

but it is likewise imperative to make it possible to raise living standards without poisoning the air and water. Only when an enforceable, global standard is in place for the production of tradeable goods, will the comparative advantage of environmentally damaging production be removed.

Second, the environment has become a global problem. The flow of water and air carries pollutants beyond their areas of origin. As we learn more and more about the interactions between our atmosphere, oceans, and ecosystems, we find that the chemicals we introduce and the land use we change may irreparably alter fundamental characteristics of the earth we inhabit. In light of this knowledge, we cannot afford to continue our economic development and remain oblivious to its consequences. The rules governing trade are the only global controls on economic development, and we must find ways to use them to promote development that will not destroy the earth.

The task is not easy or uncontroversial. Perhaps it is not possible, though I believe that it is. The progress on NAFTA is a beginning. If we are successful in fashioning an agreement that proves to be good for North American economies and for North America's environment, it will serve as a model for the world. In following this path, the United States will be moving beyond the speeches and promises made at UNCED. We will offer genuine change in the institutions that affect the patterns of economic development, and we will see how deep those promises actually reach.

20

Environmental Harmonization and Trade Policy

*Steve Charnovitz*¹

INTRODUCTION

This chapter presents an overview of environmental harmonization. The first section will discuss the theory of harmonization and present the main arguments for and against it. The second section will explain how harmonization works within the world trading system. In particular, I will cover the General Agreement on Tariffs and Trade (GATT), the European Community (EC), the United States, and the North American Free Trade Agreement (NAFTA). The concluding section will consider the future of environmental harmonization.

Before proceeding, it will be useful to clarify some terminology. The word *harmonization* means a movement toward equivalent standards (and regulations) by different countries. Two types of standards will be discussed. Product standards relate to the characteristics of a good—for example, its design or performance. Process standards relate to the way in which a good is manufactured, transported, and used—for example, the pollution emitted during production. Governments can also harmonize their degree of economic control (for example, the regulation-deregulation spectrum) and their tax policies, but these issues—which can have important ecological implications—will not be directly addressed here.

The chapter reaches four main conclusions. First, although the concept of social policy harmonization goes back over a century, the idea remains controversial. Because achieving uniformity in standards is unlikely (and is often not desirable), it may be more fruitful to refocus the debate

toward policy convergence as the desired goal. Second, a review of existing systems shows that there is no obvious or best way to harmonize. Harmonization is difficult even for a government that has the legal authority to undertake this task. Yet harmonization would be immeasurably more difficult for a supranational institution with limited authority and public accountability. Third, one way to achieve greater policy convergence is to set minimum standards for goods in international commerce. Such standards might be attained through negotiations of like-minded countries. Fourth, an international organization could aid the development and enforcement of such standards. The chapter proposes the creation of a new organization using a tripartite structure.

THEORY OF HARMONIZATION

Although the issue of harmonizing environmental standards had its initial wave of importance in the early 1970s, the concept of international harmonization of government regulation harks back to the mid-19th Century. There were academic socialists, liberal manufacturers, and other visionaries who, for different reasons, put forward proposals for a "uniformity" in national factory laws. As one German theorist explained: "Factory legislation, particularly the stabilization of the normal workday, must be international; its place is in commercial treaties, and its end should be the common good of all nations."² These ideas led to a number of intergovernmental and trade union conferences around the turn of the century which culminated in the establishment of the International Labor Organization (ILO) under the League of Nations. The ILO, now part of the United Nations system, has a unique tripartite structure of government, employer, and worker representatives from 162 member countries. The ILO writes and promulgates treaties establishing minimum international labor standards.

The need for labor and environmental process standards (or taxes) for domestic production is generally accepted. But the application of such standards to foreign production is fraught with contention. When presented with the question of whether the United States can have mutually beneficial trade with a country that mistreats its workers and degrades the environment, many traditional economists would answer affirmatively. Indeed, some go so far as to argue that such differences in domestic social policies are the fuel that drives the piston of "comparative advantage." In

other words, far from undermining free trade, the existence of different regulatory regimes (which leads to different costs) is viewed as enhancing the benefits of voluntary exchange.

This classical approach can be criticized on three counts. First, this viewpoint might be correct if trading nations were closed societies (except for the trade) or, clearer yet, were located on different planets. We probably would not care about global warming on Mars or about the working conditions of droids. But if the issue is, say, commerce between the United States and Mexico, it is hard to accept eyes-closed trade if such commerce seduces investors to go south to a polluter haven (an economic spillover) or fouls the water in Texas (a physical spillover). In response, skeptics of harmonization deny that differences in regulation have any significant impact on trade flows or investment location—arguing either that the differentials are very small or that they are compensated for by adjustments in the exchange rate. But even these skeptics acknowledge that physical spillovers can potentially negate the value of unfettered trade.

Second, the fact that countries have different values, preferences, and endowments is not solely an argument against common rules. Indeed, the opposite argument can be made. Rules are needed expressly because countries follow dissimilar policies. If all countries were clones, most rules would be superfluous.

Third, although economists often argue that world environmental rules could undermine the gains from trade, other rules—for example, against injurious dumping or financial subsidies—tend to be viewed as making trade more beneficial. Leaving aside the practical necessity of accommodating environmentalists if one is to gain their political support for trade liberalization, there is a basic issue as to whether the rules of fair trade need to encompass ecological concerns. Actually, the case for responding to many environmental externalities may be stronger than the case for responding to dumping or subsidies, since these traditional concerns usually involve only small price distortions rather than irreversible damage to the ecosystem.

It is not inconsistent with the wisdom of comparative advantage to admit that there are limits below which competition is undesirable. Even GATT recognizes that countries have a right to forbid imports made using prison labor. Nearly everyone agrees that a tolerance for chlorofluorocarbons (CFCs) should not qualify as a comparative advantage. So the issue is not whether process standards are acceptable as trade rules.

That was settled many decades ago. The issue is what specific process standards are appropriate.

Distinguishing good systems of production from bad ones is often difficult. One approach is to distinguish between virtuous and vicious circles. In a virtuous circle, the more everyone does it, the better. For example, adding new technology to a production process in order to reduce costs is probably always socially beneficial (even though it may cause unemployment). In a vicious circle, the more everyone does it, the worse off we all become. For example, exposing workers to toxic chemicals in order to reduce costs is probably always socially destructive. But for borderline issues, distinguishing between beneficial and destructive practices with any degree of precision or consistency would be very difficult.

Another approach for figuring out when environmental competition is "bad" is to examine spillovers of production. There are four types. An *economic* spillover is the financial loss to a high-standard country from competition with a country having lower environmental standards. For example, jobs and investment can migrate to the country with lower standards. A *political* spillover is the negative repercussion on the regulatory regime of the high-standard country. This might be called a "Quayle Effect"—that is, international competition can serve as a pretext for lowering domestic standards. A *physical* spillover is the environmental harm that the trade causes directly (like hazardous waste spills) or indirectly, that is, by allowing one's own consumer market to propagate the environmental harm (like killing rare tortoises to make eyeglass frames). A *psychological* spillover is the moral cost associated with participating in environmentally unfriendly commerce. For instance, knowing that the tuna is not dolphin-safe could lower a consumer's utility from eating it. Although such spillovers can be identified, it is difficult to take the next step of measuring them in a neutral way.

Of course, these same difficulties occur in domestic rulemaking too. But for domestic regulations, there is a national authority empowered to delineate fair competition. The problem one faces with international rulemaking is that there is no supranational authority to do the same.

HARMONIZATION VERSUS CONVERGENCE

Given that countries do have their own internal regimes of process standards, how should these regimes be applied to international com-

merce? One answer is that process standards should stop at the water's edge. That stance was taken by GATT's notorious tuna-dolphin panel. Yet this is an untenable solution for several reasons.

A nation needs to be able to impose its standards on goods from foreign countries in order to maintain the integrity of its domestic rules. This principle has always been recognized with respect to product standards—for instance, health regulations. But in trying to draw a line between products and processes, the tuna-dolphin panel enmeshes GATT in inconsistency. The proposed Uruguay Round agreement acknowledges that processing and production methods may need to be considered in ascertaining a product's safety. For example, process standards regarding quick-freezing, heat treatment, and irradiation can be imposed on exporters when visual inspections at the border would be insufficient or impractical. In addition, the Uruguay Round agreement would require nations to consider whether imports were produced in a manner that safeguards intellectual property. Without process standards related to copyrights and trademarks, absolutely unfettered trade would be viewed as debasing domestic commerce and infringing upon legal rights.

It is inconsistent for GATT to maintain that process standards are acceptable for certain causes (like copyrights) and forbidden for others (like marine mammals). Countries need to be able to impose process standards in order to encourage international cooperation where nations cannot achieve their goals in isolation. For example, no country can safeguard migratory birds and many other endangered species by its own endeavor. While trade controls are not essential to collective action, they are a readily available and reliable tool to encourage cooperation and discourage free riding.

Since mandating that process standards be "for internal use only" is not a realistic option, the world trade regime must find another way to deal with dissimilar process standards that reduce efficiency and lead to trade conflict. One potential solution is harmonization. The economic case for harmonization is that it facilitates trade by reducing market fragmentation. Harmonization lowers design and information costs, and generates greater economies of scale. The political case for harmonization is that it facilitates trade liberalization by obviating complaints about the lack of a "level playing field." In addition, international agreements can give nations cover to take actions that might otherwise be impeded by domestic opposition. In a few areas, there is also a public health advantage to harmonization. For example, all countries would probably

benefit from common rules on transportation and disposal of high level hazardous waste.

Just as there is a need for domestic regulation, there is a corresponding need for international regulation. But it is not clear how to "internationalize" domestic regimes. A country's domestic regulations are an outgrowth of the political system, local conditions, and social preferences within that country. How does one blend an international standard from the choices of each country? Harmonizing up to the maximum (for example, the most risk-averse) would be one possibility. Harmonizing down to the minimum (for example, the lowest common denominator) would be another. But these procrustean solutions are almost always unacceptable. Any rigid standard will generally be too high for some countries and too low for others.

Because standard setting is both art and science, countries should retain the right to establish their own standards and to compete on the basis of how wise their standards are. For example, it would not be useful to have only one approved way to harvest tuna or one approved type of fishnet. Yet it would be desirable to have an agreement among all fishing nations that dolphin safety should be a key concern in determining the legitimacy of commerce in tuna.

Given the impracticality of full harmonization, what other solutions are available? One is to shift the goal from harmonization to policy convergence. Policy convergence means a lessening of the gap, not uniformity. In determining how much convergence is desirable, an important factor is the extent of spillover involved from one country to another. For instance, when dealing with high physical spillover problems such as the spread of disease, a consistency in quarantines, testing, and disinfecting techniques may be highly advantageous.

Whatever standards are developed, however, should not serve as unintended or inflexible ceilings. As Kenneth W. Dam has noted, consumers will demand steadily higher standards and, therefore, international agreements should not frustrate such an increase.³ It is also important not to let glacially paced international negotiations serve as an excuse for national inaction.

At the core of policy convergence is the presumption that gravitational relationships exist between the environmental policies of each country. This is the main way in which environmental harmonization differs from labor harmonization. The labor policies of one country have no direct impact on the labor policies of another because there are no physical

spillovers (refugees aside) beyond borders. (On the other hand, labor harmonization may be easier to prescribe because there are more international norms on labor than on the environment.)

HARMONIZATION RULES

This section discusses the harmonization rules in several major trade agreements or common markets.

GENERAL AGREEMENT ON TARIFFS AND TRADE

Although GATT is sometimes described as a world trade constitution, it is important to understand what GATT does and does not do. It has no rules regarding the content or composition of traded goods. For example, it neither permits nor prohibits trade in babies, pollution permits, ivory, or plutonium. What GATT regulates is trade restrictions and distortions by governments. Thus, all product and process standards potentially fall under GATT rules.

GATT has three basic disciplines: most-favored-nation; national treatment; and non-protection (of domestic production). While adherence to these rules could have the result of reducing dissimilarities among national regulatory regimes, GATT does not impose any explicit harmonization. But one of GATT's duties, found in Article XXXVIII(2)(e), is to seek feasible methods "to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations, through technical and commercial standards affecting production, transportation and marketing, and through export promotion."

GATT STANDARDS CODE

Because these GATT disciplines were deemed too weak, a standards code was developed as part of the Tokyo Round of trade negotiations during the 1970s. The GATT Standards Code (Standards Code), officially the "Agreement on Technical Barriers to Trade," provides tighter rules for the thirty-eight nations that currently subscribe to it. Thus, the Standards Code supplements, but does not modify, GATT.

The Standards Code has two main disciplines. First, Contracting Parties must ensure that standards are not prepared or applied with a view to or the effect of creating "unnecessary obstacles" to international trade. It should be noted that this is a substantive constraint, requiring a judgment as to whether the standard is unnecessary. The second discipline is that Contracting Parties must use international standards as a basis for national standards except where such international standards are "inappropriate" for reasons such as the protection of the environment or human health or safety. By creating a presumption in favor of multilaterally written standards, the code facilitates the "harmonizing" of national regulations. International standards are preferred over national standards not because international standards are technically better, but because they are less susceptible to protectionist manipulation.

URUGUAY ROUND

The current Uruguay Round of trade negotiations has continued the quest for harmonization. Domestic standards are proposed to be covered by two codes: the Sanitary and Phytosanitary Code (S&P), and a revised Standards Code. Unlike all of the Tokyo Round codes, including the Standards Code, the new agreements are anticipated to become obligations of all GATT members.

The new S&P agreement includes an entire section on harmonization. It requires parties to base their national standards on the international standards established by organizations such as the Codex Alimentarius Commission. But countries may adopt a level of protection higher than the international one if a series of hurdles is met. Specifically, each Contracting Party must consider cost-effectiveness, use measures which are "the least restrictive to trade," and avoid arbitrary or unjustifiable distinctions in the levels it considers appropriate in different situations. While these hurdles are not insurmountable, they could have the effect of prodding national standards toward international levels, which might be lower for some countries. The requirement for avoiding arbitrary or unjustifiable distinctions could be especially difficult for a country like the United States with inconsistent health standards administered by different agencies. For example, cheese pizza is regulated by the U.S. Food and Drug Administration, while pepperoni pizza is regulated by the U.S. Department of Agriculture.

The proposed Standards Code builds on the existing code by establishing criteria for when a standard becomes an unnecessary obstacle to trade. Specifically, standards may not be more trade-restrictive than necessary to fulfill environmental and health objectives. Although the proposed Standards Code does not mandate downward harmonization, it would (like the S&P) make it more difficult for countries to set their own standards. How much more difficult depends upon the range of alternatives to regulation (e.g., labeling) that must be tried first under a least trade restrictive test.

EUROPEAN COMMUNITY

The EC has a number of different and sometimes conflicting rules regarding environmental harmonization. In general, powers not conferred on the EC by treaty continue to reside in Member States. The Treaty of Rome has an entire chapter on the approximation of laws. Under these rules (as amended in 1987), the Council of Ministers may, by a qualified majority, adopt regulations or directives regarding the internal market (for example, automobile emissions, use of asbestos, and product labeling). In proposing harmonization measures relating to health, safety, or environmental protection, the EC Commission must take "as a base a high level of protection." While the high level language in the treaty was left ambiguous, it apparently does not mean only upward harmonization—that is, using the highest base among the member countries.

Because harmonization can be imposed by a qualified majority (as opposed to requiring unanimity), the treaty provides for opting out by member nations with health or environmental standards higher than the EC level. In such cases, the higher national standards are subject to review by the EC Commission using the disciplines provided for in Article 36 of the Treaty of Rome. Although the language in Article 36 is based on GATT's Article XX, Article 36 has been interpreted more narrowly. Specifically, national environmental measures must: (1) not be arbitrary discrimination, (2) not have negative effects disproportionate to the objectives pursued, (3) be necessary to achieve environmental objectives, and (4) use the means that least restrict the free movement of goods.

The authority of an EC member state to enact its own standards depends upon the extent to which the EC has acted on that subject. Nations are free to adopt their own standards in the absence of EC action.

But under the doctrine of mutual recognition, nations must accept the standards of another EC member unless there is some overriding environmental or health reason for insisting on adherence to their national laws. When the EC Commission issues directives that concern "essential requirements" of health, safety, environmental protection, or consumer protection, there is less flexibility for a Member State to maintain its own standards.

In addition to these rules on harmonization, the treaty also includes authority to enact regulations specifically on the environment (e.g., water quality or use of CFCs). The Council must approve such actions (under Articles 130r and 130s) by unanimous consent. The treaty calls for environmental legislation when the EC's environmental objectives can be better obtained at the European level than at the national level. By taking community-wide actions, the Council of Ministers is able to adopt strict measures that will have the same competitive impact on all EC members. The Maastricht Treaty on European Union would change the current voting requirement to provide for Council decisions on the environment (with some exceptions) by a qualified majority. It would also provide for a safeguard clause allowing Member States to take provisional measures for non-economic reasons, but subject to review by the Commission.

Under Article 130t of the current treaty, Member States have the right to introduce and maintain more stringent protective measures than EC levels, but only if such measures are compatible with the treaty (Articles 30 and 36). Because the rules for compatibility are strict, Article 130t does not establish a minimum level above which countries may freely go. Yet there is not rigid harmonization either. The right to introduce more stringent environmental measures exists, but is subject to discipline, particularly when the EC legislation at issue concerns the free circulation of goods.

UNITED STATES

Although the Commerce Clause of the U.S. Constitution confers the power to regulate commerce on the national government, this conferment does not preclude all sub-national regulatory power. Thus, states can enact their own standards, subject to the right of the U.S. Congress to establish minimum federal standards or to pre-empt state jurisdiction.

The Congress may also write a uniform national standard. But this is rarely done for environmental or health matters.

In addition to federal legislation, state laws are regulated by judicial review. Indeed, this is the most common method by which state commercial powers have been circumscribed. In some cases, state law has been subordinated to conflicting federal statutes under the Supremacy Clause. But in most cases, the binding disciplines on state law arise from constitutional interpretation of the Commerce Clause, in the form of a long line of Supreme Court decisions going back to 1827.

The general rule is that states may legislate on matters of legitimate local concern provided that the state regulation does not materially restrict the free flow of commerce or interfere with matters in which uniformity of regulation is a predominant national concern. In scrutinizing state law, the courts will determine: whether the measure is "reasonable" or "necessary" given the facts of the case; whether the measure discriminates against out-of-state products; whether the local interest can be provided for as well with a lesser impact on interstate commerce; and whether national interests are balanced against competing state interests.

The Commerce Clause disciplines are based on proportionality (although the term is not common in American jurisprudence). Indeed, the United States disciplines can be tighter than the EC rules and are considerably tighter than GATT rules. For instance, sub-national treatment—treating out-of-state products no worse than in-state products, is no defense in U.S. courts against a state standard that unduly burdens commerce.

In summary, although the states have no rights of environmental self-determination, there is little direct harmonization dictated by federal law. Certainly some state laws have been overturned and some state action has been prevented by judicial guidelines. But states continue to retain a significant degree of competence in environmental and health matters. As the Supreme Court noted in 1986, the Commerce Clause "does not elevate free trade above all other values."⁴

NORTH AMERICAN FREE TRADE AGREEMENT

NAFTA was designed to be more environmentally sensitive than the proposed Uruguay Round agreement. It does this in four ways. First, although both the Uruguay Round and NAFTA call for the use of interna-

tional standards, NAFTA specifies that this be done "without reducing" the level of protection of health or the environment. Thus, NAFTA precludes downward harmonization, and may even imply upward harmonization.

Second, while the Uruguay Round does not mandate downward harmonization, it does set a number of conditions for the use of nationally distinct standards such as proportionality, least trade restrictiveness, and consistency. Almost all of these conditions are left out of NAFTA. Even the term harmonization is dropped.

Third, NAFTA reverses the burden of proof in environmental disputes. In other words, it will be up to the complaining party to demonstrate the inappropriateness of an environmental standard. This is an important shift from the procedures now used in GATT, the EC, and the United States, which require member governments to show the need for their standards.

Fourth, NAFTA exhorts the three parties not to "waive or otherwise derogate" from domestic health, safety, or environmental measures in order to encourage investment. The article provides for consultation between parties if complaints are lodged, but there is no recourse to dispute settlement. Still, this provision is significant in recognizing that competition between countries to attract investment by lowering environmental standards is ultimately self-defeating.

OTHER PRINCIPLES

In addition to the harmonizing principles discussed above, a few others should be noted. One is the use of science to shape the development of standards. This principle is embodied in the Treaty of Rome, the Uruguay Round, and NAFTA. Using sound science as a guide is, obviously, better than using bad science. But it is naive to think that even full agreement on scientific evidence would result in harmonization. The main reason why environmental standards differ between countries is differences in values (e.g., attitudes toward risk). Science is unlikely to homogenize these values.

Since 1972 the Organization for Economic Cooperation and Development (OECD) has espoused the Polluter Pays Principle. (This principle was added to the Treaty of Rome in 1987 in vague terms.) While there has

been a congruity in government policies toward forgoing environmental subsidies, the key factor has probably not been the persuasiveness of the OECD, but rather the fiscal binds of most governments.

Another principle is full internalization of environmental costs. This is sometimes mischaracterized as part of the Polluter Pays Principle, but the OECD addresses only who should pay, not how much should be paid. In the absence of a common policy toward internalization, the prices of environmentally sensitive goods in different countries will diverge, and may thus eventuate in trade friction. One problem with universal adoption of the internalization principle at this time is that it would seem unfair to the developing countries. They view the ensuing higher prices as a handicap that the industrial countries did not bear during their period of development.

Two main findings emerge from this review. First, environmental harmonization is always difficult, even within a polity. The strong desire of communities to have their own environmental standards should give pause to those who see worldwide harmonization as a feasible goal.

Second, one ought to be cautious about applying the disciplines used at the federal level (such as proportionality) to the international level. It is one thing for a political institution, like the United States or the EC, to balance the costs and benefits of an environmental standard. (They do not have an easy time doing it, but they do have politically accountable policymakers and legally authoritative judicial systems.) It is quite another to cede such authority to an international body, especially a single-minded one like GATT.

FUTURE OF HARMONIZATION

Harmonization is inevitable in an increasingly interdependent world; harmonization becomes less plausible as environmental consciousness and nationalism grows. Both propositions are supportable. Yet both cannot be right.

Some types of harmonization are more logical than others. One can imagine a world on the same metric system, using common electrical voltage, and driving on the same side of the road. Nevertheless, such common-sense harmonization seems unlikely (recall the ill-fated Euro-plug). Far more likely, perhaps, would be harmonization for the truly

essential things, like health and the environment. Still, that would imply a worldwide uniformity of values, discount rates, and attitudes toward risk—doubtful in the foreseeable future.

At this point, it is not clear how much of a constituency there is for harmonization. In 1972, the OECD adopted the principle that: "Where valid reasons for differences do not exist, Governments should seek harmonization of environmental policies . . ." In 1980, the Brandt Commission warned of the temptation for a country to set lower environmental standards in order to attract industry and create jobs; it concluded that "there is an obvious need to harmonize standards, to prevent a competitive debasement of them."⁶ But in its obtuse approach to the environment, GATT has undermined support for harmonization by transforming a constructive idea into a potentially dangerous one.

Harmonization is now perceived as a two-edged sword. Environmentalists, particularly in industrial countries, are worried about downward harmonization. The elites in developing countries are worried about upward harmonization. Subnational governments want to preserve their right to diverge from national standards. Transnational corporations might benefit from common regulations, but many corporations are already acting voluntarily to carry their standards with them when building new foreign facilities. (It remains to be seen what the environmental implications of the new "relationship enterprises" will be.)

Nearly everyone claims to be against downward harmonization. Yet upward harmonization to the highest level of regulation is illogical and costly. In the absence of any theory justifying a middle-ground, optimal level of harmonization, a more practical approach would be to agree upon multilaterally set minimum standards in the short run, and to seek greater policy convergence in the long run.

PROCESS STANDARDS

It is dogma in trade policy circles that unilateral import standards should relate to products only—not processes. Defenders of this position argue that process standards are intrinsic to a country and should not be anyone else's concern. Thus, what Brazil does with biodiversity is solely its business. Whether China burns more fossil fuel is its business. But this doctrine of insularity is already obsolete from an ecological perspective, and is becoming less acceptable from the perspective of international law.

It may be true that there is a category of issues that are purely internal, where no country has a valid interest in another's process standards. Although much of the analytical writing on trade and environment has sought to use this category as a basis for deriving general principles, the important issues are the ones in which other countries believe they do have an interest. That is where the debate needs to focus.

Those who deny that process standards should be the subject of international negotiations do not have history on their side. Process standards on fishing go back to 19th Century treaties. Throughout the 20th Century, there have been plurilateral or multilateral negotiations on many environmental or health issues such as bird conservation, marine pollution, whale protection, workplace health, and disease control. The point is not that all of these negotiations resulted in international standards (yet many of them did), or that they resulted in trade controls (yet many of them did). The point is that international regulation of process standards is neither a new idea nor a radical one.

Another common argument against process standards is that they are "protectionist" and "imperialist." But process standards are not inherently protectionist. There is a clear difference between a local-content requirement and an environmental-content requirement. Furthermore, many process standards are no more imperialist than product standards are. For instance, a requirement that all tuna sold be dolphin-safe is functionally equivalent to a requirement that all soft drinks sold be in recyclable bottles. In both cases, foreign exporters have to meet certain specifications if they want to sell to the regulated market. The customer is always right.

Any unilateral standard, product or process, may seem unfair or coercive to an exporter who does not meet it. Yet convenience to exporters is not a criterion GATT utilizes to judge product standards. GATT uses criteria such as national treatment, non-discrimination, and non-protectionism.

Why should GATT not utilize these same criteria to judge process standards? Nations ought to be able to extend their domestic product and process standards to imports. This points to where the tuna-dolphin panel went wrong. If it had applied the normal GATT rules to the U.S. Marine Mammal Protection Act (MMPA), the decision would have been quite different. Instead, the panel invented new rules and new interpretations in order to erect a GATT bulwark against recent progress in environmental standards.

CARROTS, STICKS, AND STANDARDS

Conducting international negotiations is one thing. Attaining a consensus is another. How can an agreement on minimum standards be achieved among a hundred countries with different values and resources? One approach is to devise a clever mix of carrots and sticks from a diverse enough issue garden to allow a cross-fertilization of concerns. The goal is not only to obtain an agreement, but also to maintain its stability.

The carrots are the basic tool. Because countries face different economic trade-offs (for example, some countries may benefit from global warming), an assistance mechanism can be developed to enable gainers to compensate losers and rich nations to "bribe" poor ones. This assistance could be in the form of financial aid or technology transfer, as provided under the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), or it could be trade concessions.

But carrots alone may not be sufficient. Uncooperative countries might attempt to extract more assistance or concessions than the global community is willing to provide. During the past decade, for example, American diplomats attempting to negotiate a dolphin-safe fishing agreement were frustrated by the unwillingness of countries like Mexico to undertake any responsibility for marine mammals. In such cases, sticks like trade sanctions may be needed to force free-riding countries to enter multilateral agreements.

In between carrots and sticks are environmental product and process standards applied equally to both domestic production and imports. Such standards are not carrots because they provide no additional benefit to foreign countries. Yet they are not sticks either so long as such standards are applied to all countries in an evenhanded manner. The characterization of such process standards as "sanctions" is an all too common misnomer.

By taking their own product and process standards to the bargaining table, countries will be better able to strike mutually beneficial deals. If the tuna-dolphin panel has its way in defenestrating national standard setting, all that remains are power-based combinations of carrots and sticks. But because the stick of a trade sanction is likely to be GATT-illegal, that leaves only carrots legitimately on the table. While it may be possible to achieve international agreements with carrots alone, it is hard to imagine any such agreement remaining stable as the appetite for carrots increases.

ESTABLISHING A RANGE

The first step in a negotiation would be to obtain a worldwide minimum standard that may be exceeded but not undercut. (The terminology gets a little confusing. By a minimum standard, I mean a minimum level of protection. Such a standard might operate by setting a maximum exposure level.) For example, there are no internationally recognized norms on dolphin safety while fishing for tuna. Establishing such a minimum is the first step toward delegitimizing the practices of countries like Mexico who claim that their dolphin-lethal techniques are irrelevant to the acceptability of tuna.

The second step would be a maximum standard to establish the highest level of protection. For example, the MMPA sets a dolphin-protection goal "approaching a zero mortality and serious injury rate." An international maximum might set a more reasonable level. If the United States insists upon zero, it should perhaps compensate other countries whenever the zero standard distorts tuna sales in favor of American suppliers. Ideally, this compensation would take the form of a cash transfer rather than an agreement to allow other countries to impose higher tariffs on imports from the United States.

Once the range of minimum and maximum standards is set, periodic discussions can be held on further convergence. There might be a presumption of upward convergence only, but the goal should not generally be the attainment of a single standard. Just as the world benefits from environmental cooperation (for example, the negotiated range), the world also gains from the competition made possible by a variability in standards.

Although it would not work for product standards, a two-tier approach may be possible for many process standards. For instance, the United States might establish a stringent process standard for its domestic commerce, but then accept imports produced under lower standards so long as such imports meet the international minimum. A two-tier approach is currently used in the MMPA that allows imports to have a 25 percent higher dolphin kill rate than American tuna producers have.

INTERNATIONAL ENVIRONMENT ORGANIZATION

Several analysts have suggested that GATT be broadened to address environmental harmonization.⁷ GATT is certainly in need of reform. For

instance, it should abandon its penchant for secrecy and assure that its dispute panels hear the environmental side of a case. Yet while a little greening would be fine, no amount of retrofitting would qualify GATT to set technical and commercial standards affecting production and transportation [Article XXXVIII(2)(e)]. Instead, a new International Environment Organization (IEO) should be established to develop ecological product and process standards for international commerce.

The IEO would be modeled after the ILO in structure and in function. It would be a tripartite organization composed of government, business, and the public (like environmentalists and consumer groups). Its function would be to develop standards, provide technical assistance to environmental agencies (such as how to conduct inspections), collect comparable environmental data, and investigate complaints. All standards would be available for adoption by each government, but need not be treaties (which ILO standards are) given the difficulty of formal ratification. The standards might instead be considered soft law. Just as international labor standards do, international environmental standards should take into account a country's level of development.

Establishing an IEO would fill the lacuna that now exists in global environmental governance. Many single-issue international negotiations have been successful (such as the Montreal Protocol), but a continuation of this ad hoc approach may be inadequate. What is needed is a permanent organization that would integrate efforts to solve different environmental problems and be prepared to deal quickly with new issues as they arise. As Lawrence E. Susskind has observed, "finding creative linkages . . . can generate economic incentives that will change the equation of acceptability for some nations. This means that several environmental treaties should always be negotiated simultaneously . . ."⁸

When new international standards are achieved, the IEO should encourage countries to convert any domestic process standards to them. For example, the United States now forbids shrimp imports from countries that do not have a turtle protection program comparable to that imposed on American producers. If an international turtle safety standard existed, then the IEO could ask the United States to adopt that standard.

What is the rationale for a tripartite organization? Why not assign this task to a government-only organization such as the new United Nations Commission on Sustainable Development? Certainly, intergovernmental institutions play an important role and should be better utilized. But more broad-based approaches may be necessary to deal with global issues of

increasing complexity and consequence. An IEO needs environmentalists to remind governments of the linkages within the ecosystem and to speak for the interests of future generations. An IEO needs business leaders to remind governments that regulations have costs and that environmental righteousness can be as inimical to commerce as protectionism is. An IEO needs government officials to keep the organization relevant and to prevent it from turning into a debating society. Government involvement is also critical for assuring that industry collaboration does not become anticompetitive.

It is true that environmental groups have had formal or informal advisory roles in most of the recent environmental negotiations. What is being proposed here is that this role be upgraded from advisory to membership, from "down-the-hall" to "at-the-table." Of course, it should be noted that even "down-the-hall" status is not accorded environmentalists by GATT. A new relationship with environmentalists needs to be instituted as part of the Uruguay Round.

The President of the United States has legislative authority for negotiating new international agreements to "apply uniform standards" for pollution control.⁹ This authority could be used now to begin international negotiations on establishing an IEO. Achieving such a new organization would be difficult. But the effort is worth making in view of the daunting challenges ahead. By creating an organization that makes it easy for businesses, environmentalists, and governments to work together, we can engender the cooperation and innovation needed for building a greener world.

NOTES

1. The author wishes to thank Patrick Low and J. David Richardson for their thoughtful comments.
2. J. Baron (1878) as quoted in John W. Follows, *Antecedents of the International Labor Organization*, pp. 86-87 (Oxford: Clarendon Press, 1951).
3. Kenneth W. Dam, *The GATT: Law and the International Economic Organization*, p. 195 (Chicago: The University of Chicago Press, 1970).
4. *Maine v. Taylor*, 477 U.S. Reports 131, 151 (1986).
5. "Recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies," *International Protection of the En-*

vironment: *Treaties and Related Documents*, Bernard Ruster and Bruno Simma, eds., vol. 1 (Dobbs Ferry, New York: Oceana Publications, Inc., 1975).

6. Independent Commission on International Development Issues, *North-South: A Program For Survival*, p. 114 (Cambridge: MIT Press, 1980).
7. For example, see Research and Policy Committee, Committee for Economic Development, *The United States in the New Global Economy: A Rallyer of Nations*, pp. 28-30 (1992).
8. Lawrence E. Susskind, "New Corporate Roles in Global Environmental Treaty-Making," *Columbia Journal of World Business*, p. 69 (Fall/Winter 1992).
9. United States Code, Public Law 92-500 §7, vol. 33, p. 1251.

Afterword

Ambassador Michael Smith

As both an unabashed free trader and a card carrying environmentalist, I was particularly troubled during the early days of the trade and environment debate. As the debate grew increasingly vicious, I found myself having two unsettling dreams. In the first dream, a long-fanged GATTzilla trampled all over the institutions of democracy, spewed toxics about the land, and eagerly devoured poor Flipper, the helpless dolphin. The second dream was equally troubling. In it a heinous looking creature that bore only the vaguest resemblance to a dolphin destroyed the Geneva home of the General Agreement on Tariffs and Trade (GATT) in the wake of its powerful tail, halted high seas trade by deep-sixing ships, and left the vast majority of the world's population cowering and impoverished in makeshift shantytowns.

My experiences with trade and the environment have given me a split personality of sorts. My trader leanings are drawn to the persuasive arguments of Professor Bhagwati. Following the theory of comparative advantage, free trade is vital to economic efficiency and raising the standards of living around the globe. Trade also serves an important role in preserving global security through interdependence.

It follows then that if every nation is free to use the trading system to impose its values, environmental or otherwise, willy nilly on other nations, the entire trading system will surely collapse under the weight of these obstacles. Today we will use trade to dictate to the rest of the world how many parts per million of benzene is permissible, tomorrow it will be how many hours in the day a worker can work, next it will be the per capita number of schools a country must have. Surely, these seemingly innocent and laudable social goals will sooner or later be hijacked by pro-

THE GEORGE WASHINGTON UNIVERSITY LAW LIBRARY

TRADE AND
THE ENVIRONMENT
LAW, ECONOMICS,
AND POLICY

Edited by
Durwood Zaelke, Paul Orbuch,
and Robert F. Housman

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

ISLAND PRESS

Washington, D.C. o Covelo, California