

# The World Trade Organization and Social Issues

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## I. INTRODUCTION

For many decades, the trade regime has been rather parochial. It has its own rulebook, its own players, and its own jargon. Today, this insularity is under attack. Environmentalists, public interest groups, and labour unions are trying to export new ideas into the trade regime. They want the General Agreement on Tariffs and Trade (GATT) to adapt itself to a changing world. They want the World Trade Organization (WTO) to follow transparent rule-making, lacking in the GATT. They want the WTO to develop linkages with other international organizations. The GATT has not been eager to embrace these changes. One might say it is being protectionist.

There are four social issues that are challenging the international trading system.<sup>1</sup> The first is the environmental critique. It questions the efficiency of trade in economic terms. Externalities not reflected in prices can send the wrong signals to the market. Trade will amplify these signals.

Environmentals are also concerned about the negative legal impact of the legal disciplines in the trade regime. This is a critique of government failure, not market failure. Intergovernmental rules, such as the Uruguay Round Agreement on Sanitary and Phytosanitary Measures, may hinder the adoption of proper health and environmental standards.<sup>2</sup> There is also concern that governments may under-regulate in order to retain or attract investment by transnational corporations.

A second social issue is labour standards. Labour standards here mean governmental rules on child labour, trade unions, etc., not the wage level of a country.<sup>3</sup>

This issue blends an economic and moral critique.<sup>4</sup> The economic critique is that when production is based on coercive relationships, it is no longer clear that market outcomes are good for all.<sup>5</sup> The moral critique is that international commerce has no

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<sup>1</sup> Competition policy is yet another, but is not discussed here. See Edward M. Graham, *Competition Policy and the New Trade Agenda*, Institute for International Economics, June 1994.

<sup>2</sup> For a discussion of these new rules, see Steve Charnovitz, *The World Trade Organization and Environmental Supervision*, *International Environment Reporter*, 26 January 1994, at 89.

<sup>3</sup> See OECD, *Employment Outlook*, July 1994, at 137.

<sup>4</sup> There is also a link between labour standards and conservation. See John Culbert Faries, *The Rise of Internationalism*, New York, W.D. Gray, 1915, at 52.

<sup>5</sup> Slave labour may be good for the consumer, but bad for the slave. Child labour may be good for the investor, but bad for the child. Government restrictions on unions may be good for management, but bad for the workers.

rules regarding labour standards. All governments regulate domestic labour standards to some extent. The International Labour Organisation (ILO), one of the oldest international organizations, has been writing international standards for seventy-five years.

A third social issue is employment and income. The critique is that although trade makes nations (as a whole) better off financially, the benefits are not uniformly distributed. Some people will get hurt by trade. There have been suggestions throughout the 20th century that trade-injured workers be compensated or given adjustment assistance, but these efforts have been disappointing.<sup>6</sup>

Stopping trade would not be a good response to such problems, since many of the same workers would probably be hurt from ongoing technological change. What is needed is positive adjustment and full employment policies. As Wallace McClure once noted, "The most vital national economic interest of every country is that its people shall always be efficiently at work."<sup>7</sup>

The fourth social issue is community and culture.<sup>8</sup> The critique is that although trade makes nations better off financially as a whole, it can devastate communities through changes in production patterns and can impregnate local culture with foreign influence. Some of the people changed might become (contrary to their expectations) happier as a result. But others will not.

The concerns for community and culture are not identical; the former is focused more on specialization, the latter on exchange. Both of these concerns seem to be rising. As John Naisbitt has noted, "although people want to come together to *trade* much more freely, they want to be *independent* politically and culturally." (emphasis in original).<sup>9</sup>

This critique is a legitimate one, but it is hard to distinguish it from garden variety protection. There is no reason why France or any other country should have to suffer typical American movies. But if a prohibition is written to ban movies based on where they were made, or on who their investors are, there is no way to distinguish that from prohibitions on where autos are made or on who their investors are.<sup>10</sup>

This article will discuss only the first two of these social issues—the environment, and labour standards. Part II will analyze these two concerns. Part III will present proposals for how the WTO and other institutions should deal with the

<sup>6</sup> For further discussion, see Steve Charnovitz, *Worker Adjustment: The Missing Ingredient in Trade Policy*, California Management Review, Winter 1986, at 156.

<sup>7</sup> Wallace McClure, *World Prosperity*, The MacMillan Company, New York, 1933, at 65.

<sup>8</sup> It is interesting to note that GATT Article XX(f) deals with culture. For a discussion of a GATT for culture, see Michael Braun and Leigh Parker, *Trade in Culture: Consumable Product or Cherished Articulation of a Nation's Soul?* Denver Journal of International Law and Policy, Fall 1993, at 155, 188–90.

<sup>9</sup> John Naisbitt, *Global Paradox*, 1994, at 10. See also Bob Davis, *Growth of Trade Binds Nations, But It Also Can Spur Separatism*, Wall Street Journal, 20 June 1994, at A1.

<sup>10</sup> GATT's rules on movies are in Articles III:10 and IV.

tissue of trade and the environment and Part IV will present proposals for how the WTO and other institutions should deal with the issue of trade and labour standards.

## II. ENVIRONMENTAL AND LABOUR

It has long been recognized that markets do not always lead to the socially optimal outcomes. In such instances, government interventions should be considered. When governments can ameliorate the problem, they should do so. When government intervention creates as many (or more) problems than it solves, such intervention should cease.

To the extent that market failures are local or national, then local or national governments will be able to handle them. But when market failures are international in scope, there is an institutional problem, since no international government exists. The closest thing we have are treaties which commit nations to take commensurate (or at least co-ordinated) action.

Only a portion of environmental regulation is covered by treaties. A great deal of labour regulation is covered by ILO Conventions, but ratifications are often low and enforcement often spotty.<sup>11</sup> Such international legislation has an ambiguous status. As Professor Hudson explained:

“It would be improper to treat all multipartite conventions as having the same value as law-making measures; but it would be equally improper to deny them any value as such.”<sup>12</sup>

In the absence of international government, national trade controls are sometimes used as a substitute for governance (or as an indirect form of regulation). Usually, this is uncontroversial. For example, if a country restricts the sale of domestic canisters, containing chlorofluorocarbons (CFCs), as the United States did before the Montreal Protocol, it can forbid entry to an imported canister that does not meet that standard. This would be consonant with GATT principles as long as “like” products are treated equally. When countries go beyond the application of domestic measures to imports, the degree of controversy will increase. Trade controls that treat imports differently from domestic products or that treat imports differently depending on their country of origin can conflict with GATT Articles III and I.

### A. SOCIAL REGULATION AND THE GATT

Many market failures are clearly international in scope. For example, the extraction from and pollution of the global commons need to be regulated through collective agreements by governments. Trade controls imposed by governments can be used to enforce such a regime (e.g. the Fur Seals Treaty), or to prevent free riders to such a regime (e.g. the Montreal Protocol).

<sup>11</sup> For background on the ILO, see John Mainwaring, Labour Canada, Ottawa, *The International Labour Organisation: A Canadian View*, 1986.

<sup>12</sup> Manley O. Hudson, *Current International Co-operation*, Calcutta University, Calcutta, 1927, at 127–28.

Although some commentators have contended that the GATT is oblivious to the environment, that is not true. The GATT contains two exceptions which together permit unilateral and multilateral trade controls for environmental purposes under certain conditions.<sup>13</sup> One can debate the scope of these exceptions; but it is difficult to deny their relevance to the global commons and trans-border environmental issues.

The internationality of other issues such as fairness, morality,<sup>14</sup> development and democratization is less clear. On the one hand, it can be argued that good policies on these matters help the entire world and therefore are of interest to everyone. On the other hand, it can be argued that each nation should follow only its own utility function.

The GATT contains rules to provide fairness. It maintains the right of countries to countervail injurious dumping and subsidies. It maintains the right of countries to ban products made by prisoners. The Uruguay Round does even more to achieve fairness: for example, by incorporating obligations on intellectual property rights enforceable through trade controls and sanctions. Some commentators want to see the GATT do a lot more to combat unfairness on issues like labour standards and environmental free riding.

The GATT contains a moral exception in Article XX(a), but it is amorphous. There is also an exception for trade controls taken pursuant to the UN Charter.<sup>15</sup> Yet there is no human rights standard in the GATT.

The GATT permits developing countries to offer less-than-reciprocal tariff reductions in order to aid their development. By decision, the GATT has permitted most-favoured-nation (MFN) violations in favour of developing countries. The Uruguay Round contains several provisions which provide a phase-in of new disciplines for developing countries.

The GATT contains no express commitment to democratization. Nevertheless, the potential contribution of trade liberalization to political liberalization was recognized by GATT's founders. It is interesting to note that the business community constantly argues that trade promotes favourable political change (e.g. South Africa and China).

In summary, the GATT already recognizes the significance of the global commons, physical externalities, unfairness, morality and development, and has made adaptations for them. One can ask whether each of these adaptations were good ideas. One can ask whether further adaptations are needed. But it seems many decades too late to deny the relevance of these points to the GATT. As John Culbert Faries pointed out in 1915:

<sup>13</sup> Steve Chamovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J.W.T.5, October 1991, at 37.

<sup>14</sup> Blackhurst and Subramanian call moral issues about foreign countries "psychological spillovers". See Richard Blackhurst and Arvind Subramanian, *Promoting Multilateral Co-operation on the Environment*, in Kym Anderson and Richard Blackhurst (eds.), *The Greening of World Trade Issues*, Harvester Wheatsheaf, London, 1992, at 247.

<sup>15</sup> GATT Article XXI(c). This would cover efforts to use trade sanctions to restore democracy in Haiti.

“When the premises were once established that the growing oneness of the world from a commercial and sanitary point of view demanded international co-operation, it was not difficult to argue that social and moral questions must seek the same solution.”<sup>16</sup>

## B. COMPARING ENVIRONMENTAL AND LABOUR ISSUES

There are many similarities between the environmental and labour issues in trade.<sup>17</sup> But there are also important differences. Each of the above points will be reviewed in turn.

The global commons is sometimes an environmental concern, never a labour one. Physical externalities are often an environmental concern, never a labour one.<sup>18</sup>

Unfairness is a concern for both the environment and labour. One issue is competitiveness—namely, that the producers in Country A with high standards will not be able to compete against producers in Country B with low standards. Another issue is the “race to the bottom”. That is, governments will lower or maintain sub-optimal standards in order to attract or retain investment.

The use of trade measures to deal with these problems may be justified in some cases. To quote Jacob Viner:

“If the expense of the [labour] legislation, moreover, is spread evenly over industry in general, it does not affect the competitive ability either of particular industries or of industry in general. If, however, the burden of the legislation falls particularly heavily upon particular industries, if these industries are unable to hold their own against foreign competition, and if this inability is solely or largely due to these special burdens, then the free trade doctrine, since the time of Ricardo, has always conceded the justice of special treatment of such industries—provided the special costs of social legislation which these industries bear have not been made necessary by especially disadvantageous social conditions to which their operations tend to lead in the absence of such legislation. If not used as a pretext for promiscuous protection, exceptional treatment could be granted to such industries without substantial violation of either the spirit or the letter of free trade.”<sup>19</sup>

Morality has always been a concern with labour and is becoming increasingly so with the environment. For example, there were treaties in the 19th century to ban trade in slaves. The treaty of 1906 on White Phosphorous Matches prohibited the phosphorus production method and required parties to ban the importation of matches made using that method.<sup>20</sup> The growing regulation of international waste trade has a strong moral component. So do proposals for banning trade in goods made with child labour.

Development is also involved with both the environment and labour, but the trade links are not overriding. It is surely true that proper environmental and labour

<sup>16</sup> Faries, *op. cit.*, *supra*, footnote 4, at 170–71.

<sup>17</sup> For further discussion, see Steve Charnovitz, *Environmental and Labour Standards in Trade*, The World Economy, May 1992, at 335.

<sup>18</sup> The most obvious of such externalities is the spread of disease through international trade. For a discussion, see L.S. Woolf, *International Government*, Brentano's, New York, 1916, at 224–37.

<sup>19</sup> Jacob Viner, *The International Economic Organization of the Future* in Howard Robinson *et al.*, Harper & Brothers, New York, *Toward International Organization*, 1942, at 122.

<sup>20</sup> 203 C. T.S. 12, Article I.

policies will promote development.<sup>21</sup> Nevertheless, it seems unlikely that trade sanctions can play a constructive role in achieving such policies. It is hard to see how re-trenching on normal trade relationships with a country can help it develop.<sup>22</sup>

Conditionality on trade preferences, however, is a different matter. Generalized System of Preferences (GSP) benefits, being a limited resource, should be channelled to those countries that will make the most use of them. The United States now has conditionality for worker rights and may soon add it for the environment. The International Monetary Fund and the World Bank also practice conditionality.<sup>23</sup>

Labour rights can facilitate democratization, but environmental standards do not. There is considerable evidence that free trade unions promote democratic norms (for example, South Africa). Of course, democratic government may be a pre-condition for attending to the environment. The similarities and differences in the environment and labour issues are summarized in Table 1.

In the Treaty of Versailles, it was declared that "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries."<sup>24</sup> In other words, the thesis was that there is a trans-border, non-physical externality from low labour standards that hurts other countries. This thesis may be true to some extent, but progress on labour standards during the century has shown this externality to be a weak force. As Martin Wolf has noted:

"... while free trade and free factor movements do reduce the ability of individual governments to impose regulation and taxation, the responsiveness of trade and factor flows is not generally so high as to eliminate the freedom of action of governments . . ." <sup>25</sup>

The same thesis can be offered for the environment as for labour. But the evidence for "polluter havens" is low. There is one important way in which this thesis may be more valid for the environment however. Many environmental problems

TABLE 1: SIMILARITIES AND DIFFERENCES IN ENVIRONMENT AND LABOUR ISSUES

Issue	Environment	Labour
Global commons	Some	No
Physical trans-border externalities	Often	No
Unfairness	Yes	Yes
Morality	Growing	Yes
Development	Some	Some
Democratization	No	Yes

<sup>21</sup> See for instance Guy Caire, *Freedom of Association and Economic Development*, ILO, Geneva, 1977, and the report of the World Commission on Environment and Development (Brundtland Commission), *Our Common Future*, Oxford University Press, Oxford, 1987.

<sup>22</sup> See *Free Trade or Foul?* The Economist, 4 June 1994, at 70.

<sup>23</sup> For a recent development, see George Graham, *Pledge over Female Mutilation*, Financial Times, 22 April 1994, at 6 (discussing the unusual broadening of the World Bank and IMF role into social issues).

<sup>24</sup> 225 C.T.S. 188, Part XIII, Section I. Other trade provisions are contained in Part X.

<sup>25</sup> Martin Wolf, *The Resistible Appeal of Fortress Europe*, Centre for Policy Studies, London, 1994, at 62. See also id., at 38.

require international co-operation to solve. Thus, the failure of any nation to cease whaling or cease producing CFCs, for example, may present a real obstacle to the environmental goals of other nations. By contrast, the failure of one country to cease child labour does not make it impossible for a neighbouring country to do so.

### C. ARE THEY TRADE ISSUES?

In early 1994, when the United States tried to place labour standards on the work plan for the WTO, many countries objected on the grounds that it was not a trade issue. In 1991, when the European Free Trade Association (EFTA) countries tried to convene the first meeting of GATT's Group on the Environment (after a delay of twenty years), many of these same countries argued that the environment was not a trade issue either. Konrad von Moltke, of Dartmouth College, has put forward an interesting thesis about the environment; he states that unmanaged environmental problems become trade problems. Not all environmental problems do so, of course. But there is an important insight here.

Von Moltke's thesis applies to many other economic dysfunctions. Unmanaged macroeconomic policies lead to trade problems. Unmanaged exchange rate policies do too. So do unmanaged subsidies, unmanaged competition policy, unmanaged employment policies, unmanaged intellectual property protection, and unmanaged international labour codes. This is not to suggest that we know how to manage all (or any) of these issues properly. The point here is that labour and environmental concerns have become trade problems in the same way that many other issues became trade problems.

If this thesis is accepted, then the path to dealing with labour and environmental issues becomes clearer. Just as there is a regime for intellectual property, regimes are needed for each of these issues. There may be a constructive role for trade instruments in some of these regimes. Certainly, one would not want to rule out trade instruments a priori.<sup>26</sup> As Michael Hart points out:

"Until governments are prepared to enter into self-executing international agreements enforced by domestic courts, trade agreements may also provide the most effective way of enforcing international rules governing such policies and resolving international conflicts—intergovernmental and intercorporate—that may arise as a result of them."<sup>27</sup>

To promote international co-ordination and collaboration, numerous organizations have been established since the mid-19th century. Many of them, such as the GATT, have been successful. But there is often the problem of these organizations not co-ordinating with each other. For example, the GATT and the ILO, despite their close physical proximity, have little interaction. The GATT also does little with the UN Environment Programme (UNEP). Greater attention is needed to this problem of international "disorganization".

<sup>26</sup> But some commentators apparently would. See Martin Wolf, *Protectionist Standards*, Financial Times, 4 July 1994, at 20 (supporting prison work for export and denying that collective bargaining is a fundamental right).

<sup>27</sup> Michael Hart, *What's Next? Canada, the Global Economy and the New Trade Policy*, Centre for Trade Policy and Law, Ottawa, 1994, at 26.

One of the benefits of the trade and environment debate is that it has led international organizations to begin working with each other. There have also been improvements in internal relations. For example, the Organization for Economic Co-operation and Development's (OECD) trade and environment programme got those two individual directorates working together as never before. The same synergy may now be achieved in labour and trade if the OECD gets the employment, development, and trade directorates working together.

An even more important effect is that trade and environment ministries in national governments have begun to work more closely with each other. UNCTAD and UNEP should be given credit for their positive efforts to improve decision-making within each country.

#### D. POLITICS OF TRADE'S SOCIAL DIMENSION

The issues of environment and labour are often reviewed rather negatively by the trade camp. For example, the GATT's staff on the environment is located in its division on non-tariff barriers. The same division is now boning up on workers rights; but environment and labour are more than non-tariff barriers.

The potential for protectionist abuse on environment and labour is obvious. So the challenge is to find a way to use these issues to promote trade liberalization. It is interesting to note that the originator of the idea of using trade negotiations to improve labour standards, James T. Shotwell, saw it as a way of liberalizing trade. Shotwell's proposal, made in 1933, was rejected by Cordell Hull. As Shotwell notes in his autobiography:

"Neither Mr Hull nor his economic assistants liked the scheme, because of its lack of a fundamental free trade principle. I said it was the Trojan horse to get inside the protectionist walls."<sup>28</sup>

This author is reluctant to second-guess Hull. But it should be noted how far we are six decades later from a fundamental free trade principle (although some notable regional progress has been made in the past few years).

By breaking its 1962 promise on trade adjustment assistance to workers, and by other lassitudes on the employment-trade connection, the U.S. trade community is to some extent responsible for organized labour's walkout from the coalition favouring trade liberalization. While environmentalists were never a major part of the coalition (except perhaps for the North American Free Trade Agreement) as trade unions once were, there is a danger of alienating environmental groups too. The opposition or non-support by environmental groups for the Uruguay Round is partly tactical. But it seems unlikely that they will help lobby the implementing legislation through the Congress.

Environmentalists ought to be part of the trade liberalization coalition (as should

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<sup>28</sup> James T. Shotwell, *The Autobiography of James T. Shotwell*, the Bobbs-Merrill Company, Indianapolis, 1961, at 308.



workers). The constructive potential can be seen in proposals from environmental groups regarding GSP wherein it is suggested that GSP conditionality be accompanied by expanding product coverage. With regard to the new WTO Environment Committee, some environmental groups have suggested that issues such as tariff escalation and market access be taken up first. It will be interesting to see whether trade policy-makers (in industrial and in developing countries) are agile enough to take advantage of this proffered support.

### III. WTO AND THE ENVIRONMENT

In recent years, it has become increasingly apparent that the world economy and the global environment are connected. The 1990 Bergen Declaration on Sustainable Development pointed out the “symbiotic nature of economy and the environment”.<sup>29</sup> The 1992 Rio Declaration declared that:

“In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”<sup>30</sup>

There are many economic issues that are far more domestic than international; there are also environmental issues that are more domestic than international. There are surely economic issues that have no serious environmental implications. There are also environmental issues that have small implications for the economy. Nevertheless, the world economy and the global environment are, to a large extent, and probably an ever increasing extent, two sides of the same coin. I am trying to give this coin a name. I call it the *ecolonomy*.

#### A. SEPARATING THE ISSUES

When one looks back at why the trade and environment conflict developed as it did, it is evident that much of the debate has been driven by the meat hormone dispute between the United States and the European Community. For example, the new Agreement on Sanitary and Phytosanitary Standards, and its emphasis on a trade restrictiveness test, came about as a way to deal with protectionist restrictions disguised as health measures. There has been much effort (e.g. in the OECD) to develop principles that can underlie the use of environmental trade measures. While much of this is useful analysis, the search for one overall set of principles is misguided and Procrustean. The issue of trade and the environment as really several different issues must be recognized, and no one set of principles will be appropriate for all.

A wiser approach would be to divide the trade and environment issue into several sub-topics and to search for principles (or rules) for each of them. The most important sub-topics would be:

<sup>29</sup> Bergen Ministerial Declaration on Sustainable Development in the ECE Region, para. 13.

<sup>30</sup> Rio Declaration on Environment and Development, Principle 4, 31 ILM 874. See also Principle 25 (Peace, development and environmental protection are interdependent and indivisible). For a comparison of the principles in the Rio Declaration to GATT principles, see Thomas A. Wathen, *A Guide to Trade and the Environment*, Environmental Grantmakers Association, New York, 1992, at 66.

### 1. *Animals*

Most GATT environmental disputes have involved fisheries. These issues muddy the waters on the larger question of how GATT should deal with environmental issues. As Ken Berlin and Jeff Lang have noted, the international trading system has always tolerated environmental trade measures for animals.<sup>31</sup> Thus, the specialness of animals should be recognized, rather than the opposing of such environmental trade measures on the grounds that the same type of measure would be inappropriate for pollution control.<sup>32</sup>

### 2. *Waste Trade*

The Basle Convention, in its Preamble, recognizes that every State "has the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in its territory."<sup>33</sup> The Convention contains several provisions which violate GATT's MFN rule. The issues of waste trade will need to be worked out in an environmental context.<sup>34</sup> There is no reason to assume, a priori, that the MFN rule is part of the solution.<sup>35</sup>

### 3. *Recycling Content*

There are already complaints about laws that require a certain percentage of recycled content in newspaper or bottles. These are legitimate environmental measures, but they can disadvantage foreign suppliers (particularly small countries) even when implemented in a country-blind manner.

### 4. *Labelling*

There are no mandatory eco-labelling provisions yet that involve processes, but it is only a matter of time before they occur. There is a large potential for protectionist abuse here, so it would be very useful to arrive at international understandings before conflicts develop.<sup>36</sup>

### 5. *Border Tax Adjustments*

The issue of when countries may use border tax adjustments on exports is being

<sup>31</sup> Kenneth Berlin and Jeffrey M. Lang, *Trade and the Environment*, The Washington Quarterly, August 1993, at 35 and 48.

<sup>32</sup> It is interesting to note that the U.S. Council for International Business has recommended that a new GATT interpretation be adopted to permit unilateral trade measures for species protection. See Statement on Constraints on the Unilateral Use of Trade Measures to Enforce Environmental Policies, April 1994.

<sup>33</sup> 28 ILM 649.

<sup>34</sup> See Bernard I. Logan, *An Assessment of the Environmental and Economic Implications of Toxic-Waste Disposal in Sub-Saharan Africa*, 25 J.W.T.1, February 1991, at 61.

<sup>35</sup> See John H. Jackson, 'Managing Economic Interdependence'—An Overview, Law and Policy in International Business, Vol. 24, 1993, at 1025 and 1028 (I do not think MFN is a rule that should be accepted without some re-examination).

<sup>36</sup> See David Runnalls and Aaron Cosbey, *Trade and Sustainable Development*, International Institute for Sustainable Development, Winnipeg, 1992, at 73.

clarified by the Uruguay Round.<sup>37</sup> But the rules on imports remain uncertain.<sup>38</sup> This entire issue needs to be addressed in an environmental context.

## 6. *Sanitary Measures*

The disciplines established under the Uruguay Round, such as the science test and the disproportionality test, will lead to new case-law. One might also want to consider rules for retroactive penalties when countries keep out perishable goods (e.g. the case of France and fresh fish). But whatever new principles evolve need not be consistent with the way that the WTO treats hazardous waste trade or animals.

## 7. *Exportation of Resources*

The GATT does not prevent the conservation of resources, but does attempt to prevent a government from refusing to allow the exportation of resources at the same time that such resources are being consumed domestically. (The GATT would not prevent private entities from such exclusionary policies however.) One problem with this rule is that poor countries, or countries with inadequate property rights, may over-utilize their resources because of export demand from wealthier countries.<sup>39</sup> The GATT may also conflict with soft international law stating the right of peoples freely to use their natural resources.<sup>40</sup>

## 8. *Zoning*

The MFN principle requires that countries be treated the same regarding "like" products. But there may be reasons to provide differential treatment for various regions that have nothing to do with protectionism.<sup>41</sup> For example, a species may be threatened in one region but not in another. The Basle Convention parties recently agreed to ban waste trade between OECD and non-OECD nations.<sup>42</sup> The International Whaling Commission recently established a whale sanctuary in the Antarctic region. There may be good reasons to treat wood from tropical forests differently to wood from temperate or boreal forests. Should the GATT co-operate by zoning certain regions for non-trade in particular products? It might be noted that the

<sup>37</sup> But one of the clarifications for exports regarding energy tax adjustments has already been disavowed by major industrial countries. See *U.S. Secures Agreement Not to Use GATT To Allow Energy Tax Rebate*, Inside U.S. Trade, 28 January 1994, at 19.

<sup>38</sup> For further discussion, see Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, Cornell International Law Journal, forthcoming 1994.

<sup>39</sup> For example, see Graciela Chichilnisky, *Social Diversity, Arbitrage, and Gains from Trade: A Unified Perspective on Resource Allocation*, AEA Papers and Proceedings, May 1994, at 427.

<sup>40</sup> General Assembly Resolution 626 (VII), 1962. See also the Rio Declaration on Environment and Development, Principle 2.

<sup>41</sup> Christopher D. Stone, *The Gnat is Older than Man*, Princeton University Press, Princeton, N.J., 1993, at 167-168.

<sup>42</sup> See Jennifer Clapp, *Africa, NGOs, and the International Toxic-Waste Trade*, Journal of Environment & Development, Summer 1994, at 17.

GATT permits discrimination in favour of developing countries. The goal of development has permitted to trump the goal of non-discrimination.

## B. ENVIRONMENTAL TREATIES

The GATT has never ruled that a trade measure taken pursuant to an environmental treaty is GATT-illegal. It seems unlikely that the GATT Council would take that suicidal plunge. But the GATT has been unable to do anything (since the unfortunate Dolphin I Decision) to assure environmentalists that such an outcome would not happen.

The new WTO Environmental Committee should move quickly to resolve the treaty issue, particularly for existing environmental treaties such as the Convention on International Trade in Endangered Species, the Montreal Protocol, the Wellington Convention, and the Basle Convention. Unlike the GATT (which disciplines trade restrictions), these treaties regulate trade. It ought to be evident that treaties that regulate trade should have precedence over treaties that discipline trade restrictions, in so far as they conflict.

The first international trade treaty followed that simple principle. The Protocol to the International Convention Relating to the Simplification of Customs Formalities states that:

“It is understood that the obligations of the Contracting States under the Convention referred to above do not in any way affect those which they have contracted or may in future contract under international treaties or agreements relating to the preservation of the health of human beings, animals or plants (particularly the International Opium Convention), the protection of public morals or international security.”<sup>43</sup>

The Charter of the International Trade Organization 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.”<sup>44</sup>

It should be noted that this provision contains no “necessary” test, as in Article XX(b), or any domestic counterpart test, as in Article XX(g).

Many commentators have suggested that trade provisions in environmental treaties which distinguish between products based on how they are produced could violate GATT rules. Without getting into the merits (or lack thereof) of this argument, it is interesting to note that this view is a departure from past thinking. The point was addressed in the GATT Secretariat’s first report on trade and the environment (in 1971). The report, written by Jan Tumlir and Margaret Potter, stated that:

“Obviously, *action taken on the basis of an intergovernmental agreement concerning maintenance of quality standards in a production process would be a different matter entirely*, but it is hard to see how the Contracting Parties to GATT could permit individual member governments to set import

<sup>43</sup> 30 L.N.T.S. 373, Protocol, para. 1.

<sup>44</sup> ITO Charter, Article 45.1(a)(x). A complaint procedure was available however.

charges in relationship to costs of production, even if it were possible to determine these particular costs accurately." (emphasis added).<sup>45</sup>

### C. PARTICIPATION

The WTO Committee should move quickly to involve environmentalists and business groups in its work plan. The recent meeting at the GATT for non-governmental organizations (NGOs) was a welcome event. It was three years overdue.

The International Trade Organization Charter of 1948 contained two good provisions on participation, only one of which was reproduced in the WTO. The one brought forward directs the Council to "make appropriate arrangements for consultation and co-operation with non-governmental organizations concerned with matters related to those of the WTO."<sup>46</sup> The other, which was not brought forward, authorized the creation of commissions to consider particular issues.<sup>47</sup> These were to be composed of qualified individuals and were to include appropriate officials from other international organizations.<sup>48</sup> A commission on trade and the environment would have been very useful during the past few years.

### D. ENVIRONMENTAL INSTITUTIONS

The core issues in environmental policy are how to get countries to improve their environmental taxes and regulations, and how to boost co-operation between countries. These issues are beyond the scope of the WTO. Elsewhere, I have proposed the creation of a new global institution, composed of business, NGOs and governments, to develop environmental standards.<sup>49</sup> Daniel C. Esty<sup>50</sup> has proposed an institution with a similar function (though not tripartite). These recommendations are probably quixotic.

Happily, UNEP is moving to fill in the vacuum. It has launched a serious research programme on trade and the environment<sup>51</sup> and will be reporting to the Commission on Sustainable Development. Such efforts should be supported financially by all governments.

Some commentators say that international trade institutions should work on trade and international environmental institutions should work on environment. This sounds appropriate, until one thinks it through. Obviously, there are good reasons for institutional specialization. Yet it must be recalled that the GATT does not really work

<sup>45</sup> GATT Secretariat, *Industrial Pollution Control and International Trade* 1971, at 18.

<sup>46</sup> Agreement Establishing the WTO, Article V.2. See ITO Charter, Article 87.2.

<sup>47</sup> ITO Charter, Article 82.

<sup>48</sup> *Id.*, Article 83.

<sup>49</sup> See Steve Charnovitz, *Environmental Harmonization and Trade Policy*, in Durwood Zaelke et al. (eds.), *Trade and the Environment*, 1993, at 279-85.

<sup>50</sup> Daniel C. Esty, *Greening the GATT*, 1994, at 78-83.

<sup>51</sup> For example, see the Environment and Trade Series, 1994.

on trade; the GATT works on trade restrictions. Thus, it will always be appropriate for the GATT to examine environmental trade measures as possible instances of disguised protection.

It is sometimes suggested that trade instruments should be used for trade policy and environmental instruments for environmental policy.<sup>52</sup> Environmental institutions utilize policy instruments such as product and process standards, taxes, quotas, sale bans, quarantines and embargoes. Are these environmental instruments or trade instruments? The GATT does not use standards, taxes, quotas, and embargoes. It disciplines them. So the notion that the trade and environment conflict would be solved if the environmental regime used its "own" instruments is not helpful to policy-making.

The GATT exists because of government failure, that is, the existence of protectionism. If protectionism were cured, there would be little need for the GATT. By contrast, environmental institutions exist because of both market failure and government failure. Unlike protectionism, which can be cured in theory, environmental problems can never be definitively cured.

#### IV. THE WTO AND LABOUR STANDARDS

The linkage between fair labour standards and trade law has a long and rich history.<sup>53</sup> Unfortunately, little progress has been made in the past. The Clinton Administration has trumpeted the GATT's agreement that the topic of labour standards could be discussed as a potential WTO issue. But it should be remembered that the Consultative Group of 18 discussed labour standards at the end of the Tokyo Round as a possible future issue. The GATT Council also discussed worker-rights at the beginning of the Uruguay Round.

The advent of the WTO offers an opportunity to make some progress on this issue. A few months ago, I suggested a three-part plan to do this<sup>54</sup> which is outlined below.

The most essential reform is to reinvigorate the ILO. A better functioning ILO would take some of the pressure off the trading system. The ILO needs to recodify its Conventions (one hundred and seventy-five is too many) and to separate core rights from good practices. Improvements are also needed in the ILO's technical assistance and in its supervision process. One might also consider a revision in the ILO's Federal-State clause to allow sub-national units of government to accede to Conventions.<sup>55</sup> In an economy of high unemployment, rapid technological change, and a changing work place, the need for a vibrant ILO is apparent.

The WTO should embrace fair labour standards as an objective of the trading

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<sup>52</sup> For example, see Geza Feketekuty, *The Link Between Trade and Environmental Policy*, Minnesota Journal of Global Trade, Summer 1993, at 171 and 182. See also Esty, *op. cit.*, *supra*, footnote 50, at 130.

<sup>53</sup> For a discussion see, Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime: An Overview*, International Labour Review, Vol. 126, No. 5, 1987, at 565.

<sup>54</sup> Steve Charnovitz, *Promoting World Labour Rules*, The Journal of Commerce, 19 April 1994, at 8A.

<sup>55</sup> ILO Constitution, Article 19.7.

system.<sup>56</sup> Unfortunately, since the Reagan Administration, the U.S. Trade Representatives have allowed the developing countries to misdefine the debate on GATT and “worker rights”. The incorporation of the fair labour standards issue into the WTO has been portrayed as a radical change to trade policy. It is far from that. Indeed, from the very beginning of the concept of international trade policy, labour rights has been present.

The first multilateral treaty to discuss trade policy was the Treaty of Versailles which called for “equitable treatment for the commerce of all Members of the League”.<sup>57</sup> In the same Article, the Treaty states that Members:

“ . . . will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in *all countries to which their commercial and industrial relations extend*, and for that purpose will establish and maintain the necessary international organizations.”(emphasis added).<sup>58</sup>

This Treaty elevated labour standards to an international issue.

One motivation for the creation of the ILO was to equalize conditions of competition among nations so that trade might be liberated without reducing standards of living.<sup>59</sup>

Perhaps one treaty is an anomaly,<sup>60</sup> but when the same issue came up in the drafting of the ITO Charter, even firmer action was taken. The Charter included an Article on fair labour standards stating that the Members:

“ . . . recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory . . . In all matters relating to labour standards that may be referred to the Organization in accordance with the provisions of Article 94 or 95 [GATT Article XXIII], it shall consult and co-operate with the International Labour Organization.”<sup>61</sup>

This can be called firmer action because it was linked to dispute settlement.

The WTO should develop a set of minimum international labour standards that all Members would undertake to follow in producing for international commerce. The list of standards should be short at the beginning. One might imagine five standards to start with such as:

- forced labour;
- child labour;
- freedom of association;
- toxic substances; and

<sup>56</sup> For a thoughtful argument against this, see T. N. Srinivasan, *International Labour Standards—Once Again!* in U.S. Department of Labor (ed.), *International Labor Standards and Global Economic Integration*, Proceedings of a Symposium, July 1994, at 34.

<sup>57</sup> 225 C.T.S. 188, Article 23(e).

<sup>58</sup> *Id.*, Article 23(a).

<sup>59</sup> Karl Polanyi, *The Great Transformation*, Beacon Press, Boston, 1944, p. 26.

<sup>60</sup> For a rare example of a multilateral treaty dealing with the environment, trade and labour, see the Treaty Concerning the Archipelago of Spitsbergen of 1920, 2 LNTS 8. In Article 2, Norway is specifically permitted to take measures to ensure the preservation and, if necessary, the reconstitution of the fauna and flora of the region. In Article 3, MFN is guaranteed. In Article 8, Norway guarantees to the paid staff the remuneration and protection necessary for their physical, moral and intellectual welfare.

<sup>61</sup> ITO Charter, Article 7.

— derogations from national law in export processing zones. These standards should be written jointly by a WTO-ILO commission.<sup>62</sup>

The final element of the plan would be a moratorium on any enforcement of the above standards through trade measures for a long period, perhaps eight years. The moratorium would apply both to multilateral enforcement through WTO disputes settlement and to unilateral enforcement (e.g. Section 301). There are three purposes of the moratorium. First, it would be a concession from the demander countries.<sup>63</sup> Second, it would force developing countries to talk about the standards rather than to harangue against trade sanctions. Third, it would give voluntary commitments a chance to work. If that succeeds, then there may be no need to reopen the question of trade sanctions at the end of the moratorium.

The WTO should also work with the ILO and the OECD to improve upon existing codes of conduct for transnational corporations. There would be less objection to investment and capital movements if such corporations were a stronger force for positive change.<sup>64</sup> The Sullivan Principles<sup>65</sup> offer a good model in this regard.

## V. CONCLUSION

In March 1994, GATT Director General, Peter Sutherland, gave a thoughtful speech at the Toronto Canadian Club. Mr Sutherland sees trouble on the horizon. Specifically, there is a danger of "overloading the industrial world's economic and political circuits." He warns that:

"Simplistic demands for drastic trade remedies against so-called eco-dumping or social dumping sometimes bear a striking similarity to more conventional forms of protectionist rhetoric, but in many respects ill-thought-out measures can be more dangerous because of the popular emotional appeal that they appear able to carry with them."<sup>66</sup>

Mr Sutherland is right to be concerned about these developments. But he misses the point to some extent. The problems of unemployment, unfair labour standards, and environmental degradation are already coursing through the world's economic and political circuits.

The solution to these problems does not lie in the trading system. (They are not fomented by open trade; nor can they be solved by open trade.) But once these problems osmose into the trading system (as they have), then the trading system must be seen as addressing them. An unwillingness of the trading system to do so will erode

<sup>62</sup> For a discussion of the possible role of the ILO in devising fair labour standards for trade, see ILO, *Defending Values, Promoting Change*, Report of the Director-General, ILO, Geneva, 1994, at 54-66.

<sup>63</sup> The countries opposing worker-rights in the GATT might say that it is not much of a concession to forgo taking actions that are GATT-illegal.

<sup>64</sup> Some corporations have adopted their own standards for suppliers. See *Two Firms' Views on Human Rights*, USA Today, 24 May 1994, at 8B. For another interesting development in the private sector, see Craig Torres and Thomas T. Vogel Jr., *Some Mutual Funds Wild Growing Clout in Developing Nations*, Wall Street Journal, 14 June 1994, at A1.

<sup>65</sup> Suggested guidelines by the Rev. Leon Sullivan of Philadelphia to promote the economic and social advancement of non-white employees of U.S. firms in their facilities in South Africa in the 1970s.

<sup>66</sup> Peter D. Sutherland, *Consolidating Economic Globalization*, 21 March 1994, GATT Doc. NUR 083.



support for trade. Since these problems are difficult, if not intractable, trade is vulnerable to being made the scapegoat for them.

In the face of this political situation, GATT Members have taken the wrong stance. Instead of resisting committees on the environment and labour, they should be welcomed. The world community needs to find ways to harmonize environmental and labour standards when appropriate and to formalize interface on these issues when problems persist.<sup>67</sup> The surest way to encourage damaging trade restrictions is for the WTO to dodge these issues.

Openness among nations is good. World commerce is to be encouraged. But not every competitive advantage a producer attains is benign. In a world economy which is governed only at the national level, there are bound to be disjunctions between what governments can do and what they should do. Since trade is important to linking the world together, it seems appropriate for the WTO to undertake formal co-ordination with other international institutions and to establish serious work groups on the environment, labour standards, culture, community or any other issue with systemic implications.

In the closing ceremony at the GATT's Marrakesh Ministerial Meeting, King Hassan II noted that:

"By bringing into being the World Trade Organization today, we are enshrining the rule of law in international economic and trade relations, thus setting rules and disciplines over the temptations of unilateralism and the law of the jungle."<sup>68</sup>

Workers in sweatshops pray for the enshrinement of international law. Environmentalists are not tempted by the law of the jungle (although they would like to preserve some jungles). The challenge for the world community is whether it is ready to start setting rules and disciplines for all aspects of international economic relations, including the use of capital, labour and natural resources. One hopes that the WTO will be ready to meet this challenge.

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<sup>67</sup> For a discussion of the concepts of harmonization and interface, see John H. Jackson, *The World Trading System*, MIT Press, Cambridge, 1989, at 305. See also John H. Jackson, *Managing the Trading System: The WTO and Post Uruguay Round GATT Agenda*, in C. Fred Bergsten and Peter Kenen (eds.), *Managing the World Economy*, Institute for International Economics, Washington, April 1994.

<sup>68</sup> See *WTO: Rule of Law in Economic Relations*, GATT Focus, No. 107, May 1994, at 4.