliance. Some environmental groups have proposed the idea of an International Commodity Related Environmental Agreement wherein importing countries would impose an environmental levy on commodities as a means of internalizing environmental costs.[18] No such agreements have been reached, however.

The trade regime has rules regarding the use of import bans.[19] These rules are mainly in the General Agreement on Tariffs and Trade (GATT), which is now incorporated into the WTO system.[20] GATT Article XI disallows import bans,[21] but Article XX's "General Exceptions" may allow import bans (or other trade measures) disallowed by Article XI.[22] Article XX has two exceptions that cover the environment.[23] Article XX(b) provides an exception for measures "necessary to protect human, animal or plant life or health."[24] Article XX(g) provides an exception for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[25] Both exceptions are "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or [be] a disguised restriction on international trade."[26]

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55 (1995).

18. BRITISH HOUSE OF COMMONS, ENVIRONMENT COMMITTEE, 1 WORLD TRADE AND THE ENVIRONMENT ¶¶ 134-138 (June 17, 1996).

19. For simplicity, the discussion will not cover export bans. The CTE Report focuses on import bans in MEAs.

20. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194; PHILIP RAWORTH & LINDA C. REIF, THE LAW OF THE WTO, FINAL TEXT OF THE GATT URUGUAY ROUND AGREEMENTS, SUMMARY, & A FULLY SEARCHABLE DISKETTE 831 (1995) [hereinafter GATT]; WTO Agreement Annex 1A.

21. GATT Article XI:1 says:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT art. XI:1. Article XI:2 contains exceptions, but none apply to environmental measures. *Id.* art. XI:2.

22. *Id.* art. XX.

23. *See generally* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX,* 25 J. WORLD TRADE 37 (Oct. 1991).

24. GATT art. XX(b).

25. *Id.* art. XX(g).

26. *Id.* art. XX (headnote); *see* David Palmeter, *The WTO Appellate Body's First Decision*, 9 LEIDEN J. INT'L L. 337, 348–49 (1996) (criticizing Appellate Body's interpretation of Article XX headnote).

The scope of these Article XX exceptions is in dispute.[27] In 1991, a GATT dispute settlement panel (i.e., the *Tuna–Dolphin I* case) concluded that a government could not invoke Article XX(b) and (g) to safeguard environmental resources outside that country's jurisdiction.[28] In 1994, another GATT panel (i.e., the *Tuna-Dolphin II* case) concluded that countries could not invoke that exception to "force" other countries to change their policies.[29] Both panels found the challenged U.S. import ban to be a GATT violation.[30] Neither report is authoritative, however, since the GATT Council adopted neither.[31] Moreover, both disputes involved unilateral import bans by the U.S. unrelated to MEAs.

Article XX(b) and (g) do not distinguish between import bans pursuant to national law and import bans pursuant to treaty commitments. The fact that import bans in MEAs are not likely to be directly applied would complicate making such a distinction.[32] In other words, each party enacts its own implementing legislation to comply with the treaty requirement.[33] For example, in the U.S., the Endangered Species Act [34] implements the provisions in the Convention on International Trade in Endangered Species (CITES)[35] that require

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27. Benedict Kingsbury, *The Tuna-Dolphin Controversy, The World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 1994 Y.B. INT'L L. No. 5, 1.

28. *United States–Restrictions on Imports of Tuna*, 30 I.L.M. 1594, ¶¶ 5.26–5.27, 5.31–5.32 (1991); *see* Mary Ellen O'Connell, *Using Trade to Enforce International Environmental Law: Implications for United States Law*, 1 IND. J. GLOBAL LEGAL STUD. 273, 287 (1994) (noting that the panel's decision shows a value preference for free trade over environmental protection).

29. *United States–Restrictions on Imports of Tuna*, 33 I.L.M. 839, ¶¶ 5.26–5.27, 5.38–5.39 (1994). According to the European Commission, this "confirms the classic interpretation" of Article XX(b) and (g). EUROPEAN COMMISSION, 1995 REPORT ON U.S. BARRIERS TO TRADE AND INVESTMENT 17 (1995). The Commission offers no evidence for this dubious proposition. *See also* Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131, 2144–48 (1995) (reviewing and critiquing the GATT panel report); Sean Fox, *Responding to Climate Change: The Case for Unilateral Trade Measures to Protect the Global Atmosphere*, 84 GEO. L.J. 2499, 2532–34 (1996) (pointing out that the GATT panel relied on faulty assumptions).

30. *United States–Restrictions on Imports of Tuna*, *supra* note 28, ¶ 7.1; *United States–Restrictions on Imports of Tuna*, *supra* note 29, ¶ 6.1.

31. Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 396, 444 (1996) (discussing the GATT panel process).

32. *See generally* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992).

33. Daniel P. Blank, *Target-Based Environmental Trade Measures: A Proposal for the New WTO Committee on Trade and Environment*, 15 STAN. ENVTL. L.J. 67, 103 (1996).

34. 16 U.S.C. § 1538(c)(1), (c)(2)(B) (1985).

35. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

import bans.[36] It is the actual import ban, and not the treaty inspiring it, that would be the subject of any dispute in the WTO.

The reader should note that the Charter of the International Trade Organization (1948) did directly address the MEA issue.[37] The Charter was the world community's first attempt to establish an organization to govern trade.[38] The International Trade Organization never came into being, however. Article 45 of the Charter provided an exception for measures "taken in pursuance of any inter-governmental agreement which relates solely to the conservation of fisheries resources, migratory birds or wild animals . . . ."[39] This provision remains significant, however, in showing that the drafters of the Charter—who were also the drafters of the GATT[40]—were aware of the potential conflict between MEAs and trade rules and were willing to make room for MEAs within trade rules.[41]

Aside from the GATT, there is another set of rules under the WTO that relates to MEAs. The Agreement on Sanitary and Phytosanitary Measures (SPM)[42] supersedes the GATT to the extent of any inconsistency.[43] This means that a trade measure permitted by GATT Article XX could potentially violate the SPM, and hence the WTO. Alternatively, the SPM Agreement could sanctify a trade measure violative of the GATT. The latter option could occur because SPM Article 3.2 states that SPM measures "which conform to international standards, guidelines or recommendations shall be . . . presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994."[44] For example, the International Plant Protection Agreement requires parties to regulate the importation of plants and plant products.[45] Thus, SPM rules would govern an import ban; GATT Articles XI and XX would not. The significance of the SPM's legal impact on the MEA issue is limited. Current controversies involve

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36. *Id.* arts. III–VII, 27 U.S.T. at 1087, 993 U.N.T.S. at 243.

37. Havana Charter for an International Trade Organization, Canadian Treaty Series Mar. 24, 1948, art. 7.1 (not in force).

38. *See* KENNETH W. DAM, THE GATT: LAW AND THE INTERNATIONAL ECONOMIC ORGANIZATION 10-12 (1970).

39. Havana Charter, *supra* note 37, art. 45.1(a)(x). This provision also requires that the agreement not be inconsistent with the objectives of the Charter and that it be given full publicity. *Id.*

40. ALSO PRESENT AT THE CREATION: DANA WILGRESS AND THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT AT HAVANA (Michael Hart ed., 1995).

41. Steve Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 ENVTL. L. REP. 10,567, 10,579 (1994).

42. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND; 33 I.L.M. 1128 (1994) [hereinafter Sanitary and Phytosanitary Agreement]

43. WTO Agreement Annex 1A.

44. Sanitary and Phytosanitary Agreement art 3.2. It is unclear whether this is an irrebutable presumption.

45. International Plant Protection Agreement, Dec. 6, 1951, art. VI, 150 U.N.T.S. 67.

MEAs covering issues outside SPM such as species protection, pollution, and waste trade.[46]

The trade and environment debate has illuminated the various ways that MEAs use trade measures.[47] One distinction concerns whether the treaty requires or merely countenances the trade measure. For example, the Fishing Nets Treaty requires parties to ban the landing or sale of fish below a prescribed size.[48] By contrast, the Wellington Convention on Driftnets states that parties may prohibit the landing of driftnet caught fish.[49]

Another distinction concerns the treatment of non-parties. For example, the Pan American Convention on Nature Protection establishes a certification system among parties.[50] The Convention bans imports solely from parties that have decided to protect a species.[51] Other treaties, such as the Basel and Bamako Conventions on Wastes, ban imports from non-parties.[52] Still other treaties generally ban trade in specified products with non-parties but allow trade with a non-party country that is in compliance with the Convention. An example is the Montreal Protocol on Ozone Protection.[53]

There has been a considerable amount of legal commentary on whether the trade provisions in particular MEAs violate WTO rules.[54] The key issue is how

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46. *See generally* THE RELATIONSHIP BETWEEN THE MULTILATERAL TRADING SYSTEM AND THE USE OF TRADE MEASURES IN MULTILATERAL ENVIRONMENTAL AGREEMENTS–SYNERGY OR FRICTION? (Asser Instituut ed., 1996).

47. *See* Steve Charnovitz, *A Taxonomy of Environmental Trade Measures,* 6 GEO. INT'L ENVTL. L. REV. 1 (1993).

48. Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish, Apr. 5, 1946, art. 9, 231 U.N.T.S. 200. This provision was based on an earlier treaty that did not come into force. Convention on the Regulation of Meshes of Fishing Nets and Size Limits of Fish, Mar. 23, 1937, art. 7, 7 Hudson 642 (not in force).

49. Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific Ocean, Nov. 24, 1989, art. 3(1)(a), 29 I.L.M. 1454, 1456 (1990). According to the treaty, such action needs to be consistent with international law. *Id.*

50. Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193.

51. *Id.* art. IX(2), 56 Stat. at 1355, 161 U.N.T.S. at 194.

52. Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, art. 4(5), 28 I.L.M. 649; Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 29, 1991, art. 4(1), 30 I.L.M. 773 (1991); *see generally* C. Russell Shearer, *Comparative Analysis of the Basel and Bamako Conventions on Hazardous Waste,* 23 ENVTL. L. 141 (1993).

53. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, art. 4(8), 26 I.L.M. 1541 (1987); *see generally* Hilary F. French, *Learning from the Ozone Experience, in* LESTER R. BROWN ET AL., STATE OF THE WORLD 1997, at 151–71 (1997).

54. *See* CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, THE USE OF TRADE MEASURES IN SELECT MULTILATERAL AGREEMENTS (1995); CENTRE FOR TRADE POLICY &

a WTO dispute panel would interpret and apply Article XX(b) and (g). In light of the holdings of the *Tuna-Dolphin* panels,[55] a panel might find the trade measures in an MEA to be a violation of the WTO.[56] Alternatively, a panel might distinguish an MEA from the national measures considered in the *Tuna-Dolphin* cases.[57] A panel also might abandon the holdings of the *Tuna-Dolphin* panels

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LAW, TRADE POLICY IMPLICATIONS OF THE BASEL CONVENTION EXPORT BAN ON RECYCLABLES FROM DEVELOPED TO DEVELOPING COUNTRIES (1996); ROSALIND TWUM-BARIMA & LAURA B. CAMPBELL, PROTECTING THE OZONE LAYER THROUGH TRADE MEASURES: RECONCILING THE TRADE PROVISIONS OF THE MONTREAL PROTOCOL AND THE RULES OF THE GATT (1994); Douglas Jake Caldwell, *International Environmental Agreements and the GATT: An Analysis of the Potential Conflict and the Role of a GATT "Waiver" Resolution*, 18 MD. J. INT'L L. & TRADE 174 (1994); James Cameron & Jonathan Robinson, *Use of Trade Provisions in International Environmental Agreements and their Compatibility with the GATT*, 2 Y.B. INT'L ENVTL. L. 3 (1991); Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL. AFF. 203, 216–18 (1992); Christine Crawford, *An Examination of Conflicts Between the Convention on International Trade in Endangered Species and the GATT in Light of Actions to Halt the Rhinoceros and Tiger Trade*, 7 GEO. INT'L ENVTL. L. REV. 555 (1995); Paul Demaret, *TREMs, Multilateralism, Unilateralism and the GATT, in* 1 TRADE & THE ENVIRONMENT: THE SEARCH FOR BALANCE 52–68 (James Cameron et al. eds., 1994); Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices, in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 120–42 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); Shannon Hudnall, *Towards a Greener International Trade System: Multilateral Environmental Agreements and the World Trade Organization*, 29 COLUM. J.L. & SOC. PROBS. 175 (1996); Benedict Kingsbury, *Environment and Trade: The GATT/WTO Regime in the International Legal System, in* ENVIRONMENTAL REGULATION AND ECONOMIC GROWTH 189–231 (A.E. Boyle ed., 1994); Winfried Lang, *Trade Restrictions as a Means of Enforcing Compliance with International Environmental Law, in* ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISM A VIABLE MEANS? 265 (Rüdiger Wolfrum ed., 1996); Shinya Murase, *Perspectives from International Economic Law on Transnational Environmental Issues*, 253 R.C.A.D.I 287 (1995); Markus Schlagenhof, *Trade Measures Based on Environmental Processes and Production Methods*, 29 J. WORLD TRADE 123, 135–41 (December 1995); Wen-Chen Shih, *Multilateralism and the Case of Taiwan in the Trade Environment Nexus: The Potential Conflict between CITES and GATT/WTO*, 30 J. WORLD TRADE 109, 126–39 (June 1996); David A. Wirth, *Trade Implications of the Basel Convention Amendment Banning North-South Trade in Hazardous Wastes*, 19 INT'L ENV'T REP. 796 (1996); Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841 (1996).

55. *See supra* text accompanying notes 28 & 29.

56. M. Düerkop, *Trade and Environment: International Trade Law Aspects of the Proposed EC Directive Introducing a Tax on Carbon Dioxide Emissions and Energy*, 31 COMMON MKT. L. REV. 807, 837–844 (1994); *GATT– Article XX: A Commentary*, 4 INT'L COUNCIL ON METALS & THE ENV'T NEWSL. 5 (1996) (declaring that some trade experts believe that MEAs like CITES and the Montreal Protocol have trade provisions which are at odds with the non-discriminatory requirements of the WTO).

57. *See, e.g.*, Robert E. Hudec, *The GATT/WTO Dispute Settlement Process: Can it Reconcile Trade Rules and Environmental Needs, in* ENFORCING ENVIRONMENTAL

which limited the scope of Article XX.[58] So far, no government has filed a complaint regarding an MEA, but this could happen at any time.[59]

Some commentators have looked outside the WTO to consider whether WTO rules are "opposable" to a government banning an import pursuant to an MEA. For example, Shinya Murase considers whether the WTO is a "self-contained regime" apart from public international law. Murase concludes that it is not.[60] E.U. Petersmann suggests that an MEA requiring trade restrictions among parties to the MEA would prevail as an *inter se* agreement superseding the WTO.[61] Recently, the International Court of Justice indicated, in the *Nuclear Weapons* decision, that "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[62] The relationship between this general obligation (*e.g.*, the obligation of Mexico to regulate tuna fishing by Mexicans on the high seas) and WTO rules remains to be determined.

There has also been some analysis of the efficacy of using trade measures in MEAs. Some studies emphasize the potential or actual contribution of trade measures;[63] while others are more skeptical as to the benefits.[64] The purpose of

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STANDARDS: ECONOMIC MECHANISM A VIABLE MEANS?, *supra* note 54, at 145–46; Paul J. Yechout, *In the Wake of Tuna II: New Possibilities for GATT-Compliant Environmental Standards*, 5 MINN. J. GLOBAL TRADE 247 (1996).

58. But most delegations that spoke in the CTE stated that Article XX does not permit a country to impose unilateral trade restrictions for the purpose of protecting environmental resources that lie outside its jurisdiction. CTE Report, *supra* note 12, ¶ 7.

59. Murray Smith, *Looking Beyond Singapore on Trade and Environment*, 4 INT'L COUNCIL ON METALS & THE ENV'T NEWSL. 2 (1996) (stating that differences among parties to MEAs about whether trade restrictions are appropriate could arise and could easily lead to a WTO dispute).

60. Shinya Murase, *Unilateral Measures and the WTO Dispute Settlement, in* ASIAN DRAGONS AND GREEN TRADE, *supra* note 10, at 137–44.

61. E.U. PETERSMANN, INTERNATIONAL AND EUROPEAN TRADE AND ENVIRONMENT LAW AFTER THE URUGUAY ROUND 41 (1995); *see also* Richard Eglin, *Trade and Environment in the World Trade Organization*, 18 WORLD ECON. 769, 774 (1995) (stating that among parties to both the WTO and an MEA, the provisions of the MEA would surely prevail in a conflict).

62. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 29 (July 8); *see also* Rio Declaration on Environment and Development, princ. 2, 31 I.L.M. 874 (1992).

63. *See* DUNCAN BRACK, INTERNATIONAL TRADE AND THE MONTREAL PROTOCOL (1996); Richard Blackhurst, *Alternative Motivations for Including Trade Measures in Multilateral Environmental Agreements*, 131 SWISS J. ECON. & STAT. 329 (1995); Raymond Clémençon, *Global Climate Change and the Trade System: Bridging the Culture Gap*, 4 J. ENV'T & DEV. 29 (1995); Charles Pearson, *Theory, Empirical Studies and their Limitations, in* ASIAN DRAGONS AND GREEN TRADE, *supra* note 10, at 26–28; Peter H. Sand, *Commodity or Taboo? International Regulation of Trade in Endangered Species, in* GREEN GLOBE YEARBOOK 1997 (forthcoming 1997).

trade measures in MEAs is generally to facilitate the operation of the MEA or to encourage countries to become parties.[65]

Far less analysis has been done to compare the use of trade measures in MEAs with their use in trade agreements. Yet the WTO specifically permits several trade measures. For example, the GATT permits parties to levy anti-dumping and countervailing duties against implicated imports.[66] The WTO Agreement on Safeguards permits parties to keep one import restraint agreement until the year 2000.[67] In one instance, the WTO actually commits parties to impose trade measures. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) requires parties to prohibit the importation of goods infringing intellectual property rights. This prohibition is triggered by the rights holder.[68]

The purpose of trade measures in the WTO varies. Some are protectionist (*e.g.*, anti-dumping).[69] Some aim to encourage other countries to meet international standards (*e.g.*, TRIPs). Some are political compromises. For example, allowing one restraint agreement until 2000 was necessary to gain support from the European Commission for the overall Uruguay Round accord.[70]

CTE Conclusions and Recommendations—MEAs

The following sections will list the main conclusions and recommendations of the CTE followed with a comment (in some instances) by the author.[71]

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64. *See* LAURA A. STROHM & PETER THOMPSON, INTERNATIONAL TRADE AND THE ENVIRONMENT: A REVIEW OF THE LITERATURE 67–72, 90–95 (1996); Jagdish Bhagwati & T.N. Srinivasan, *Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade, in* 1 FAIR TRADE AND HARMONIZATION, *supra* note 54, at 196–97; Richard Blackhurst & Arvind Subramanian, *Promoting Multilateral Cooperation on the Environment, in* THE GREENING OF WORLD TRADE ISSUES 247–68 (Kym Anderson & Richard Blackhurst eds., 1992); Thomas Princen, *The Zero Option and Ecological Rationality in International Environmental Politics*, 8 INT'L ENVTL. AFFAIRS 147–55 (1996).

65. Steve Charnovitz, *Trade Measures and the Design of International Regimes*, 5 J. ENV'T & DEV. 168, 174–84 (1996).

66. GATT art. VI.

67. Agreement on Safeguards, Apr. 15, 1994, art. 11(1)(b), 11(2), WTO Agreement, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994).

68. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 51, WTO Agreement, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 81 (1994) [hereineafter TRIPs].

69. *See* Gary N. Horlick, *How the GATT Became Protectionist–An Analysis of the Uruguay Round Draft Final Antidumping Code*, 27 J. WORLD TRADE 5 (Oct. 1993).

70. JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM 301 (1995).

71. The points listed are the author's attempt to distinguish the CTE's observations from more concrete conclusions and recommendations. The numeration is used to aid exposition. All conclusions and recommendations are cited to their

1. **The CTE endorses and supports multilateral solutions based on international co-operation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature.**[72]

Comment–This statement reflects Principle 12 of the Rio Declaration on Environment and Development (1992), which states, in part, that "[e]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus."[73] Principle 24 of the Stockholm Declaration on the Human Environment (1972), however, seems to urge a broader policy, namely, that "[C]o-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all states."[74] One difference is that the Stockholm language specifically addresses activities in "all spheres." For example, the plight of an endangered species indigenous to one country is within the purview of Stockholm Principle 24, but may not be within the purview of Rio Principle 12 and the CTE Report.

2. **Due respect must be afforded to both WTO Agreements and MEAs.**[75]

3. **Adequate international co-operation provisions, including among them—financial and technological transfers and capacity building, as part of a policy package in MEAs are important to facilitate the ability of governments, particularly of developing countries, to become parties to an MEA . . . .**[76]

Comment–Developing countries do need financial and technology transfers. Heretofore, the GATT/WTO has not carried out negotiations on these issues.

4. **Trade measures based on specifically agreed-upon provisions can also be needed in certain cases to achieve the environmental objectives of an MEA, particularly where trade is related directly to the source of an environmental problem. They have played an important role in some MEAs in the past, and they may be needed to play a similarly important role in certain cases in the future.**[77]

Comment–While this may be a useful consensus statement, it does not advance the debate. The phrase "related directly to the source of an environmental

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paragraph number in the CTE Report. **Boldface** is used for exact quotations from the Report; plain type is used for excerpts and paraphrases.

72. CTE Report, *supra* note 12, ¶ 171.

73. Rio Declaration on Environment and Development, *supra* note 62, 31 I.L.M. 874.

74. Declaration of the United Nations Conference on the Human Environment, princ. 24, 11 I.L.M. 1416 (1972).

75. CTE Report, *supra* note 12, ¶ 171.

76. *Id.* ¶ 173.

77. *Id.*

problem" is ambiguous. Is trade in turtle shell directly related to the source of the endangered turtle problem? Some might say no: the turtle is already dead. Arresting trade won't bring back the turtle and so is not related directly to the need for better regulation of capture.

5. The following points have been noted in the course of discussions in the CTE:

(i) Trade measures have been included in a relatively small number of MEAs. There is no clear indication for the time being of when or how they may be needed or used in the future . . . .

(ii) A range of provisions in the WTO can accommodate the use of trade-related measures needed for environmental purposes including Article XX. **This accommodation is valuable and it is important that it be preserved by all.**

(iii) When considering trade provisions in MEAs, mutual respect should be paid to technical and policy expertise in both the trade and environment areas.[78]

Comment–The CTE Report describes these merely as something noted in the discussion. They are not consensually agreed positions.

6. The CTE recommends that the WTO Secretariat continue to play a constructive role through its co-operative efforts with the Secretariats of MEAs and provide information to WTO members of trade-related work in MEAs.[79]

7. The CTE should also consider extending invitations to appropriate MEA institutions to attend relevant discussions of the CTE.[80]

Comment–The WTO Council's adoption of the CTE Report means that the CTE will now consider extending such invitations. If CTE members had favorably considered invitations to MEA institutions in 1994, the ensuing discussions might have been more productive.

8. Views differed on whether any modifications to the provisions of the multilateral trading system are required . . . .[81]

9. While WTO members have the right to bring disputes to the WTO dispute settlement mechanism, if a dispute arises between WTO members, parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanisms available under the MEA.[82]

Comment–This statement addresses the scenario where two countries are parties to both the MEA and the WTO. As explained above, this scenario is

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78. *Id.* ¶ 174(ii).
79. *Id.* ¶ 175.
80. *Id.*; *see also* ¶ 217.
81. *Id.* ¶ 176.
82. *Id.* ¶ 178.

legally simpler than when one WTO member is not a party to the MEA. The CTE suggests that governments consider dispute resolution under the MEA first. This is good advice, but it is just advice. The CTE did not consider the possibility of amending the WTO to require that governments utilize the MEA forum when available. It is interesting to note that one hybrid MEA—the Law of the Sea Convention—has a forum clause that refers disputes about production subsidies to the GATT.[83]

10. **Improved compliance mechanisms and dispute settlement mechanisms available in MEAs would encourage resolution of any such disputes within the MEA.**[84]

Comment–This is a constructive suggestion because MEA dispute procedures are far less developed than those in the WTO. Many environmentalists would like to model new MEA dispute procedures on the procedures available in the WTO.

11. **The CTE recognizes the benefit of having all relevant expertise available to WTO panels in cases involving trade-related environmental measures . . . .** The WTO Dispute Settlement Understanding (art. 13) **provides the means for a panel to seek information and technical advice from any individual or body which it deems appropriate and to consult experts, including by establishing expert review groups.**[85]

Comment–The Dispute Settlement Understanding gives panels the ability to solicit technical expertise.[86] In the first WTO dispute concerning an environmental law, however, the panel did not do so.[87] The CTE should have interviewed the panelists to find out why they did not seek technical assistance. The CTE might also have considered whether it is appropriate for panelists in environmental cases to be trade bureaucrats with no expertise in environmental law.

12. **Further work by the CTE is needed.**[88]

Comment– Last fall, the WTO denied a request by the Sierra Club Legal Defense Fund to send a brief to the WTO panel considering the meat hormone

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83. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 151(8), 21 I.L.M. 1261; Agreement Relating to the Implementation of Part XI, July 28, 1994, art. 1(2) & Annex, § 6(1)(f)(i), 33 I.L.M. 1309 (1994).

84. CTE Report, *supra* note 12, ¶ 178.

85. *Id.*

86. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994).

87. United States–Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 274 (1996); Steve Charnovitz, *The WTO Panel Decision on U.S. Clean Air Act Regulations,* 13 INT'L TRADE REP. 459, 459–60 (1996).

88. CTE Report, *supra* note 12, ¶ 176.

dispute.[89] The CTE did not explore how interested NGOs could transmit information to WTO panels.

These twelve points comprise the CTE's recommendations on MEAs. They are not a cornucopia of insight. They do not settle any of the concerns about MEAs that led to the establishment of the CTE.[90]

Perhaps the most important element missing is explicit attention to clarifying WTO rules.[91] As noted above, a wide spectrum of views exist regarding the WTO-legality of MEA trade bans. One camp thinks that such measures are WTO-legal. Another camp believes that such measures are WTO-illegal and favors that status. A third camp considers such measures WTO-illegal, but would favor a corrective amendment to the WTO.

In view of this divergence of opinion, clarifying the law might advance negotiations.[92] The G-7 Declaration of 1991 stated that: "We look to the General Agreement on Tariffs and Trade (GATT) to define how trade measures can properly be used for environmental purposes."[93] The WTO Ministerial Council has the authority to adopt interpretations of WTO agreements.[94] The CTE made no recommendations for obtaining an authoritative interpretation, however.

Under international law, a treaty is to be interpreted based on the "ordinary meaning" of its terms in light of its object and purpose.[95] The phrase "human, animal or plant life or health" in a treaty would not ordinarily be limited to the humans, animals, or plants in one party. GATT XX(f) provides an exception for measures "imposed for the protection of *national* treasures of artistic, historic or archaeological value."[96] Unlike Article XX(b), XX(f) uses the term "national."

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89. Letter from Jeffrey L. Gertler, Counsellor Legal Affairs Division, WTO to J. Martin Wagner, International Program, Sierra Club Legal Defense Fund (Oct. 17, 1996) (on file with author).

90. *See* Jessica Mathews, *Environmentally Challenged,* WASH. POST, Oct. 14, 1996, at A27 (suggesting that the MEA issue should have taken about a week to resolve).

91. *See* Schlagenhof, *supra* note 54 (stating that the WTO gives little guidance as to whether trade measures are a reasonable way of dealing with global and transboundary environmental problems).

92. *But see* Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law,* 48 STAN. L. REV. 1247, 1277 (1996) (suggesting that legal uncertainty may help prevent negotiating positions from hardening excessively).

93. WKLY. COMP. PRES. DOC. 968, LONDON ECONOMIC SUMMIT ECONOMIC DECLARATION: BUILDING WORLD PARTNERSHIP 27 (1991).

94. WTO Agreement art. IX(2); ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY INSTRUMENTS 214–15 (1995).

95. Vienna Convention on the Law of Treaties, art. 31(1), 8 I.L.M. 679 (1969). The Vienna Convention includes additional factors in art. 31(2)-(4), but none seem strongly applicable to GATT Article XX.

96. GATT art. XX(f) (emphasis added).

This language may show how the GATT's authors drafted an inward-looking exception.

If the meaning remains ambiguous, then international law provides that the treaty's preparatory work can be a supplementary means of interpretation.[97] From negotiating history, one can argue that the likely intention of GATT's authors was to provide an exception for the environment outside as well as inside of national jurisdiction.[98] One can infer the intent of the "General Exceptions" by the national laws existing in 1947 that might have actuated Article XX.[99]

By leaving the legal status of MEAs in doubt, the CTE may chill environmental treaty making. If a government were to lodge a WTO complaint about an MEA, the ensuing litigation could harm not only the MEA, but also the WTO. As one commentator has aptly noted, "[i]f the World Trade Organization were to rule, for example, that the Convention on International Trade in Endangered Species or some other equally popular agreement violated the provisions of the trade agreements, popular acceptance of the World Trade Organization would probably decline."[100]

The CTE also neglected to consider bringing MEAs into the WTO as Annex IV Plurilateral Trade Agreements.[101] Such agreements—for example, the International Dairy Agreement[102]—are part of the WTO, but bind only the parties to the plurilateral agreement.[103] Using Annex IV might be a way of recognizing MEA responsibilities within the WTO.

The CTE spent much of its time trying to craft a set of criteria for when nations may appropriately include trade measures in MEAs.[104] Governments could use such criteria either in: (1) assessing whether to give MEAs a waiver from WTO rules;[105] (2) applying GATT Article XX to MEAs; or (3) giving guidelines to MEA negotiators.[106] Some of the proposed criteria consider whether the MEA is open to all, has broad participation, and addresses a global or transboundary problem.[107] Other criteria consider whether the trade measure used

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97. Vienna Convention on the Law of Treaties, *supra* note 95, art. 32, 8 I.L.M. at 679; *see also* Nielsen v. Johnson, 279 U.S. 47, 52 (1929) (stating that when the meaning of a treaty is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties).

98. Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT'L L. & POL. 751, 782–83 (1994); Charnovitz, *supra* note 41, at 10,578–79.

99. *See* Charnovitz, *supra* note 23, at 40.

100. Nichols, *supra* note 31, at 464–65 (footnote omitted).

101. *See* WTO Agreement Annex 4.

102. International Dairy Agreement, B.I.S.D. (26th Supp.) at 9.

103. WTO Agreement arts. II:3, III:1, X:9.

104. CTE Report, *supra* note 12, ¶¶ 17–31.

105. The WTO Agreement provides authority to grant a temporary waiver from WTO obligations by consensus or a three-fourths vote. WTO Agreement art. IX:3.

106. Reiterer, *supra* note 10, at 113–18.

107. CTE Report, *supra* note 12, ¶¶ 18, 21.

is effective, is proportional to environmental harm, is the least trade restrictive option available, is necessary, and is not applied to obtain trade advantage.[108]

The CTE's exercise was ill-considered and came to naught. Within the CTE, some parties expressed pragmatic concerns that this approach could limit the flexibility of environmental policymakers and act as a disincentive to multilateral action.[109] But the search for criteria had a more basic problem—the CTE's tunnel vision.

Consider the following provision in an important treaty:

> The contracting parties recognize further that it may be necessary for those contracting parties [i.e., developing countries], in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement.

How might the criteria under consideration in the CTE be applied to this trade provision? First, the provision is not addressed to a *global or transboundary* problem, but rather to the domestic problem of economic development. Second, the use of import restraints are not an *effective* way to raise the general standard of living.[110] Third, import measures are the most—rather than the *least—trade restrictive* instrument. Fourth, protective measures affecting imports can be used to achieve *trade advantage.* Therefore, measured against the CTE's criteria, the trade provision quoted above would appear to bat zero.

The quoted provision, of course, comes from the GATT.[111] The fact that the GATT itself contravenes many of the criteria being vetted does not seem to have discomfited anyone on the CTE.[112] Even governments that routinely employ trade measures to protect favored domestic industries evinced no embarrassment in casting doubt on the propriety of trade measures in MEAs.[113] Yet the CTE

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108. *Id.* ¶¶ 18, 19, 21, 30.

109. *Id.* ¶ 29.

110. *See* DOUGLAS A. IRWIN, AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE 221–24 (1996); John Whalley, *Trade and Environment, the WTO, and the Developing Countries, in* EMERGING AGENDA FOR GLOBAL TRADE: HIGH STAKES FOR DEVELOPING COUNTRIES 91–92 (1996).

111. GATT art. XVIII:2; *see also* Safeguard Action for Development Purposes, Nov. 29, 1979, GATT B.I.S.D. (26th Supp.) at 209, ¶ 1 (1980).

112. Steve Charnovitz, *Multilateral Environmental Agreements and Trade Rules,* 26 ENVTL. POL'Y & L. 163, 167–68 (1996).

113. *Compare* CTE Report, *supra* note 12, ¶¶ 11, 13, 25 (proposals from India and ASEAN) *with* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TRADE, EMPLOYMENT AND LABOR STANDARDS 139–40 (1996) (classifying Indonesia, Philippines, and Thailand as having a moderatively restrictive trade regime and India as having a restrictive regime).

seems not to have considered test-driving the proffered MEA criteria by applying them first to multilateral trade agreements.

The CTE also neglected to examine whether the WTO should recognize environmental requisites for harmonious trade relationships. As many economists have noted, welfare gains from free trade may not exist when spillovers from production fall on other countries.[114] For example, if Country A produces widgets by polluting Country B, then it may not be in Country B's interest to import widgets from Country A. Yet the WTO may forbid Country B to embargo A's widgets for environmental reasons. Perversely, the WTO would allow Country B to impose an anti-dumping duty on A's widgets if (1) these widgets were priced below the price in A's home market, and (2) these widgets caused commercial injury to B's widget producers.[115] B's widget consumers would have no right to complain to the WTO. This situation demonstrates the WTO's bias in favor of special producer interests and against general environmental and consumer interests.

Environmentalists have suggested that the WTO needs to free itself from this mortmain of mercantilism. One possible reform is to impose environmental preconditions to WTO membership modeled on the intellectual property provisions approved during the Uruguay Round.[116] The TRIPs Agreement requires WTO members to comply with various provisions of intellectual property treaties.[117] Were the WTO to require its members to adhere to certain principles in MEAs, it could reduce clashes between environmental governance and trade rules.[118]

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114. C. FORD RUNGE, FREER TRADE, PROTECTED ENVIRONMENT 23 (1994); Kym Anderson & Richard Blackhurst, *Trade, the Environment and Public Policy, in* THE GREENING OF WORLD TRADE ISSUES, *supra* note 64, at 19.

115. *See* GATT art. VI:1.

116. Horst Siebert, *Trade Policy and Environmental Protection*, 19 WORLD ECON. 183, 193 (1996) (proposing that WTO members be induced to adhere to international environmental agreements); Whalley, *supra* note 110, at 88–89; *see also United States–Restrictions on Imports of Tuna*, *supra* note 28, ¶ 6.4 (suggesting that the GATT could act to address international environmental problems); Alice Enders, *The Role of the WTO in Minimum Standards, in* CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION 71 (Pitou van Dijck & Gerrit Faber eds., 1996) (pointing out that the WTO would need to identify environmental rights holders).

117. TRIPs arts. 2.1, 3.1, & 9.1; PETERSMANN, *supra* note 61, at 93–94.

118. *Compare* Esty, *supra* note 16, at 73 (stating that the legitimacy of the international trading system depends on developing a structure of GATT precepts that reinforce environmental norms) *with* SCHMIDHEINY, *supra* note 3, at 70 (stating that free trade cannot be made to support the internalizing of environmental costs).

B. Environmental Policies and the Trading System

CTE participants discussed a number of issues under this rubric, such as the compatibility of trade and environmental policymaking principles.[119] The only conclusion reached by the CTE is that further work is needed.[120]

C. Environmental Taxes and the Trading System

Environmental taxes are an important issue because such taxes can be a first-best economic instrument to deal with market failure.[121] Thus, limitations imposed by the WTO on such taxes would be a serious problem. Some commentators have suggested that one could interpret the WTO to limit the use of eco-taxes.[122] The only conclusion reached by the CTE is that further work is needed.[123]

D. Packaging, Labeling, and Recycling

Packaging, labeling, and recycling are critical issues in the trade and environment debate.[124] They are important as potentially effective environmental instruments, on the one hand, and potential trade barriers on the other.[125] The CTE Report states that further work is needed on all these issues, but addresses only environmental labeling, known as eco-labeling.[126]

Governments have three main interests in eco-labeling. One is to promote accurate eco-labeling in order to help consumers make informed choices.[127]

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119. CTE Report, *supra* note 12, ¶¶ 180–81.

120. *Id.* ¶ 181.

121. STROHM & THOMPSON, *supra* note 64, at 81–82.

122. Charnovitz, *supra* note 1, at 498-513 (1994); Charles S. Pearson, *Testing the System: GATT + PPP = ?*, 27 CORNELL INT'L L.J. 553, 574 (1994); Steve Charnovitz, *The WTO's "Alcoholic Beverages" Decision*, 6 REV. EUR. COMMUNITY & INT'L ENVTL. L. (forthcoming 1997) (analyzing recent WTO decision with implications for environmental taxes); *see generally* RICHARD A. WESTIN, ENVIRONMENTAL TAX INITIATIVE AND MULTILATERAL TRADE AGREEMENTS: DANGEROUS COLLISIONS (1997).

123. CTE Report, *supra* note 12, ¶ 182.

124. *See generally* Alexandra Haner, *Will the European Union Packaging Directive Reconcile Trade and the Environment?*, 18 FORDHAM INT'L L.J. 2187 (1995); Andre Nollkaemper, *Protecting Forests Through Trade Measures: The Search for Substantive Benchmarks*, 8 GEO. INT'L ENVTL. L. REV. 389 (1996) (discussing labeling).

125. VOGEL, *supra* note 1, at 11–12, 40–51, 77–78, 82–93, 228–31.

126. CTE Report, *supra* note 12, ¶¶ 183, 186.

127. *See Report of the United Nations Conference on Environment and Development*, Annex II, Chapter 8, June 14, 1992, Agenda 21, at ¶¶ 4.21, 4.22(b), 9.12(l), 14.76(d), U.N.Doc.A/CONF.151/PC/100/Add.1, U.N. Sales No. E.93.I.11

Another is to promote transparency in the operation of labeling systems so as to avoid disguised barriers to trade.[128] A third is to utilize eco-labeling as a market-based instrument for environmental management.[129] Although these interests (or at least the first two) are consonant with the WTO's aims, it remains uncertain whether the WTO has jurisdiction over voluntary labeling systems.[130] In addition, the WTO rules for mandatory eco-labels are murky.[131]

During the CTE discussions, many delegations took the view that eco-labels linked to production processes were illegitimate under WTO rules.[132] Their argument is that the WTO cannot allow importing countries to distinguish products on the basis of their production process. It is hard, however, to reconcile this view with other parts of the WTO that accord validity to such process distinctions. For example, the Agreement on Rules of Origin allows an importing country to use a "criterion of manufacturing or processing operation" in determining the national origin and hence the importability of a product.[133] The purpose of such rules of origin is to restrict trade in order to safeguard domestic competitiveness.[134]

(1992) (regarding labeling) [hereinafter Agenda 21]; JULIAN MORRIS & LYNN SCARLETT, BUYING GREEN: CONSUMERS, PRODUCT LABELS AND THE ENVIRONMENT (Reason Foundation Policy Study No. 217, Nov. 1996); NATIONAL WILDLIFE FEDERATION, GUARDING THE GREEN CHOICE (1996).

128. Laura B. Campbell, *Making Green Labels Fair,* 7 OUR PLANET 33 (No. 1, 1995); Kristin Dawkins, *Ecolabeling: Consumer's Right to Know or Restrictive Business Practice?, in* ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISM A VIABLE MEANS?, *supra* note 54, at 501.

129. *See, e.g.*, Kristine Forstbauer & John Parker, *The Role of Ecolabeling in Sustainable Forest Management,* 11 J. ENVTL. L. & LITIG. 165 (1996).

130. *See generally* Christian Tieje, *Voluntary Eco-Labeling Programmes and Questions of State Responsibility in the WTO/GATT Legal System,* 29 J. WORLD TRADE 123 (Oct. 1995).

131. *See generally* Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and its Role in the "Greening" of World Trade,* 21 COLUM. J. ENVTL. L. 205 (1996) (presenting a useful typology for labels and discussing the WTO legal issues).

132. CTE Report, *supra* note 12, ¶¶ 70, 75.

133. Agreement on Rules of Origin, Dec. 15, 1993, art. 2(a)(iii), 2(c), WTO Agreement, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994) [hereinafter Agreement on Rules of Origin]; *see also* Joseph A. LaNasa III, *Rules of Origin and the Uruguay Round's Effectiveness in Harmonizing and Regulating Them,* 90 AM. J. INT'L L. 625, 634 (1996).

134. *See* Agreement on Rules of Origin art. 1(2).

E. CTE Conclusions and Recommendations—Eco-labels[135]

13. Well-designed eco-labeling schemes/programs can be effective instruments of environmental policy to encourage the development of an environmentally-conscious consumer public.[136]

14. Increased transparency can help deal with trade concerns regarding eco-labeling schemes/programs while it can also help to meet environmental objectives by providing accurate and comprehensive information to consumers . . . . The CTE stresses the importance of WTO members following the provisions of the TBT Agreement and its Code of Good Practice, including those of transparency.[137]

15. Further work by the CTE is needed.[138]

Comment–All of the recommendations on eco-labeling are homilies. The TBT Agreement and its Code of Good Practice are already WTO obligations for all members. The CTE does nothing to clarify the WTO's rules for mandatory and voluntary labeling systems. The CTE also fails to address the need to assure that eco-labeling criteria reflect the latest technological developments. Otherwise, there is a danger that eco-labels may impose a perverse incentive against adopting new production processes.

F. Information Regarding Trade-Related Environmental Measures

16. The CTE recognizes that trade-related environmental measures should not be required to meet more onerous transparency requirements than other measures that affect trade.[139] The CTE concludes that no modifications to WTO rules are required to ensure adequate transparency for existing trade-related environmental measures.[140]

17. The implementation of transparency notifications should be improved.[141] The WTO Secretariat should keep its database up

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135. The numbering will pick up from the CTE conclusions discussed above.

136. CTE Report, *supra* note 12, ¶ 183.

137. *Id.* ¶¶ 184–85; The Uruguay Round Agreement on Technical Barriers to Trade, Apr. 14, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994) [hereinafter TBT Agreement]. Annex 3 is the Code of Good Practice for the Preparation, Adoption and Application of Standards.

138. *Id.* ¶ 186.

139. *Id.* ¶ 188.

140. *Id.* ¶ 189.

141. *Id.* ¶ 190.

to date and co-operate with other international organizations collecting similar data.[142]

G. Market Access, Trade Restrictions, and Trade Distortions

Market access is perhaps the most important CTE agenda item, particularly for developing countries. Market access involves three main issues. First, do environmental measures constitute a significant market barrier?[143] If so, what should be done to remedy this impact? Second, what environmental gains can be achieved from removing existing trade restrictions?[144] If these benefits are significant, how should such restrictions be attacked by new trade negotiations? Third, what environmental gains can be achieved from removing existing trade distortions, such as subsidies of energy, timber, water, agriculture, mining, and fisheries?[145] If these benefits are significant, how should the WTO Committee on Subsidies and Countervailing Measures attack such subsidies?[146]

CTE Conclusions and Recommendations—Market Access

18. **The CTE emphasizes the importance of market access opportunities in assisting developing countries to obtain the resources to implement adequate developmental and environmental policies. . . .**[147]

19. **It has been recognized that trade liberalization including the elimination of trade restrictions and distortions can yield developmental and environmental benefits by facilitating a more efficient allocation of resources. At the same time, however, the CTE underlines that implementing appropriate environmental**

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142. *Id.* ¶¶ 192–93.

143. *See* STROHM & THOMPSON, *supra* note 64, at 51–54; JAMES LEE & ROLAND MOLLERUS, TRADE-RELATED ENVIRONMENTAL MEASURES: SIZING AND COMPARING IMPACTS (GETS Study 96–4, Nov. 1996) *available in* <http://gurukul.ucc.american.edu/ted/gets.htm>.

144. *See* Kym Anderson, *Environmental Standards and International Trade, in* ANNUAL BANK CONFERENCE ON DEVELOPMENT ECONOMICS 1996 (M. Bruno & B. Pleskovic eds., 1996).

145. *See generally* OECD, THE ENVIRONMENTAL EFFECTS OF TRADE 19–122 (1994); David Malin Roodman, *Reforming Subsidies, in* STATE OF THE WORLD 1997, at 132–50 (Lester R. Brown et al. eds., 1997).

146. The WTO Agreement on Subsidies and Countervailing Measures is overseen by a Committee of that name. *See* Agreement on Subsidies and Countervailing Measures, Apr. 14, 1994, art. 24, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994).

147. CTE Report, *supra* note 12, ¶ 197.

policies determined at the national level as part of sustainable development strategies are (sic) needed in order to ensure that these benefits are realized and that trade-induced growth will be sustainable.[148]

20. **Further work on this item should be based on analytical work and empirical evidence . . . .**[149]

Comment–The lack of analytical preparation for the CTE was a severe stumbling block. More research is needed. The entire WTO research staff for all issues consists of only nine professionals.[150]

21. **Further work should also focus on . . . the contribution that improved market access opportunities could make in assisting developing countries in implementing adequate environmental policies determined at the national level.**[151]

Comment–This is a constructive suggestion. More income from trade could help developing countries gain resources that they could use to improve environmental management.

22. **Further work is needed to ensure that the implementation of environmental measures does not result in disguised restrictions on trade . . . .**[152]

Overall Evaluation of Market Access Recommendations

Despite meritorious proposals by Argentina,[153] Australia,[154] and Norway,[155] the CTE was unable to offer much substance. The CTE did not deepen our understanding of the issues. Nor did it fashion any consensus for new WTO action to remove trade restrictions and distortions.

H. Domestically Prohibited Goods

The GATT considered the issue of Domestically Prohibited Goods (DPGs) during the Uruguay Round, but failed to resolve the problem.[156] Two main

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148. *Id.*
149. *Id.* ¶ 198.
150. Letter from Richard Blackhurst, Director, Economic Research and Analysis, WTO, to Steve Charnovitz (Oct. 11, 1996) (on file with author).
151. CTE Report, *supra* note 12, ¶ 199.
152. *Id.*
153. *Id.* ¶ 115.
154. *Id.* ¶¶ 99, 116.
155. *Id.* ¶ 121.
156. *See generally* CTE Report, *supra* note 12, ¶¶ 123–31; Blank, *supra* note 33, at 92–95; John Sankey, *Domestically Prohibited Goods and Hazardous Substances–A New GATT Working Group is Established*, 23 J. WORLD TRADE 99 (Dec. 1989).

issues exist. First, when a government bans the sale of an unsafe good domestically, but allows export of the good, should it have an obligation to notify the government of the importing country about each impending shipment? Second, if an importing government receives such a notice, could it legally ban the import on that ground under GATT rules?[157]

At the CTE, Nigeria submitted a proposal that would require exporting countries to notify importing countries about DPGs if such notice is not already given pursuant to another international agreement.[158] Nigeria and other developing countries also expressed concerns that they do not have sufficient timely information about the characteristics of DPGs nor the technical capacity to make informed decisions about them.[159]

CTE Conclusions and Recommendations--DPGs

23. **Governments, not already doing so, should consider participating in international organizations which have the expertise to provide technical assistance in this field.**[160] **Governments should provide technical assistance to developing countries.**[161]

24. The WTO Secretariat should **determine what information is already available in the WTO on trade-related environmental measures which relate to trade in domestically prohibited goods, including restrictions or bans on domestic sale or use of products which are or may be exported . . . .**[162]

25. **WTO members should submit any additional information they might have to the Secretariat.**[163]

26. The information in #24 and #25 should be installed in the database mentioned in #17.

27. **The CTE needs to continue to concentrate on what contribution could be made in this area by the WTO, bearing in mind the need for this work neither to duplicate nor to deflect**

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157. Some countries do ban imports of goods solely on the grounds that their sale is prohibited in the country of production. *See, e.g.*, 21 U.S.C. § 381 (1995) (banning imports of articles forbidden or restricted in sale in the country in which it was produced or from which it was exported).

158. CTE Report, *supra* note 12, ¶ 125.

159. *Id.* ¶ 200.

160. *Id.* ¶ 201.

161. *Id.* ¶ 205.

162. *Id.* ¶ 203.

163. *Id.*

attention from the work of other specialized inter-governmental fora.[164]

Overall Evaluation of Recommendations on DPGs

The CTE seems clueless on how to deal with this issue. It is not clear what the WTO could do that is not being done elsewhere. Apparently, Nigeria thought the WTO did have a potential role. The DPG recommendations provide a good example of how the agenda of the CTE—which includes some environmental issues—was mismatched with the composition of the CTE—which was largely trade negotiators. Participating by mediating groups like NGOs could have helped clarify Nigeria's concerns.

I. Intellectual Property Rights

Three main issues arise under this rubric. First, the TRIPs Agreement states that the protection of intellectual property rights "should contribute to the promotion of technological innovation and to the transfer and dissemination of technology . . . ."[165] This language has led to suggestions that the WTO should review the adequacy of technology transfer and, in particular, of environmentally-sound technology.[166] A second issue is whether TRIPs puts indigenous people at a disadvantage in not providing legal protection for traditional knowledge.[167] A third issue is the relationship between the WTO and biodiversity and, in particular, the Convention[168] on Biological Diversity.[169] The CTE has not defined these issues well.

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164. *Id.* ¶ 202.

165. TRIPs art. 7.

166. CTE Report, *supra* note 12, ¶¶ 132–38.

167. *Id.* ¶¶ 142–43; Dinah L. Shelton, *Fair Play, Fair Pay: Preserving Traditional Knowledge and Biological Resources*, 5 Y.B. INT'L ENVTL. L. 1994, at 77, 107–09; David Runnalls, *What the North Must Do, in* ASIAN DRAGONS AND GREEN TRADE, *supra* note 10, at 183–84; Justin R. Ward, *Symposium: Environmental Reform Priorities for the World Trading System*, 35 SANTA CLARA L. REV. 1205, 1208 (1995).

168. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992).

169. CTE Report, supra note 12, ¶¶ 142–51; *see generally* BIODIVERSITY AND THE LAW chs. 6, 7, 8, 9, 14 (William J. Snape III ed., 1996); Christopher D. Stone, *What to Do About Biodiversity: Property Rights, Public Goods, and the Earth's Biological Riches*, 68 S. CAL. L. REV. 577 (1995).

CTE Conclusions and Recommendations–TRIPs

28. The CTE noted that the TRIPs Agreement has an essential role in facilitating environmentally-sound technology.[170]

29. Further work is needed in the CTE on: (a) the generation of environmentally sound technology and products, (b) access to and transfer of such technology and products to developing countries, (c) unsound technologies and products, (d) incentives for the conservation of biological diversity, and (e) fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including the knowledge of indigenous and local communities.[171]

30. The exchange of information between the CTE and the [Secretariat of the] **Convention on Biological Diversity might be pursued further as appropriate.**[172]

Overall Evaluation of Intellectual Property Recommendations

These recommendations are vague, but constructive. The GATT did not have any significant role in technology transfer so it will be interesting to watch developments unfold in the WTO. The inclusion of the concern about indigenous peoples is a new step for the trading system.

J. Services

The WTO General Agreement on Trade in Services contains a General Exception in Article XIV(b) parallel to GATT Article XX(b); there is no exception—akin to GATT Article XX(g)—for the conservation of natural resources.[173] Because it was not clear to negotiators whether a natural resource exception was needed, WTO parties reached a decision at the end of the Uruguay Round that the CTE would "examine and report, with recommendations if any, on the relationship between services trade and the environment including the issue of sustainable development."[174]

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170. CTE Report, *supra* note 12, ¶ 207.

171. *Id.* ¶ 208.

172. *Id.* ¶ 209.

173. General Agreement on Trade in Services, Apr. 14, 1994, art. 14, WTO Agreement, Annex 1B, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1168 (1994) [hereinafter GATS].

174. Decision on Trade in Services and the Envoronment, *in* LEGAL-INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, *supra* note 4. The Decision also stated that the CTE

CTE Conclusions and Recommendations—Services

31. **Preliminary discussion in the CTE to date on this Item has not led to the identification of any measures that Members feel may need to be applied for environmental purposes to services trade which would not be covered adequately by GATS** [General Agreement on Trade in Services] **provisions, in particular Article XIV(b).**[175]

32. **Further work by the CTE is necessary before it could draw any conclusions on the relationship between services trade and the environment.**[176]

Overall Evaluation of Services Recommendations

Services (e.g., tourism and transportation) clearly do have potential implications for the environment.[177] The CTE does not commit itself to carrying out any research on this issue.

K. Involvement of NGOs in the WTO

The WTO Decision on Trade and Environment of 1994 invited the CTE "to provide input to the relevant bodies [of the WTO] in respect of appropriate arrangements for relations with intergovernmental and non-governmental organizations referred to in Article V of the WTO."[178] Article V(2) of the WTO provides that the WTO General Council "may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO."[179] Governmental participants at the CTE articulated two divergent views concerning this issue. Some governments said that non-governmental organizations (NGOs) could provide information and technical expertise and that their presence in CTE meetings would be useful.[180] Other governments said that "the WTO's deliberations could be compromised if

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shall examine the relevance of inter-governmental agreements on the environment and their relationship to the GATS.

175. CTE Report, *supra* note 12, ¶ 210.

176. *Id.* ¶ 211.

177. INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, THE WORLD TRADE ORGANIZATION AND SUSTAINABLE DEVELOPMENT: AN INDEPENDENT ASSESSMENT 25–27 (1996).

178. Decision on Trade and Environment para. 2.

179. WTO Agreement art. V(2). For a discussion, see Steve Charnovitz & John Wickham, *Non-Governmental Organizations and the Original International Trade Regime*, 29 J. WORLD TRADE 111 (Oct. 1995).

180. CTE Report, *supra* note 12, ¶ 163.

public interest groups were allowed to participate directly in its work."[181] One may note that, unlike the GATT, the WTO directs governments to impose various disciplines on NGOs.[182] This underlines the issue of whether NGOs—now being the object of WTO rules—should have a role in administering those rules.

CTE Conclusions and Recommendations—NGOs

33. **It is recognized in the CTE that there is a need to respond to public interest in WTO activities in the area of trade and environment . . . .**[183]

34. **The CTE considers that closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where primary responsibility lies for taking into account the different elements of public interest which are brought to bear on trade policy-making.**[184]

Comment–The CTE presumes that trade policy-making should occur at the national level, but that presumption is questionable in a global economy. Few, if any, national trade policies can be carried out without affecting other countries. Of course, in spite of what would be economically rational for the world economy, much trade policy-making persists at the national level. The issue before the CTE was how to implement WTO Article V which establishes the principle that the WTO should consult and cooperate with NGOs. When the CTE says that national governments should improve their internal cooperation, it is dodging the issue it was asked to consider.

35. **All remaining restricted documents prepared by the Secretariat for the CTE during 1994-96 should be derestricted. The CTE encourages governments who have not derestricted their proposals to do so.**[185]

Comment–In comparison to prior GATT non-disclosure practices,[186] the WTO did well in providing information to the public about CTE deliberations.[187]

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181. *Id.* ¶ 164.

182. Sanitary and Phytosanitary Agreement art. 13; TBT arts. 3.1, 4.1, 8.1, Annex 3; GATS art. 1.3(a).

183. CTE Report, *supra* note 12, ¶ 212.

184. *Id.* ¶ 213.

185. *Id.* ¶ 215.

186. *See* SCHOTT, *supra* note 14, at 36 (remarking that the WTO has few secrets and keeps virtually none); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1255 (1992).

187. CTE Report, *supra* note 12, ¶ 216.

The WTO issued an informative newsletter after each CTE meeting.[188] There is also a need for disclosure of WTO documents outside of the CTE process.[189] Environmentalists are interested in all aspects of the WTO's work as are other NGOs.

36. **The CTE recommends that the Secretariat continue its interaction with NGOs which will contribute to the accuracy and richness of the public debate on trade and environment.**[190]

Comment–So far, most of the WTO's communications with the public have flowed only in one direction.

37. **The CTE has extended observer status to all those intergovernmental organizations which have so requested . . . .** The possibility exists to consider future requests from MEAs.[191]

Comment–Representatives from inter-governmental organizations may attend, but may not speak at the CTE meetings. The CTE failed to extend an invitation to the World Conservation Union (IUCN)[192]—an organization composed of government agencies and NGOs.[193] Yet in contrast, the CTE did invite representatives of the business-dominated International Organization for Standardization (ISO) to attend meetings even though the ISO's organizational status is similar to that of the IUCN.[194]

38. **Discussions have demonstrated that the multilateral trading system has the capacity to further integrate environmental considerations and enhance its contribution to the promotion of sustainable development without undermining its open, equitable and non-discriminatory character.**[195]

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188. *See generally Trade and the Environment* (World Trade Organization periodic newsletter). The newsletter does not attribute remarks to particular individuals. In some instances, it does identify the government making a point.

189. L. BRENNAN VAN DYKE & JOHN BARLOW WEINER, AN INTRODUCTION TO THE WTO DECISION ON DOCUMENT RESTRICTION 15-19 (International Centre for Trade and Sustainable Development, 1996).

190. CTE Report, *supra* note 12, ¶ 216.

191. *Id.* ¶ 217; *see also id.* ¶ 175.

192. *See* World Conservation Union, *The International Union for the Conservation of Nature and Natural Resources: The Issue of Sustainable Development*, 7 COLO. J. INT'L L. & POL'Y 213 (1996).

193. *See* CTE Report, *supra* note 12, ¶ 160 n. 76.

194. UNION OF INTERNATIONAL ASSOCIATIONS, 1 Y.B. INT'L ORG. 1996/1997, at 1032 (33rd ed. 1996) (discussing ISO). The ISO participates as an observer in the CTE, with the following understanding (recorded in the minutes, WT/CTE/M/6, (17 January 1996)) – that it participates on an "ad hoc basis as an observer at formal and informal meetings of the Committee where issues related to Item 3 would be discussed and the Committee might benefit from input by the ISO." The ISO also has observer status in the WTO's TBT Committee.

195. CTE Report, *supra* note 12, ¶ 167.

Comment–The WTO's capacity to enhance sustainable development is not in doubt. What is in doubt is whether the WTO has the will to undertake needed reforms.

39. [P]**olicy coordination between trade and environment officials at the national level has an important role to play. Work in the CTE is helping to better equip trade officials to make their contribution in this area.**[196]

Comment– Policy coordination at the national level has been the CTE's most beneficial result. Some governments have sent environmental officials as part of their national teams[197] and their CTE participation has equipped them to make a better contribution.

40. **WTO Member governments are committed not to introduce WTO-inconsistent or protectionist trade restrictions or countervailing measures in an attempt to offset any real or perceived adverse domestic economic or competitiveness effects of applying environmental policies . . . .**[198]

Comment– Member governments were presumably already committed not to take WTO-inconsistent measures.[199] This statement is new for the WTO, but is similar to a provision in Agenda 21.[200] Some potential use of countervailing measures related to environmental policy may not be WTO-inconsistent.[201]

41. [B]**earing in mind the fact that governments have the right to establish their national environmental standards in accordance with their respective environmental and developmental conditions, needs and priorities, WTO Members note that it would be inappropriate for them to relax their existing national environmental standards or their enforcement in order to promote their trade.**[202]

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196. *Id.* ¶ 168.

197. One estimate is that the WTO Committee had about 70 trade officials and less than 10 environmental officials. *See* Michael Battye, *Environmental Groups Blast World Trade Body*, Dec. 8, 1996, *available in* LEXIS, News Library, Reuter World Service File.

198. CTE Report, *supra* note 12, ¶ 169.

199. WTO Agreement art. XVI(4).

200. Agenda 21, *supra* note 127, ¶ 2.22(e) (stating that governments should avoid using trade restrictions to offset differences in cost arising from differences in environmental standards).

201. A recent study explains: "If a particular industry is singled out for special exemption from environmental regulation is that tantamount to a subsidy of the sort that would be countervailable? In theory, the answer to this question must be 'yes.'" *See* Ronald A. Cass & Richard D. Boltuck, *Antidumping and Countervailing-Duty Law: The Mirage of Equitable International Competition, in* 2 FAIR TRADE AND HARMONIZATION, *supra* note 54, at 396–97.

202. CTE Report, *supra* note 12, ¶ 169.

Comment– This is a new commitment for the WTO. It resembles a provision in the NAFTA stating "[t]he Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures."[203] Both provisions are solely hortatory. The two provisions are different in some ways. The WTO provision addresses trade whereas the NAFTA provision addresses investment. The WTO provision addresses only environmental standards whereas the NAFTA provision also addresses health and safety measures.

Overall Evaluation of NGO Recommendations

NGO involvement in the WTO remains at a primitive stage. The CTE did not hold any public hearing for NGOs, nor did it meet with NGOs privately. According to one commentator, "the WTO proceeds as if the post-Rio [referring to the Rio Conference on Environment and Development] compact of collaboration between the government and non-government sectors did not exist."[204] The CTE failed to move the WTO closer toward a faithful implementation of WTO Article V(2).

L. Future of the CTE

The CTE was created in 1994 to have a two-year life. Developing countries had initially opposed establishing a committee and then relented on the condition that the CTE have a fixed term.[205]

42. The CTE recommends that it continue its work with its original mandate and terms of reference.[206]

Comment–Just before the Singapore conference, one environmental group, Friends of the Earth (International), called on the WTO to discontinue the CTE. Friends of the Earth declared: "The CTE is a waste of time and money and threatens to stand in the way of real environmental progress."[207] This position was supported by the Competitive Enterprise Institute (a free market NGO in Washington D.C.). In November 1996, this author recommended that the WTO abolish the CTE or if that were impossible, that the WTO revise its mandate to provide for more balanced discussions.[208] At Singapore, the trade ministers

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203. NAFTA, *supra* note 7, art. 1114(2), 32 I.L.M. at 642.

204. Paula DiPerna, *1997: The Year of Making Tough Choices,* EARTH TIMES, Jan. 1–15, 1997, at 6–7.

205. *See* Frances Williams, *GATT Draft Ready on Eco-Issues*, FIN. TIMES, Mar. 24, 1994, at 4; Frances Williams, *WWF Calls for GATT Green Plan*, FIN. TIMES, Feb. 2, 1994, at 5.

206. CTE Report, *supra* note 12, ¶ 219.

207. Battye, *supra* note 197.

208. Steve Charnovitz, *The Trade & Environment Debate: To Singapore and*

renewed the CTE reflexively, without any debate as to its workability. They also did not take into account the possible negative impact of the CTE on the trade and environment work of other institutions. For example, the Organisation for Economic Co-Operation and Development (OECD) sharply reduced its analytical program on trade and environment in deference to the CTE. Thus, continuing the CTE may not only be ineffective, but it may also be counterproductive.

M. Issues Not Considered

The CTE failed to consider one important issue in depth—environmental reviews of proposed trade agreements. It is well established that trade flows and trade agreements can affect the environment.[209] Nevertheless, the GATT carried out its Uruguay Round over eight years without any analysis of the potential environmental implications. Some commentators have suggested that the WTO establish a mechanism for future reviews.[210] The CTE, however, made no comment on this proposal.[211]

The issue of environmental reviews may lie outside the CTE's terms of reference.[212] The CTE's task is to look at "environmental policies relevant to trade" and at "environmental measures with significant trade effects."[213] It also must look at the "environmental benefits of removing trade restrictions and distortions."[214] Its terms of reference, however, do not include *trade* measures with significant environmental effects or the environmental *costs* of removing trade restrictions. Thus, the WTO asked the CTE to look only at an optimistic scenario.

The CTE also failed to consider the relationship between environmental protection and investment.[215] This issue was not put in the CTE's mandate in 1994. At the Singapore Ministerial, the WTO agreed to establish a working group to examine the relationship between trade and investment.[216] But the trade

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Beyond, Presentation to the Overseas Development Council, Conference on Shaping the Trading System for Global Growth and Employment, Nov. 21, 1996, *available in* <http://www.gets.org/gets>; *see also* Steve Charnovitz, *Environmental Blindness?*, 7 OUR PLANET 23, 24 (No. 1 1995) (expressing skepticism that CTE would succeed).

209. *See generally* THE ENVIRONMENTAL EFFECTS OF TRADE, *supra* note 145; O.J. KUIK ET AL., THE CONSEQUENCE OF THE URUGUAY ROUND AGREEMENTS FOR DUTCH NATIONAL AND INTERNATIONAL ENVIRONMENTAL POLICIES (1996).

210. *See, e.g.*, ESTY, *supra* note 1, at 207–10.

211. The CTE notes only that there was discussion about national reviews of trade agreements. *See* CTE Report, *supra* note 12, at ¶¶ 47, 181. But this is a different issue than an international review carried out by the WTO or some other organization.

212. Decision on Trade and Environment para. 2.

213. *Id.*

214. *Id.*

215. *See Green Groups Call for Delay of MAI, Stronger Environment Rules*, INSIDE U.S. TRADE, Feb. 21, 1997, at 11–13 (discussing ongoing negotiation in the OECD).

216. WTO Singapore Ministerial Declaration, at ¶ 20 WTO Doc.

ministers did not add the "environment and investment" linkage to the CTE's mandate.

A third issue not considered is whether the WTO should establish rules against government boycott threats. For example, in 1992, Austria passed a law requiring that tropical timber sold in Austria be so labeled.[217] Indonesia and Malaysia objected to this law as GATT-illegal, and threatened to boycott Austrian companies doing business in the region unless Austria repealed its labeling law.[218] Faced with this economic coercion, Austria repealed the law.[219] Austria lacked a right of action in the GATT to lodge a complaint against this unilateral boycott.

A fourth issue the CTE failed to consider is international trade in pollution permits. Are special rules needed to regulate such potential trade? Should unlimited trade be permitted between industrial and developing countries? These issues will be a future challenge to the WTO.[220]

Finally, the CTE did not consider the relationship between the WTO and the World Bank vis-à-vis trade and environment analysis.[221] During the Uruguay Round, the parties agreed that the WTO should "pursue and develop cooperation with the international organizations responsible for monetary and fiscal matters."[222] This was another missed opportunity to achieve policy coherence.

N. Reaction and Response to the CTE Report

The CTE Report was not viewed with great enthusiasm by the Clinton Administration. The U.S. government statement said: "While the report makes some valuable contributions, we wish to express our disappointment that the CTE has not significantly advanced the understanding of environmental

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WT/MIN(96)/DEC/W, (Dec. 13, 1996), <http://www.wto96.org/wto-dec.html>; 36 I.L.M. 220 (1997).

217. Staffin, *supra* note 131, at 241–42. Another provision in the Austrian law contained a voluntary eco-label to identify tropical timber derived from sustainable forestry practices. *Id.*

218. *Id.* at 243; *see also Malaysia May Retaliate Against Austria Over Trade*, Reuter Library Report, Oct. 5, 1992, *available in* LEXIS, News Library, Reuter File (reporting statement by Malaysian Primary Industries Minister Lim Keng Yaik).

219. *Malaysia May Retaliate Against Austria Over Trade*, *supra* note 218.

220. Wouter Tims, *New Standards in World Trade Agreements: Two Bridges Too Far, A Comment, in* CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION, *supra* note 116, at 313 (stating that searching for ways to create markets in environmental property rights should be a challenge put before the WTO).

221. *See also* INTERNATIONAL TRADE AND THE ENVIRONMENT (Patrick Low ed. 1992) (World Bank Discussion Paper No. 159); *see generally* STEF MEIJS, DIRECTORATE FOR INTERNATIONAL ENVIRONMENTAL AFFAIRS, NETHERLANDS, ENVIRONMENT AND TRADE AT THE WORLD BANK (1997).

222. Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking, 33 I.L.M. 1249 (1994).

concerns."[223] The U.S. government expressed a few particular concerns. First, with regard to #41 above, it said that countries should not read the language that "governments have the right to establish their national environmental standards in accordance with their respective environmental needs" as denying a corresponding responsibility of governments, in accordance with Principle 2 of the Rio Declaration, "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States . . . ."[224] Second, it disagreed with the suggestion in #5 above that "there is no clear indication for the time being" that trade measures in MEAs may be needed in the future.[225] The U.S. government explained that trade measures have been under consideration in recent negotiations for the Biosafety Protocol to the Biodiversity Convention and for Prior Informed Consent of Toxic Chemical Trade.[226] Third, it sought to make clear that the statement in #5 above about "mutual respect" for "technical and policy" expertise includes respect for the expertise of environmental negotiators in determining when trade measures may be needed. Fourth, it sought to make clear that countries should not read the statement in #9 above (about bringing disputes) to preclude WTO members from agreeing "to foreswear recourse to WTO dispute settlement in favor of settling the dispute within the provisions of the MEA."[227] Fifth, it stated that the further work in #22 above should not "become a wide ranging investigation into all manner of environmental measures."[228] Finally, the U.S. government expressed its regret at the CTE's unwillingness to state that "WTO rules should not hamper the ability of MEAs to achieve their environmental objectives."[229]

Others joined the U.S. government in disappointment. For example, Leon Brittan, the European Commissioner for Trade Policy, said "[t]here is widespread concern at the lack of concrete results so far . . . ."[230] The European Parliament's delegation to the Singapore meeting lamented that "no progress has been made in

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223. *Statement of the United States upon the Adoption of the Report of the WTO Committee on Trade and Environment,* undated (on file with the Author).

224. *Id.*; *see* Rio Declaration on Environment and Development, *supra* note 62, princ. 2, 31 I.L.M. at 874.

225. *Statement of the United States upon the Adoption of the Report of the WTO Committee on Trade and Environment, supra* note 223.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*; *compare* Canada–Measures Affecting Exports of Unprocessed Herring and Salmon, Mar. 22, 1988, GATT B.I.S.D. (35th Supp. 98) at 111, ¶ 3.40 (1988) (reciting argument by United States that contrary to assertion by Canada, international fishery agreements do not modify obligations under GATT).

230. *Ministers Adopt Trade/Environment Report, Renew Committee Created to Look at Issues*, 20 INT'L ENV'T REP. 3 (1997).

the field of trade and environment . . . ."[231] Several environmental NGOs "strongly condemned" the CTE's failure to produce any significant results.[232]

Despite this disappointment, the WTO Ministerial Conference approved the CTE Report and extended the life of the CTE without changing its terms of reference.[233] Indeed, environment was a "non-issue" at Singapore, according to some observers.[234] The trade ministers agreed that the CTE "has made an important contribution toward fulfilling its Work Programme."[235] The ministers also stated that "[f]ull implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development."[236]

As the listing above shows, many tangible trade and environment problems exist that need attention at the international level. The CTE performed poorly as an institution in resolving these problems. The best portions of the CTE Report were #4, 10, 29, and 41. These minor agreements, however, were dwarfed by the CTE's inability to make progress on resolving the legal limbo of MEAs or on reducing trade restrictions and distortions that simultaneously harm the environment and retard economic growth.

The CTE failed for several reasons. First, the U.S. government did not offer constructive leadership by either making early concrete proposals or by rallying support from other governments.[237] The European Commission did offer leadership, but its compass seemed stuck on the WTO. For example, just before the Singapore conference, the Commission declared that: "[f]ree trade and environmental protection are equally valid objectives, but they will only achieve equal weight if the WTO is allowed to develop as an effective arbiter in order to ensure a fair balance between them."[238] Neither the U.S. Trade Representative nor the European Commission were willing to put market access on the table as a way of winning developing country support for a package of reforms.[239] The

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231. *Id.*

232. *Id.*; *see also Ministers, NGOs Cite Worries about Environmental Panel*, Agence France Presse, Dec. 9, 1996, *available in* LEXIS, New Library, Agence France Press File.

233. WTO Singapore Ministerial Declaration, *supra* note 216, ¶ 16.

234. *Earth Negotiations Bulletin* (Dec. 16, 1996) <http://www.iisd.ca/linkages>.

235. WTO Singapore Ministerial Declaration, *supra* note 216, ¶ 16.

236. *Id*; *but see WTO Ministerial Short on Results, but Sets Stage for Future Work*, INSIDE U.S. TRADE, Jan. 10, 1997, at 14 (noting modest results on other WTO issues).

237. *See* Esty, *supra* note 16, at 73, 83 (criticizing lack of U.S. government leadership); Kelly Jude Hunt, *International Environment Agreements in Conflict with GATT-Greening GATT after the Uruguay Round Agreement*, INT'L LAW. 163, 189 (1996) (noting weak environmental goals of U.S. government).

238. *Reinforcing the Open Trading System–The EU's Priorities for World Trade in View of the First WTO Ministerial Meeting*, Dec. 5, 1996, *available in* LEXIS, EURCOM Library, RAPID File.

239. *See* CTE Report, *supra* note 12, ¶¶ 101, 118.

industrial countries also failed to convince the developing countries to see something larger in the trade and environment debate than simply damage control.

A second reason the CTE failed is the domination of trade officials. Only a small number of countries sent environmental officials to join their trade colleagues at the meetings.[240] Yet it is noteworthy that at least seventeen of the forty-two conclusions or recommendations were more environment than trade-oriented.[241]

Third, the CTE did not commission any research or analysis other than background papers from the WTO Secretariat.[242] This limited the ability of committee members (typically trade bureaucrats) to understand the implications of the ecological issues being discussed. By contrast, when the OECD examined the trade and environment linkage in 1989-95, it commissioned several studies.[243]

Fourth, the CTE did not invite input from NGOs even though such proposals might have helped bridge the North-South gap.[244] NGO participation would have put more pressure on the U.S. and the European Commission to respond to developing country concerns. NGOs could also have provided information to the CTE on issues like MEAs, eco-labeling, disguised restrictions on trade, and environmental taxes.

Fifth, the WTO has made little effort to develop institutional linkages with inter-governmental organizations for the environment. For example, the Executive Director of the United Nations Environment Programme (UNEP) was not invited to speak at the Singapore conference because the WTO had not accredited UNEP.[245] This unwillingness to pursue policy integration with UNEP constitutes a major failing of the WTO.

In summary, despite high expectations in some quarters, the CTE made very little progress in addressing trade and environment problems. Since the WTO failed to correct any of the flaws in the CTE process, it seems unlikely that the CTE will have more success in the future.[246] This has led observers to redirect attention to regional solutions via mechanisms like NAFTA expansion.

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240. Esty, *supra* note 16, at 77; *see also* Chairman's Summary of G-7 Environment Ministers, May 9-10, 1996, ¶ 28 (stating that the CTE needs to receive effective input from environmental experts).

241. CTE Report, *supra* note 12, ¶¶ 1, 3, 4, 9, 10, 13, 18, 19, 21, 23, 28, 29, 31, 32, 37, 38, & 41.

242. *Id.* Annex II (listing only three studies).

243. *See, e.g,* THE ENVIRONMENTAL EFFECTS OF TRADE, *supra* note 145.

244. *See WTO Trade and Environment Committee Report to Ministerial Stalled by North-South Split,* 19 INT'L ENV'T REP. 953 (1996).

245. *Earth Negotiations Bulletin* (Dec. 10, 1996) <http://www.iisd.ca/linkages/>.

246. As this Article goes to press, the WTO has announced that the CTE will meet only three times in 1997. BRIDGES (Newsletter of the Int'l Centre of Trade and Substantiable Dev.) Mar. 1997, at 3.

III. USING NAFTA EXPANSION TO INTEGRATE TRADE AND ENVIRONMENT

From an economic perspective, harmonizing trade policy toward free trade is best done at the global level.[247] The only reasons to liberalize regionally are political and pragmatic. In the absence of a global agreement, a regional trade agreement may be a useful second-best strategy. Still, there is always a question as to whether a regional agreement will be a building block or a stumbling block.[248] In the case of the NAFTA, the evidence suggests that the NAFTA was a building block toward completing the Uruguay Round.[249]

The environmental situation differs. There is no presumption that the best level for action is global. Many environmental issues are local or regional. When the global level is the proper one (e.g., climate change), regional agreements cannot be effective in solving the problem. It is unclear whether a regional environmental agreement can serve as a building block toward a global agreement.

Because a free trade agreement provides preferential market access to members, other nations want to join to get those benefits. There is no analogous individual membership benefit, however, in a regulatory-style environmental agreement. This could change if MEAs begin to incorporate more financial and technology transfer (see #3 above).

Although the dynamics are different for regional trade versus regional environmental agreements, some observers have suggested that nations could resolve trade and environment problems regionally as a supplement, or alternative, to resolving them in the WTO.[250] Adding environmental provisions to a regional trade agreement may be a way to address existing transborder environmental problems as well as any new problems induced by trade liberalization.[251] This approach can also garner political support from environmentalists for ratifying the trade accords.

Some of the issues considered by the CTE would be amenable to progress within a Free Trade Area of the Americas. For example, nations could reach an accord on labeling, environmental subsidies, and market access regionally without distorting global trade. Some of the most constructive proposals in the CTE

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247. Robert Z. Lawrence, *Regionalism and the WTO: Should the Rules be Changed?, in* THE WORLD TRADE SYSTEM: CHALLENGES AHEAD, *supra* note 16, at 43–45.

248. *Id.*

249. GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, WESTERN HEMISPHERE ECONOMIC INTEGRATION 161 (1994).

250. *See, e.g.*, MICHAEL HART, WHAT'S NEXT: CANADA, THE GLOBAL ECONOMY AND THE NEW TRADE POLICY 59 (1994) (suggesting bilateral accords on trade and environment linkage); Steve Charnovitz, *Regional Trade Agreements and the Environment*, 37 ENV'T 16 (July/August 1995); Simon S.C. Tay, *The Way Ahead in Asia, in* ASIAN DRAGONS AND GREEN TRADE, *supra* note 10, at 197–98 (discussing role for regional initiatives).

251. HUFBAUER & SCHOTT, *supra* note 249, at 147–53.

came from Western Hemisphere countries—for example, Canada on labeling and Argentina on market access.[252]

Efforts to incorporate environmental provisions into Western Hemisphere trade agreements can build on the limited progress made in the NAFTA.[253] There are at least four features of the NAFTA that can serve as useful models. First, the NAFTA clarifies (and perhaps even expands) the relevant exceptions of the GATT. NAFTA Article 2101(1) states GATT Article XX(b) is interpreted to include "environmental measures" necessary to protect human, animal or plant life or health.[254] NAFTA Article 2101(1) states GATT Article XX(g) is interpreted to include measures relating to the conservation of living as well as non-living exhaustible natural resources.[255] Other recent regional trade agreements have also expanded GATT Article XX. For example, the Free Trade Agreement between Estonia and Sweden includes the "protection of the environment" among its General Exceptions.[256]

A second exemplary feature of the NAFTA is its provision on MEAs. NAFTA Article 104 states that for specified MEAs, obligations to use trade measures will prevail over NAFTA rules "provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement [i.e., the NAFTA]."[257] While this provision has its weaknesses, it is better than the current treatment of MEAs by the WTO.[258]

A third feature of the NAFTA is its forum selection clauses for certain environment-related trade disputes—*viz.* (1) disputes about MEAs covered by NAFTA Article 104, (2) disputes about NAFTA chapter on Sanitary and Phytosanitary Measures,[259] and (3) disputes two places about NAFTA chapter on Standards-Related Measures[260] that implicate the environment or public health. These clauses provide that, in contrast to the regular NAFTA rule whereby the

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252. *See* CTE Report, *supra* note 12, ¶¶ 74, 115.

253. NAFTA AND THE ENVIRONMENT (Seymour J. Rubin & Dean C. Alexander eds., 1996); PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA 256–76 (1996); Robert F. Housman, *The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*, 10 CONN. J. INT'L L. 301 (1995); Gustavo Alanis Ortega, *What We Can Learn from NAFTA, in* ASIAN DRAGONS AND GREEN TRADE, *supra* note 10, at 71.

254. NAFTA, *supra* note 7, art. 2101(1), 33 I.L.M. at 699.

255. *Id.*

256. Free Trade Agreement between the Republic of Estonia and the Kingdom of Sweden, Mar. 31, 1992, art. 6.

257. NAFTA, *supra* note 7, art. 104.1, 32 I.L.M. at 298.

258. Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, 26 L. & POL'Y INT'L BUS. 1, 42–47 (1994).

259. NAFTA, *supra* note 7, ch. 7, 32 I.L.M. at. 368.

260. *Id.* ch. 9, 32 I.L.M. at 386.

complaining party can choose either a GATT or a NAFTA forum,[261] a responding party in the disputes listed above can elect the NAFTA as the forum for dispute settlement.[262] Because the NAFTA rules in such disputes are different than the WTO rules, the clauses provide choice of forum and law.[263]

A fourth feature of the NAFTA is its provision directing parties to use "relevant international standards . . . except where such standards would be an ineffective or inappropriate means to fulfill its legitimate objectives . . . ."[264] Among the standardizing bodies listed by the NAFTA is the ISO.[265] Its most important environmental project is ISO 14000 which contains standards for environmental management.[266] Although the NAFTA has not yet done so, it could take a more activist role in encouraging North American companies to follow ISO 14000.

The NAFTA side agreement on the environment also contains features that could be emulated in other Western Hemisphere trade agreements.[267] Perhaps the most important feature of the North American Commission for Environmental Cooperation is its existence as an environmental commission linked to a trade agreement.[268] The Commission, which is now over two years old, has begun to make a contribution to regional environmental policy.[269]

There are several aspects of the NAFTA side agreement that can serve as models. First, the agreement provides for considerable ongoing public input.[270] Second, it provides a mechanism by which the three countries' environmental

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261. *Id.* art. 2005.1, 32 I.L.M. at 694.

262. *Id.* arts. 2005.3, 2005.4, 32 I.L.M. at 694.

263. Charnovitz, *supra* note 258, at 24.

264. NAFTA, *supra* note 7, art. 905.1., 32 I.L.M, at 387.

265. *Id.* art. 915.1, 32 I.L.M. at 391.

266. Christina C. Benson, *The ISO 14000 International Standards: Moving Beyond Environmental Compliance*, N.C. J. INT'L L. & COM. REG. 307 (1996); Charles M. Denton, *Environmental Management Systems: ISO Standard 14000*, 19 INT'L ENV'T REP. 715 (1996); Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L.Q. 479 (1995).

267. North American Agreement for Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1519.

268. *See* Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 31 (1995).

269. *See generally* COMMISSION FOR ENVIRONMENTAL COOPERATION, 1995 CEC ANNUAL REPORT (1996); *North American Standards Suffering in Name of Self-Regulation, CEC Director Says*, 20 INT'L ENV'T REP. 13 (1997).

270. North American Agreement for Environmental Cooperation, *supra* note 267, arts. 6, 14, 16, 32 I.L.M. at 1484, 1488, 1489; JOHNSON & BEAULIEU, *supra* note 253, at 138–40, 152–60, 162–69, 253–55. One area in which the NAFTA is less open than the WTO is that the identity of NAFTA Chapter 20 panelists is not disclosed to the public.

ministers meet together on a regular basis.[271] Third, the Commission carries out research and analysis on issues like eco-region mapping and assessing the impact of the NAFTA on the environment.[272]

The NAFTA side agreement also provides a dispute mechanism to oversee enforcement of national environmental standards.[273] For reasons discussed elsewhere, this provision's value as a model for other agreements is doubtful.[274] It will take a few more years, however, before any empirical assessment can be made.

In 1948, the twenty-one governments at the Inter-American Conference on Conservation of Renewable Natural Resources (in Denver) agreed on a set of principles for conservation.[275] Among them was that:

> No generation can exclusively own the renewable resources by which it lives. Successive generations are but trustees charged with maintaining unimpaired the inheritance of their successors. We hold the common wealth in trust for posterity, and to lessen or destroy it is to commit treason against the future. The principal is the natural resources. The interest is the earth's ability to maintain their yield so long as natural relationships are preserved and so long as man will govern his activities and institutions in accord with them.[276]

This principle is similar to what we now call "sustainable development."[277]

New arrangements for economic integration in the Americas should be tested against the principle agreed upon in 1948. Are our governing institutions in accord with natural relationships? Do our activities refrain from committing treason against the future? When we can answer yes, then we will be on the right track toward achieving free trade without sacrificing environmental quality.

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271. North American Agreement for Environmental Cooperation, *supra* note 267, art. 9, 32 I.L.M. at 1485.

272. COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 269, at 10–17.

273. North American Agreement for Environmental Cooperation, *supra* note 267, Part V, 32 I.L.M. at 1490; JOHNSON & BEALIEU, *supra* note 253, at 171–240.

274. Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L.J. 257, 275–87 (1994).

275. Proceedings of the Inter-American Conference on Conservation of Renewable Natural Resources, U.S. Dept. of State, Sept. 7-20, 1948.

276. *Id.* at 21.

277. *See* WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 8 (1987) (defining "sustainable development" as development "that meets the needs of the present without compromising the ability of future generations to meet their own needs").