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**Living in an Ecolonomy:
Environmental Cooperation and the GATT**

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*Prepared for the Conference on International Trade
Agreements and the Environment on April 29-30, 1994*

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This article considers the need to improve international governance to take into account both economic and environmental factors. It discusses the new environmentalist critique of international trade and explains why some of these concerns are misplaced. The paper then moves to a discussion of GATT and the environment. Both narrow and broad reform proposals are offered.

The concepts of a world economy and of a global environment have been recognized for some time. Throughout the century, statesmen have attempted to devise international institutions and agreements establishing rules for human activities involving both of these systems. Of course, not all of these attempts were successful. For example, the effort in 1927 to establish an international treaty on trade restrictions failed.¹ But two years later, the effort to establish an international treaty to control plant diseases succeeded.²

The recognition that the world economy and the global environment should be viewed as closely linked systems is also not new. For example, in 1925, William Smith Culbertson, one of the architects of America's trade reciprocity policy, called for an international conference on commercial policy to consider issues such as most-favoured nation rules, unfair competition, market access, and investment.³ That alone was visionary, but Culbertson sought even more. He suggested that "Following, or perhaps as part of, a conference on commercial policy, there should be held a world conference on the conservation of natural resources."⁴

What is relatively new is the notion that the world economy and the global environment should be viewed as the *same system*.⁵ The Bergen Declaration on Sustainable Development of 1990 pointed out the "symbiotic nature of economy and the environment."⁶ The Rio Declaration of 1992 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.⁷

governing trade itself, the GATT governs only trade restrictions and distortions.¹⁹ So far, it has operated by consensus which limits the decisions it can take. The International Labour Organization (ILO) can draft standards regarding the workplace, but they do not become obligations without subsequent ratification by governments. Ratification experience in recent years has been disappointing. There is no institution comparable to the ILO for the environment. The UNEP plays a coordinating and educational role. The new U.N. Commission on Sustainable Development has not yet left a mark.

On the other hand, progress in governance is being made. The creation of the World Trade Organization (WTO) in 1993 was a significant achievement in international economic cooperation.²⁰ In recent years, nations have attained treaties on ozone protection, trade in hazardous waste, driftnet fishing, climate change, and biodiversity. The Global Environment Facility is in place.²¹ The World Bank is now taking the environment seriously.²²

Trade and the Environment

The links between international trade and environmental damage go back hundreds of years.²³ This paper will focus mainly on the past few years, however, during which the linkage has become a serious concern in both the trade and environmental policy camp. The trade camp largely sees it as a threat to business as usual. The trade liberalizers worry that environmental rationales will be put forward to justify new restrictions.²⁴ For example, the GATT Secretariat set up its environmental staff as an appendage to its division on technical barriers to trade. The protectionists include between those who view the environment as an additional argument for trade barriers and those who want to reserve trade leverage for commercial rather than environmental goals.

The environmental camp has articulated three major concerns. One, that international trade rules will be invoked to deny the use of environmental trade measures (ETMs). Two, that trade liberalization may degrade the environment.²⁵ Three, that protectionism may degrade the environment. Environmentalists have also seized upon the creation of the WTO as an opportunity to sensitize the GATT to environmental concerns, and have been frustrated by

Although there are some variations on this theme, the basic insight is that any significant environmental issue has economic implications and that any significant economic issue has environmental implications.⁸ Thus, Agenda 21 calls for governments to "ensure that environment and trade policies are mutually supportive, with a view to achieving sustainable development."⁹ The U.S. Congress has declared it to be the "policy of the United States that sustainable economic growth must be predicated on the sustainable management of natural resources."¹⁰

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 insight remains valid: the world economy and the global environment are, to a large extent, and probably an ever increasing extent, two sides of the same coin.¹¹ So far, the coin lacks a name.¹² So I propose to call it the "ecolonomy."¹³

Once it is accepted that humans inhabit one ecolonomy, the inadequacy of current international¹⁴ governance becomes apparent. There is a General Agreement on Tariffs and Trade (GATT), but it has no competence for the environment. There is a United Nations Environment Programme (UNEP), but it has limited competence for economic coordination.¹⁵ There are numerous treaties on economic policy and on the environment, but they seldom are linked.

Recognizing the ecolonomy also raises the question of when economic borders and national decisionmaking cease to be useful.¹⁶ As Allan G. B. Fisher once noted:

The hard fact is that we live in a world where, in part at least, our fate depends inexorably on what other people do... The beginning of wisdom in modern international economic life is to realise that in this sense no nation, great or small, can be free, independent or sovereign.¹⁷

The sovereign nations of the world have been slow to yield authority to international institutions.¹⁸ There is no institution

The Expanding Issue

Over the past few years, the topic of trade and environment issue has broadened considerably. The debate is no longer just about GATT rules and the environment or the environmental effects of trade policy. Rather, the issue has expanded to embrace: (1) the environmental effects of all production involved in trade, (2) the use of the global commons, (3) appropriate development strategies, and (4) ways to promote international environmental cooperation.

This expansion presents both challenge and opportunity. The challenge is that the additional issues are complicated. The opportunity is that the linkage between trade and environment has captured the attention of key governments, the GATT, other international organizations, non-governmental organizations (NGOs), and the media. This rare attentiveness can be used to develop public support for new policies to deal with seemingly intractable problems.

When the trade and the environment issue is viewed broadly, it becomes apparent that many of the issues go beyond the GATT. One response to this is to broaden GATT's mandate. Perhaps this will happen. But in the meantime, there is a need to enlist UNEP, the ILO, the Organization for Economic Co-operation and Development (OECD), U.N. Development Program (UNDP), and other organizations to deal with the non-GATT aspects of the issue. Indeed, it can be argued that the GATT aspects are not solvable without such parallel action.

For example, consider the issue of unilateral ETMs, such as the U.S. law banning shrimp from countries that do not have comparable turtle protection regimes.³¹ Some would try to deal with this issue by clarifying GATT rules. Yet it seems evident that either permitting the United States to continue its law, or denying this right to the United States will not, in itself, solve the problem of incidental damage to endangered turtles. What is needed is an enforceable international regime for turtle protection combined with technical assistance to poor countries.³² The GATT does not promote this kind of cooperation through standard-setting or dispute settlement.³³

GATT's disinclination to be greened.²⁶

Both camps have their extremists. For example, William H. Lash III fears that the GATT "is in danger of becoming the latest sacrifice to the environmental lobby."²⁷ The view that trade measures should never be used for environmental purposes is predicated on three assumptions:

1. Environmental problems and concerns are purely domestic, in response to national values. No one cares about the external environment (e.g., foreign tigers).
2. There are no physical transborder spillovers.²⁸
3. There is no global commons, no ocean, no atmosphere.

It is not being suggested that any commentator necessarily believes all three, only that the trade *uber alles* view would follow if all three assumptions were true. In reality, none of these assumptions is true. The closest one might come is case of Nauru with respect to the second assumption.

The environmental camp is also susceptible to hyperbole. During the past year, there has been a proliferation of economic Dadaism by Ravi Batra and others who inveigh against free trade.²⁹ Some, like Tim Lang and Colin Hines, see no embarrassment in identifying themselves as "protectionists," despite the great harm done by protectionists in the past.³⁰

Leaving the extremists aside, both camps seem to want to blend their disparate views. This paper will attempt to contribute to this merger by analyzing some of the main issues and offering new policy recommendations. Part I will discuss some conceptual points. Part II will discuss GATT and WTO reform. Part III will discuss the need for the creation of a Global Environmental Organization.

I. Conceptual Points

Part I will discuss briefly several issues which underlie the trade and environment debate.

surprising. Economic and environmental issues are very controversial within countries too. The same coercion, eco-imperialism, paternalism, and burden shifting that is so regularly deplored at the international level seems more acceptable at the national level.

The Daly Thesis

For over two decades, Herman E. Daly has been writing provocative critiques of economic growth.³⁶ He is absolutely correct that our measurements of production, like GDP, are flawed by not taking account of the consumption of natural resources. He is also correct that finite limits on natural resources have implications for the possibility of economic growth.³⁷ But his recent critiques of trade are not well-aimed. They will be discussed here because they are so influential to a new generation of socially conscious analysts.

A central tenet to Daly's thesis is that we must control and limit resource "throughput." That may be true. But the large increase in world growth that has occurred since Daly first propounded this thesis would seem to call into question whether the economy has reached its throughput limit. Of course, it is always easy to overuse particular renewable resources (e.g., salmon). But with skillful management, it may be possible to increase the stock of such resources commensurately with a growing economy.

Since it is not proven that we have reached our throughput limit, it is not clear that growth should be capped at current levels. Thus, the very simple argument that free trade is undesirable because trade stimulates growth, is not correct. Daly offers a more sophisticated set of arguments:³⁸ First, free trade "introduces greater spatial separation between the production benefits and the environmental costs of throughput growth, making it more difficult for the latter to temper the growth of the former."³⁹ Second, a "country trying to internalize external costs cannot accomplish that efficient policy if it enters into free trade with countries that do not internalize their external costs."⁴⁰ These are indeed problems which may suggest the need for international regulation.

Daly sees the need for a more radical solution. In his view, "Measures to further globalize and integrate the world economy should now be treated as a bad idea unless proven otherwise ..."

International Cooperation

In considering the issue of cooperation, it is useful to distinguish two kinds of cooperation -- *essential* and *mutually reinforcing*. Essential cooperation occurs when joint action is absolutely necessary. The treaties on fur seals and narcotics control in the early 20th century are an example of where solitary action by any one nation would have been ineffective. Common action is needed to protect a shared resource.³⁴

Mutually reinforcing cooperation occurs when countries find that, due to political considerations, they can act better in concert. For example, countries may adopt the same regulations in order to level the competitive playing field. This was the one of the rationales for the ILO. Unlike the first situation described above, cooperation is not essential in these situations. Nations can adopt appropriate policies in isolation; it's just hard for them to do so.³⁵ Trade negotiations are a good example of this.

Environmental issues involve both kinds of cooperation. Domestic producers will accept the new standards more readily if they perceive that foreign competitors are bound by the same rules. When some commentators (e.g., the GATT Secretariat) suggest that ETMs are not needed so long as countries agree upon environmental policies, they are probably thinking more about essential cooperation than about mutually reinforcing cooperation. It is not enough that a government sees the need for a change in its environmental policy. It must be able to achieve that result politically.

It has long been recognized that the environment is a public good and therefore proper environmental standards do not occur spontaneously. Various market failures suggest the need for government intervention. Governments attempt to devise interventions that will improve outcomes.

Since there is no government for the economy, intervention is difficult at the international level. Whenever the regulations or taxes in one country affect others, the optimal outcome will require negotiations between countries. Although many commentators offer detailed explanations as to why nations might take different positions into negotiations, this diversity of view should not be at all

Daly does not explain how capital mobility invalidates comparative advantage. On first impression, it would appear that capital mobility would stimulate specialization and therefore the benefits of trade. In any event, economics professors have probably overused the doctrine of comparative advantage to teach trade. One does not need a doctrine of comparative advantage to justify non-intervention by governments in the normal process of human exchange. Since trade is voluntary, it does not occur unless it makes participants better off. Thus, governments don't need a reason to permit free trade. It is the denial of free trade that requires a rationale. The mobility of capital is not a logical reason to deny human freedom.

II. GATT and the Environment

Many commentators have noted that rather than embracing free trade, the GATT adopts a mercantilist stance. On the issue of trade and the environment, however, the GATT has not been mercantilist. The GATT has been feudalist. It closes its eyes to the existence of the ecolonomy. It believes that the trade regime should be impervious to new ideas from outside the trade community. Environmental inputs are the vassals of world commerce. They are important as a whole but one doesn't need to pay much attention to them. A feudalist GATT is a threat to the ecolonomy.

The Environment Group

When the GATT initiated its work on the environment in the early 1970s, it acted constructively. GATT's first report on trade and pollution control --principally written by Jan Tumlir -- was very good.⁴⁹ For example, the report recognizes that international agreements might be needed that discriminate against products on the basis of the production process.⁵⁰ The GATT also established a permanent group on environmental measures in trade, but the Group never met.

When Austria sought to convene this Group in 1990, the GATT Council should have called the Group together. Instead, the Council embarked upon a long, fruitless debate about whether ETMs were disguised protectionism. It took about a year before the Group held its first substantive meeting.

While this prescription would deal with the condition noted above, it would be quite costly in foregone welfare. Daly does not offer a compelling reason for why society should surrender that growth.

Daly buttresses his anti-trade views with another argument about self-sufficiency. He states that "the community dimension of welfare is completely overlooked in the simplistic argument that if specialization and trade increase the per capita availability of commodities, they must be good."⁴³ I doubt Daly is arguing that, all things being equal, less is better than more. Rather, I think he is claiming that there is some special benefit in community self-sufficiency and diversity that outweighs a loss in total output.⁴⁴ Perhaps there is. But one should be careful in prescribing such materialistic abstinence for persons (or families, firms, or communities) who may prefer more to less.

Moreover, any argument about self-sufficiency of a community raises the issue of what the appropriate unit of sufficiency is. Is it a continent, a nation, a state, a city, a neighborhood, or a family? Daly does not tell us even though his argument is empty until he does.⁴⁵

Daly also criticizes free trade by attempting to refute the doctrine of comparative advantage. According to Daly:

The doctrine of comparative advantage is quite correct given the assumptions on which it rests, but unfortunately one of those assumptions is that capital is immobile internationally... Once capital is mobile then the entire doctrine of comparative advantage and all its comforting demonstrations become irrelevant.⁴⁶

The doctrine of comparative advantage is mathematically sound. It is true that some demonstrations of the doctrine have "assumed" capital immobility for expositional convenience. But other demonstrations build peregrinating mobility into the model. As Paul Krugman has noted, the neoclassical economic theorists of the 19th century lived in a time of high capital mobility.⁴⁷ According to Krugman, "We are living in a world which is about as integrated, give or take a few measures, as the world of the 19th century."⁴⁸

Over the next two years, the Group met 12 times and commissioned several papers. They held no public meetings or no hearings. No papers were released to the public until 1994. The Group did not hold any formal consultations with environmental NGOs.

The Group did not reach any conclusions. No final report was made. Instead, the chairman of the Group made a report to the GATT on his own responsibility.⁵¹ The report demonstrates how little was accomplished during those two years. Consider the following excerpts on the most important issue considered by the Group, the trade provisions in treaties:

The Group was not requested nor designed to conduct an examination of the GATT consistency of trade provisions contained in existing MEAs [multilateral environmental agreements].⁵²

The spirit of mutual confidence and cooperation which has prevailed in the discussions has enabled the Group to move forward in line with the dictum of not rejecting any notion out-of-hand, nor taking any concept at face value.⁵³

One issue is what defines an MEA. Two factors have been mentioned in this regard. One is the need for a clear understanding of the meaning and coverage of the term "environment" in this context (which is yet to be pursued in depth).⁵⁴

The majority of delegations have yet to elaborate their positions over what, if anything, needs to be done.⁵⁵

This represents two years of work. Given how little of value was obtained from the Group during the 20 years in which it did not meet, or during the two years in which it did, this author was baffled as to why environmental organizations made the creation of a new WTO committee on the environment such a high priority.⁵⁶ The NGOs, with the help of the U.S. government, succeeded in forcing a new committee. Thankfully, it is not permanent.

The first two GATT environmental committees caused no damage. But the newest committee might.⁵⁷ The tendency of GATT groups to act in an anti-environmental way is already evident from recent dispute settlement, in particular, the Dolphin decisions.

It is important that the GATT act quickly to make provision for environmentalist input into the new committee. As Jessica Mathews has noted:

The strongest force for progress lies outside governments, among nongovernmental organizations. Only if they can be effectively brought into the process is there much hope for success.⁵⁸

Unfortunately, many environmentalists are gullible. The trade community found it easy to convince them that the GATT prohibits unilateral, extrajurisdictional, or process-related measures.

Uruguay Round

The Uruguay Round contains two new agreements that impose limitations on ETMs.⁵⁹ While the agreements do not seriously undercut national sovereignty, they do impose tough disciplines on governments.⁶⁰ These new disciplines are considerably tougher than those in the North American Free Trade Agreement (NAFTA).

In the final weeks of the Round, the U.S. government succeeded in watering down some of the more stringent disciplines in earlier Dunkel Text of 1991.⁶¹ But a watering down the Dunkel Text does not constitute a greening of the Uruguay Round. It was damage control, that is, the reversal of some objectionable provisions inspired by the Reagan Administration.⁶² Aside from the provisions on non-actionable environmental subsidies, there are no provision environment provisions in the Round. The provision on subsidies is significant, but it should be noted that it had been part of the Brussels Text of 1990. It did not come about as a response to the new concerns regarding trade and the environment.

This is not to suggest that the Uruguay Round is anti-environment. The process of trade liberalization should benefit all countries and enable them to afford more environmental protection, if they want it. The decline in agricultural subsidies and increased market access may also benefit the environment by shifting production to more suitable locations.

Greening the GATT

A quarter century ago, John H. Jackson pointed out that the "GATT as presently constituted can be criticized for its lack of attention to the problems that concern the individual citizen.⁵⁶ Since then, the GATT has not increased its attention to such problems.⁵⁹ Should it? For instance, should the GATT establish an Office of Dolphin Protection? The question is not wholly facetious. The GATT Dolphin panel suggested that international cooperative arrangements on dolphin protection "would seem to be desirable in view of the fact that dolphins roam the waters of many states and high seas."⁷⁰ But the GATT Council has not undertaken any efforts to develop such a desirable regime.⁷¹

If one thinks that the GATT would have no business doing that, then why does the GATT Secretariat now have a small environmental staff. What should the purpose of such a staff be? Should GATT staff attend international environmental negotiations to explore the use of ETMs in new treaties? Should GATT staff attend international environmental negotiations to support the use of ETMs in new treaties? Perhaps GATT staff should *study* the effectiveness (or lack thereof) of such ETMs as such systematic analysis has been relatively absent from the trade and environment debate so far.

Many environmentalists seek to transform the GATT into a sustainable development organization.⁷² For example, Lang and Hines suggest changing the GATT into a General Agreement on Sustainable Trade (GAST).⁷³ DeBellevue et al. suggest changing the GATT into a General Agreement of Trade and the Environment (GATE).⁷⁴

This fixation on the GATT results from a misunderstanding. Environmentalists assume that the GATT's mission is to regulate trade and that the GATT is very powerful.⁷⁵ In reality, both assumptions are untrue.⁷⁶ But the advent of the WTO will transform the GATT into a true organization and so the environmental community was correct to seize the opportunity to ask how the WTO would relate to environmental objectives.⁷⁷ As Konrad von Moltke has noted, the unwillingness of GATT delegates to consider the link to the environment manifests a real lack of imagination.

The approval of the Uruguay Round by the U.S. Congress will require a vote on the entire WTO agreement, including the GATT. This will be the first vote in either the House or Senate on the GATT, and one can anticipate a flurry of grass roots objections to the "loss" of national sovereignty. This concern will also be expressed in other countries. In India, there have been riots. In Italy, there is a fear that the GATT (in conjunction with the European Union) will endanger traditional recipes.⁶³

Because some anti-GATT activists have exaggerated the extent of GATT supervision of environmental standards, it is important that the defenders of the Uruguay Round be scrupulously accurate in their description of the changes being made. Unfortunately, the Clinton Administration has already mischaracterized the changes, in a similar manner to the way that they misportrayed the NAFTA.⁶⁴ For example, in describing the new WTO Agreement on Technical Barriers to Trade, U.S. Trade Representative Mickey Kantor declared that it provides that each country may determine its appropriate level of protection and ensures that the encouragement to use international standards will not result in downward harmonization.⁶⁵

The Agreement does not do this however. Although its preamble alludes to a general recognition of this point,⁶⁶ the Agreement itself does nothing to provide that each country may determine its appropriate level of protection. Nor does the Agreement have any specific provisions aimed at avoiding downward harmonization, as NAFTA does.

It is interesting to note that the U.S. government did succeed in adding a clause to the preamble of the Sanitary and Phytosanitary Agreement suggesting that international harmonization would not require nations "to change their appropriate level of protection." But the word "change" was used, rather than the word "lower" (as proposed by the United States), to buttress the views of developing countries that the Agreement would not require *upward* harmonization.⁶⁷ Although the hortatory statements in preambles are generally not worth commenting on, it is being noted here to show how far the GATT majority is from ensuring that international standards will not result in downward harmonization.

It is this importance of positive integration that is the best argument for *not* giving the WTO a sustainable development role. The GATT/WTO has a difficult mission: to reduce protectionism. This is an critical mission for the economy and, for the foreseeable future, will be a full-time job. Allowing the WTO to get distracted to other aims will render it less effective in combating protection.⁸⁴

If the promotion of environmental objectives is to be kept off GATT's plate, then this has to be assigned to some other international organization. Thus, those who want to prevent GATT from losing its focus have an obligation to propose the necessary institutions to deal with the non-GATT parts of the trade and environment debate.⁸⁵ Unless some other forum for such discussions is provided, then all the issues will by default be left to the new GATT trade and environment committee. This will lead to continued deadlock since the GATT does not have the competence to discuss many of the issues (e.g., internalization of environmental costs) that will be brought up.

Of course, the GATT/WTO does need to take some action on the environment. The most important task is to assure that its supervision of trade restrictions does not interfere with legitimate environmental measures.⁸⁶ Unfortunately, the Uruguay Round goes in the opposite direction.⁸⁷ One possible reform (first suggested by Steven Shrybman⁸⁸) is to reverse adjudication of GATT Article XX so that the complaining party has the burden of proof. The Uruguay Round agreements on sanitary standards and other non-tariff barriers might be amended to clarify that the complaining party has the burden of proof.

It would also be useful to obtain international agreement on when unilateral ETMs covering foreign and global environments are warranted.⁸⁹ Yet this will be very difficult so long as many GATT members persist in claiming that all such measures are GATT-illegal. One might envision a set of rules for PLUMs -- provisional, legitimate, unilateral measures.⁹⁰ Provisional might mean that such measures are put in place as part of an effort to obtain multilateral agreement. Legitimate might mean that such measures respond to an environmental rather than a protectionist objective.

It is interesting to note that the International Trade Organization (ITO) of 1948 took a pro-development stance toward resources. For example,

Article 8 provided that

The members recognize that the *productive*⁷⁸ use of the *world's* human and material resources is of *concern* to and will benefit all countries, and that the industrial and general economic development of all countries...will improve opportunities for employment, enhance the productivity of labor, increase the demand for goods and services, *contribute to economic balance*,⁷⁹ expand international trade and raise levels of real income.

Article 9 provided that

Members *shall within* their respective territories take action designed progressively to develop, and where necessary to *reconstruct*, industrial and other economic resources and to *raise standards of productivity* through measures not inconsistent with the other provisions of this Charter.⁸⁰

Article 11 provided that

The Organization [ITO] may, in such *collaboration* with other inter-governmental organizations as may be appropriate...make recommendations and *promote agreements* designed to facilitate an equitable distribution of skills, arts, *technology*, materials and equipment, with due regard to the needs of all Members.⁸¹

While these do not constitute an environmental mandate, they show that the ITO's authors saw the connection between trade, development, and non-economic goals. Had the ITO been established, the emphasis on a productive use of resources might have led over time to a role in overseeing resource use that was not productive. The provision is Article 9 is especially noteworthy in committing parties to take internal actions. The provisions in Article 11 are examples of what Tinbergen calls positive integration.⁸² The current GATT provides for only negative integration, that is, commitments not to undertake certain policies.⁸³ As Tinbergen noted, "Positive integration may be even more important."⁸⁴

tion of how GATT should deal with environmental trade measures. As Ken Berlin and Jeff Lang have noted, the international trading system has always tolerated ETMs for animals.⁹¹ Thus, we should recognize the specialness of animals, rather than oppose such ETMs on the grounds that the same type of measure would be inappropriate for pollution control.⁹²

2. Waste trade -- The Daly thesis on local self-sufficiency has its greatest validity on the issue of waste disposal.⁹³ The Basel Convention already contains provisions which violate GATT's most-favoured-nation (MFN) rule. To the surprise of many, the European Court of Justice has permitted Wallonia to restrict waste imports in Community trade. (U.S. adjudication has gone in a different direction.) The issues of waste trade will need to be worked out in an environmental context. There is no reason to assume, a priori, that the most favoured nation rule is part of the solution.⁹⁴

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 even when implemented in a country-blind manner.

4. Labeling -- There are no mandatory eco-labeling 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.⁹⁵

5. Border Tax Adjustments -- The issue of when countries may use border tax adjustments on exports is being clarified by the Uruguay Round.⁹⁶ But the rules on imports remain uncertain.⁹⁷ 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

The GATT also needs to make clear that existing environmental treaties, such as the Montreal Protocol, will not be considered a violation of GATT rules. As noted above, the GATT Group considered treaties for two years, but did not reach any conclusions. The GATT should also establish a mechanism, perhaps in conjunction with UNEP, for monitoring the environmental effects of trade agreements. At present, the GATT Secretariat's position is that GATT will assess the trade effects of environmental agreements, but leave the other issues to someone else.

The WTO needs reform with respect to the environment for both substantive and political reasons. The substantive reason is that all international institutions should practice balanced economics, not just fixate on one variable (e.g., trade). The political reason is that international institutions like the WTO (and the World Bank) may not be politically sustainable unless they reform their attitudes toward the environment.

Dividing 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 ETMs. While much of this is useful analysis, the search for one overall set of principles is misguided and procrustean. We must recognize the issue of trade and the environment is really several *different* issues, and no one set of principles will be appropriate for all of them.

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:

1. Animals -- Most GATT environmental disputes have involved fisheries. These issues muddy the waters on the larger ques-

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 when 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 foreign export demand.⁹⁸ The GATT may also conflict with soft international law stating the right of peoples freely to use their natural resources.⁹⁹

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. For example, some species are threatened in one region but not in another. The Basel Convention parties recently agreed to ban waste trade between OECD and non-OECD nations. The International Whaling Commission recently established a whale sanctuary in the Antarctic region. Should the GATT cooperate by zoning certain region for non-trade in particular products? It might be noted that the GATT permits discrimination in favor of developing countries. The goal of development was permitted to trump the goal of non-discrimination.

Procedural Reforms

In a speech before GLOBE in February 1994, U.S. Trade Representative Mickey Kantor characterized the GATT panels as star chamber proceedings that are taking the most important decisions that affect the lives of all of our citizens -- especially in the environmental area -- and there is no accountability whatsoever, because no one knows what those decisions are, what the basis was, who is making the decision, how they're being made, [and] what pieces of paper we'll put in front of them.¹⁰⁰

This seems a bit strong. Still, there are a number of steps which the GATT could take to improve its decisionmaking, and at the same time indicate interest in problems that concern the individual citizen:

1. GATT Council meetings should be held in public session, as is the United Nations General Assembly. If that proves impractical, then summaries of the meetings should be released soon after, rather than be classified as restricted documents for two years.

2. The GATT should set up coordinating mechanisms with other international organizations having related missions. The Uruguay Round provides for this in the case of the World Bank and the IMF, but says nothing about UNEP, the ILO, UNCTAD, the Commission on Sustainable Development, etc.

3. The new provision in the Uruguay Round authorizing the WTO to "make appropriate arrangements for consultation and cooperation with non-governmental organizations" should be implemented immediately by the GATT.¹⁰¹

4. The WTO should develop two-way communication with the public.¹⁰² One possibility might be advisory groups such as those in the OECD. It is interesting to note that the International Trade Organization of 1948 contemplated the appointment of Commissions on particular topics.¹⁰³ The GATT could have used such a Commission on the environment during the past few years as an ongoing forum for trade and environmental issues to be discussed. In a few cases, problems have arisen simply because of miscommunication. Many of the terms used in the debate may be understood differently by economists and environmentalists (and international lawyers).¹⁰⁴

5. The WTO should move away from relying on ad hoc panelists (e.g., former ambassadors to the GATT) for disputes. If the function is to be a judicial one, then perhaps professional judges should be used.

6. Although there may be a good reason to allow the dispute settlement process to be conducted in closed sessions,¹⁰⁵ all briefs submitted by governments should be public. In addition, any advice given to panels by the GATT Secretariat concerning GATT rules should be put in writing and made public. Since many of the GATT members open their domestic judicial proceedings to the public, the less open attitude in Geneva seems to reflect GATT's predisposition for downward harmonization.

The OECD recommended in 1972 that:

Where products are traded internationally and where there could be significant obstacles to trade, Governments should seek common standards for polluting products and agree on the timing and general scope of regulations for particular products.¹¹²

The U.N. Conference on the Human Environment (Stockholm Conference) stated in 1972:

That all countries agree that uniform environmental standards should not be expected to be applied universally by all countries with respect to given industrial processes or products except in those cases where environmental disruption may constitute a concern to other countries. In addition, in order to avoid an impairment of the access of the developing countries to the markets of the industrialized countries because of differential product standards, Governments should aim at world-wide harmonization of such standards.¹¹³

Yet in spite of these statements, little harmonization has occurred in the intervening years. Why? Certainly, part of the answer is that the political will was not there and that other issues displaced the environment. Moreover, harmonization was a lot easier said than done, as the European Commission learned in later years. But there is another reason why so little harmonization has occurred. That is, there is no international institution to carry it out.¹¹⁴

There are, of course, many environmental standards that do not need to be harmonized. Here, regulatory competition should rule. But in a global economy, there are many standards that do concern more than one country. There are also many issues, relating to both products and processes, that lead to trade restrictions. For those issues, minimum harmonization would be worthwhile exploring.

In a provocative article several months ago, Daniel C. Esty suggested that in addition to "greening the GATT," the world community also needed to begin "GATTing the Greens."¹¹⁵ Specifically, he proposed "a new parallel international regime designed to defend

7. Panels should set aside one day for hearing public testimony on any dispute that involves the environment. It is interesting to note that one of the goals set by the Congress for the Tokyo trade round of the 1970s was "the adoption of international fair labor standards and of public petition and confrontation procedures in the GATT."¹⁰⁶ The non-transparency of the GATT is not just an American pre-occupation. Many third-world non-governmental organizations also advocate more openness.¹⁰⁷

8. The GATT should appoint an Advocate General to represent Nature and future generations.¹⁰⁸ This person would have the responsibility of summarizing for the panel the environmental implications of any case before it. Appointment of such an official would signify GATT's understanding that a dispute about dolphins is different than a dispute about, say, beer. It would also be an acknowledgment that GATT is rapidly becoming one of the more frequently used institutions to settle environmental disputes.¹⁰⁹

9. Mechanisms should be developed to arbitrate disputes like dolphin-tuna so that neither country feels that it has lost sovereignty. At present, GATT panels rely upon adjudication (i.e., a trade court), which is appropriate for commercial disputes, but less so for environmental ones.

10. The WTO should provide for appeal in disputes to the International Court of Justice in the same manner provided in the ITO Charter.¹¹⁰

In summary, there is much that the GATT/WTO can do constructively to resolve the trade and environment problem. But the larger issues of environmental reform should not be addressed in the GATT. For that, a different forum is needed.

III. Broader Institutional Changes

Twenty years ago, there was considerable consensus that international harmonization of certain environmental standards was a good idea. In 1971, the U.S. Commission on International Trade and Investment Policy (Williams Commission) recommended that the United States join with others in negotiating, whenever possible, uniform international product pollution standards.¹¹¹

to reassign the task of trade and sustainable development.

The OECD has a mandate to carry out harmonization,¹²¹ but has done little of that. Still, its recommendations on the environment over the years have been very good. It is interesting to note that one of the aims of the OECD is "to achieve the highest *sustainable* economic growth" and the members agree in the treaty that they will, individually and jointly "promote the efficient use of their economic resources."¹²² The OECD deserves great credit for recognizing the economy by assigning trade and the environment to a joint committee of these two directorates.

Global Environmental Organization (GEO)

The ideal solution is to create a new Global Environmental Organization (GEO).¹²³ The GEO should be modeled on features from the ILO, the GATT, and the International Monetary Fund (IMF). Since the GEO would be drafting social standards, it should be modeled on organizations that do the same task.¹²⁴ The only international institution that does this kind of work is the ILO, which happens to be one of the oldest organizations. The ILO is a tripartite organization consisting of government, worker, and employer delegates from each of the member countries. That this mechanism works to achieve consensus standards can be seen by the fact that since 1919, the ILO has drafted 174 labor conventions. In recent years, the ILO has done more work on the environment.¹²⁵

If an environmental organization is to pursue harmonization, it should be similarly tripartite. In other words, instead of being composed merely of government delegates, it should contain NGOs and business organizations as members.¹²⁶ This would avoid one of the defects of the GATT which is that it provides for no involvement by interested groups. Businesses are needed because they are the main polluters. NGOs are needed to represent consumers (who pollute too) and environmentalists.

The ILO is also a useful model for two other reasons. First, it provides technical assistance to countries to help them meet labor standards. The GEO should do the same for environmental standards.¹²⁷ Second, some ILO standards apply rights to individuals.

the environment as a necessary element of a prosperous global economy and to coordinate policies with the GATT...¹¹⁶ Esty uses the GATT as a model of an organization that can "provide a bulwark against domestic political pressures that undermine long-term thinking."¹¹⁷

It is an important insight that the supervisory role provided by GATT rules on trade policy could also be useful to countries on environmental policy. But Esty stretches the analogy too much. The GATT, as noted above, is an institution of negative integration. It proscribes government action; it does not prescribe government action. There are, surely, some environmental issues where prohibitions on government action are needed.¹¹⁸ But for most issues, what is needed are agreements on *active* steps that governments can take in the form of incentives or regulations regarding private behavior. The GATT succeeds when it prevents nations from legislating.¹¹⁹ But an environmental organization would want to encourage nations to legislate -- for example, by proposing cost internalization measures.¹²⁰

Although the GATT analogy is only partly persuasive, Esty deserves credit for pointing out that an environmental organization is key to solving the problem. Since a new organization would seem unlikely, one should consider ways to use existing organizations for this purpose. The most obvious possibilities are UNEP, the Commission on Sustainable Development, the U.N. Conference on Trade and Development (UNCTAD), and the OECD.

UNEP would perhaps be the most logical, but it may not have the institutional capacity or the budget to carry out such a task. Its location in Nairobi is also a disadvantage. On the other hand, its Executive Director, Elizabeth Dowdeswell, is very thoughtful and has been personally involved in this issue.

The Commission is the newest environmental organization, but has no secretariat. It was set up to a coordinating body, not an operational one.

UNCTAD does have institutional capacity and has recently shown an interest in environmental issues. As an organization ostensibly devoted to trade and development, it would seem to easiest

ENDNOTES

¹ 97 LNTS 393.

² 126 LNTS 305.

³ William Smith Culbertson, INTERNATIONAL ECONOMIC POLICIES (1925), at 555. Culbertson had earlier served as Vice Chairman of the U.S. Tariff Commission.

⁴ *Id.*, at 556.

⁵ For some good schematics showing the linkages, see Gilberto Gallopin, IMPROVEMENT AND SUSTAINABLE DEVELOPMENT: A SYSTEMS APPROACH (Winnipeg: International Institute for Sustainable Development, 1994), at 48-69.

⁶ Bergen Ministerial Declaration on Sustainable Development in the ECE Region, para. 13.

⁷ Rio Declaration on Environment and Development, Principle 4, 31 ILM 874. See also Principle 25 (Peace, development and environmental protection are interdependent and indivisible).

⁸ For a contrasting view, see Geza Feketekuty, "The Link Between Trade and Environmental Policy," MINNESOTA JOURNAL OF GLOBAL TRADE, Summer 1993, at 171, 182 (trade and environmental policy goals can be reconciled most effectively when trade and environmental policies are both designed to most efficiently achieve their respective objectives).

⁹ Agenda 21, ch. 2.10(d). See also Paris Economic Summit Declaration, 1989, at para. 37 (Environmental protection is integral to issues such as trade, development, energy transport, agriculture and economic planning), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, George Bush, 1989, at 966.

¹⁰ 22 U.S.C. §2621(a).

¹¹ See Jim MacNeill et al, BEYOND INTERDEPENDENCE: THE MESHING OF THE WORLD'S ECONOMY AND THE EARTH'S ECOLOGY (1991), at 32. See also Jimmy Carter, "US Needs to Support Global Tropical-Timber Agreement," *The Christian Science Monitor*, 20 September 1993, at 19 (We must recognize the strong interdependence between trade and the environment, between international policymaking and people's lives, and between North and South.)

¹² In a recent paper, Urs Thomas calls this the "ecology." See Thomas, "Environmental Politics, Trade, and UN Reform," Institute of Environmental Sciences, March 1994.

¹³ Thus, the ecology is the world economy and environment viewed as the same system rather than as separate systems with important linkages.

¹⁴ The term "international" was first used by Jeremy Bentham in 1780. See *The Oxford English Dictionary*, Vol. VII, (1989), at 1123. Eugene Staley once suggested that the word "mondial" be used to denote worldwide issues in contradistinction to the literal meaning of international, that is, issues among nations.

¹⁵ See U.N. General Assembly Resolution 2997 (XXXVII) on Institutional and Financial Arrangements for International Environmental Co-operation, 1972, reprinted in INTERNATIONAL PROTECTION OF THE ENVIRONMENT, Vol. I, at 152 (the UNEP Governing Council has a responsibility to provide general policy guidance for the direction and coordination of environmental programs within the UN system).

¹⁶ See Lester R. Brown, et al, SAVING THE PLANET: HOW TO SHAPE AN ENVIRONMENTALLY SUSTAINABLE GLOBAL ECONOMY (1991), at 22-23 (humanity's expanding economic activities cannot be separated from the natural systems and resources from which they ultimately derive).

¹⁷ Allan G. B. Fisher, ECONOMIC PROGRESS AND SOCIAL SECURITY (1945), at 356.

¹⁸ For a recent example, see David E. Pitt, "Pact Eluding Fishing Nations in Talks on Imperiled Species," *The New York Times*, 6 April 1994, at A13 (The issue is a clash between the rights of nations and the ichthyological reality that fish do not respect jurisdictional boundaries).

¹⁹ Many commentators get this wrong. For example, see Robert Evans, "Envoys See Compromise in GATT Labor Dispute," *The Journal of Commerce*, 6 April 1994, at 3A (GATT is the international body that governs trade throughout much of the world).

²⁰ See generally Gardner Patterson and Eliza Patterson, "The Road from GATT to MTO," MINNESOTA JOURNAL OF GLOBAL TRADE, Spring 1994, at 35.

²¹ See "Restructuring the Global Environment Facility," Overseas Development Council, 1993.

²² See Michael Prowse, "Towards a Leaner, Greener Bank," *Financial Times*, 20 July 1994, at 3 (quoting the President of the World Bank who says that "the biggest mistake the bank has paid the highest price for was not recognising the importance of the environment").

²³ For example, see Richard H. Grove, "Origins of Western Environmentalism," SCIENTIFIC AMERICAN, July 1992, at 42.

²⁴ James M. Sheehan, "A New Eco-Trade Bureaucracy," *The Journal of Commerce*, 19 January 1994, at 8A (central planning of trade and the environment will make the world neither richer nor cleaner).

36 For example, see Herman E. Daly, "Toward A New Economics--Questioning Growth," in Warren A. Johnson and John Hardesty (eds.), *ECONOMIC GROWTH VS. THE ENVIRONMENT* (1971), at 73.

37 The planet is not getting any bigger to accommodate a growing population.

38 Although some commentators have argued that trade is bad because it permits environmentally harmful production, Daly recognizes that domestic production can be similarly harmful.

39 Herman E. Daly, "Problems with Free Trade: Neoclassical and Steady-State Perspectives," in Durwood Zaelke et al. (eds.), *TRADE AND THE ENVIRONMENT* (1993), at 156. Sandra Postel sees free trade as fostering unsustainable consumption levels by creating the illusion of infinite supplies. See Postel, "Carrying Capacity: Earth's Bottom Line," in Lester Brown et al., *STATE OF THE WORLD* 1994, at 18.

40 Daly, *id.*

41 See Charles Arden-Clarke, *SOUTH-NORTH TERMS OF TRADE, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT*, WWF, February 1992.

42 Herman E. Daly, "Problems with Free Trade: Neoclassical and Steady-State Perspectives," in Durwood Zaelke et al. (eds.), *TRADE AND THE ENVIRONMENT* (1993), at 157.

43 Herman E. Daly, "The Perils of Free Trade," *SCIENTIFIC AMERICAN*, November 1993, at 50, 51.

44 See also Ralph Nader, "Free Trade and the Decline of Democracy," in Ralph Nader et al., *THE CASE AGAINST FREER TRADE* (1993), at 11 (No one denies the usefulness of international trade and exchange. But societies need to focus their attention on fostering community-oriented production.)

45 Nor do Lang and Hines who argue that the GATT should "foster not global competition, but self-sustaining local economies in both developed and developing nations." See Tim Lang and Colin Hines, "GATT: The Pitfalls Amid the Promise," *The New York Times*, 17 April 1994, at F13.

46 Herman E. Daly, "From Adjustment to Sustainable Development," in Ralph Nader et al., *THE CASE AGAINST FREER TRADE* (1993), at 125-26.

47 Paul Krugman, "Competitiveness: Does it Matter?," *FORTUNE*, 7 March 1994, at 109-10.

48 Alan Farnham, "Global-Or Just Globaloney," *FORTUNE*, 27 June 1994, at 97-98.

49 GATT Secretariat, *INDUSTRIAL POLLUTION CONTROL AND INTERNATIONAL TRADE* (1971).

25 According to a WWF brochure: "The dramatic dismantling of trade barriers accomplished in the Uruguay Round... will inevitably worsen already serious environmental problems, because the prices of traded goods do not incorporate these environmental costs." See "The GATT Effect," 1994. In other words, more trade based on improper prices will be worse than less trade.

26 Some from the GATT camp think that the GATT has already been greened. For example, B.K. Zutshi, Indian Ambassador to GATT, states that "GATT and the existing Multilateral Trading System allow for policies of environmental protection. Not only do they allow for them, they facilitate them." See "Key Note Address," 7 November 1993, Brussels, at 18. See also Alan Oxley, "Why the GATT is Green," in Ralf Buckley and Clyde Wild (eds.), *INTERNATIONAL TRADE, INVESTMENT AND ENVIRONMENT* (1994). Oxley is a former chair of the GATT Contracting Parties.

27 William H. Lash III, "Green Gang's GATT Holdup," *The Journal of Commerce*, 10 December 1993, at 6A.

28 In the absence of such spillovers, Steil sees no basis for exceptions from the discipline of the multilateral trading system. See Benn Steil, "The New Rules of Trade," *NATIONAL REVIEW*, 18 April 1994, at 40-41.

29 Ravi Batra, *THE MYTH OF FREE TRADE* (1993), at 226 (international trade comes out as the worst villain in the destruction of the environment. It is the most diabolical polluter in the world and offers a precious lesson in the desirability of economic diversification versus specialization).

30 Tim Lang and Colin Hines, *THE NEW PROTECTIONISM* (1993). The authors suggest that "Free trade promises more than it can deliver and like all junkies when faced with failure, its only solution is to repeat the dose." See *id.* at 5.

31 16 U.S.C. § 1537 note.

32 This was recognized as early as 1979, but the international community did little. See Karen A. Bjorndal (ed.), *BIOLOGY AND CONSERVATION OF SEA TURTLES*, Proceedings of the World Conference on Sea Turtle Conservation (1981), at 582.

33 It might be argued that bargaining between countries would be facilitated if public property rights -- in other words, GATT rules -- were perfectly clear.

34 Sometimes, common action is pursued to extirpate a resource, as in the case of 1911 meeting in Copenhagen of the International Association for the Extirmination of the Rat.

35 Thus, for cases like fur seals, non-regulation in the absence of an agreement may be individually rational. For cases like labor conditions, non-regulation is probably irrational because the benefits of regulation outweigh the costs. Thus, in the latter case, there is a political failure.

⁶⁵ Michael Kantor, "The Uruguay Round: Growth for the World, Jobs for the U.S.," Testimony to the Subcommittee on Commerce, Consumer Protection, and Competitiveness," 24 March 1994, at 11.

⁶⁶ The same preamble is in the Agreement on Technical Barriers to Trade (of 1979).

⁶⁷ See "U.S. Forces Pro-Green Changes in GATT Sanitary & Phytosanitary Text," INSIDE U.S. TRADE, 10 December 1993, at 1-2.

⁶⁸ John H. Jackson, *WORLD TRADE AND THE LAW OF GATT* (1969), at 517.

⁶⁹ Of course, trade liberalization is related to economic growth and job creation. But this linkage may not be evident to everyone. Indeed, many people suspect the reverse.

⁷⁰ GATT, BISD 39S/155, at para. 5.28.

⁷¹ One might view the GATT decision as constructive in clarifying property rights -- in this case the right of the exporter to sell tuna without regard to how it is produced. But the U.S. government believes that it has the right under GATT Article XX to refuse such tuna.

⁷² See Charles Arden-Clarke, *THE GENERAL AGREEMENT ON TARIFFS AND TRADE, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT*, (1991). Trade unions also support this objective. See International Confederation of Free Trade Unions, *ENVIRONMENT AND DEVELOPMENT: THE TRADE UNION AGENDA*, (1992), at 42 which recommends that one goal of the U.N. Conference on Environment and Development should be the modification of GATT "to take full account of social and environmental standards."

⁷³ Tim Lang and Colin Hines, *THE NEW PROTECTIONISM* (1993), at 130, 140.

⁷⁴ Edward B. De Bellevue et al., "The North American Free Trade Agreement: An Ecological-Economic Synthesis for the United States and Mexico," *ECOLOGICAL ECONOMICS*, Vol. 9 (1994), at 53, 69.

⁷⁵ For example, see Thomas A. Wathen, *A GUIDE TO TRADE AND THE ENVIRONMENT* (1992) and Monika Bauerlein, "GATTzilla?," *UTNE READER*, January/February 1994, at 19.

⁷⁶ The GATT has no real operations, no outputs, no field offices, and no governing body. It is quite different from the ILO which has technical assistance functions and an explicit role in reviewing conformance to standards.

⁷⁷ See "Citizens Groups Around the World Declare Opposition to Creation of WTO," INSIDE U.S. TRADE, 18 December 1992, at S-7.

⁷⁸ One might imagine amending this word to sustainable and using the same paragraph for the WTO.

⁵⁰ *Id.*, at 18.

⁵¹ Report by Ambassador H. Ukawa (Japan), 25 January 1994.

⁵² *Id.*, at 5.

⁵³ *Id.*, at 6.

⁵⁴ *Id.*, at 8.

⁵⁵ *Id.*, at 11.

⁵⁶ The WTO committee is hardly a new idea. It was being planned by the GATT even as early as 1992. See "Post-Uruguay Round System Structure," INSIDE U.S. TRADE, 18 December 1992, at S-7.

⁵⁷ For the terms of reference of the new committee, see INSIDE U.S. TRADE, 8 April 1994, at S-4.

⁵⁸ Jessica Mathews, "The Great Greenless GATT," *The Washington Post*, 11 April 1994, at A19.

⁵⁹ See Steve Charnovitz, "The World Trade Organization and Environmental Supervision," *INTERNATIONAL ENVIRONMENT REPORTER*, 26 January 1994, at 89.

⁶⁰ But according to GATT Director General Peter Sutherland, there were not any legitimate concerns regarding environmental safety or consumer issues. See "GATT Director General Rejects Selective Textile Market Access," INSIDE U.S. TRADE, 8 October 1993, at S-7. Sutherland stated this *before* the agreements were modified at the end of the Round.

⁶¹ "U.S. Uruguay Round Proposals Fall Short of Environmental Demands," INSIDE U.S. TRADE, Special Report, 3 December 1993, at 5.

⁶² It should be noted that the Reagan Administration had Congressional authority to seek strong provisions. See 19 U.S.C. §2901(b)(7)(C).

⁶³ Nancy Harmon Jenkins, "The Endangered Foods of Italy," *The Washington Post*, 6 April 1994, at E1 (bread makers may no longer let the dough ferment overnight, and wood-fired bakers' ovens are gradually being phased out, to be replaced by more sanitary gas burners).

⁶⁴ For a discussion of the mischaracterizations of the NAFTA by the Clinton Administration, see Steve Charnovitz, "The North American Free Trade Agreement: Green Law or Green Spin?," *JOURNAL OF LAW AND POLICY IN INTERNATIONAL BUSINESS*, Vol. 26, 1994 (forthcoming).

⁹² 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.

⁹³ See Herman Daly and Robert Goodland, "An Ecological-Economic Assessment of Derogulation of International Commerce Under GATT," *ECOLOGICAL ECONOMICS*, Vol. 9, 1994, at 73, 80-81, 86.

⁹⁴ See John H. Jackson, "Managing Economic Interdependence?—An Overview," *LAW AND POLICY IN INTERNATIONAL BUSINESS*, Vol. 24, 1993, at 1025, 1028 (I do not think MFN is a rule that should be accepted without some re-examination).

⁹⁵ See David Runnalls and Aaron Cosbey, *TRADE AND SUSTAINABLE DEVELOPMENT* (1992), at 73.

⁹⁶ 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.

⁹⁷ For further discussion, see Steve Charnovitz, "Free Trade, Fair Trade, Green Trade: Defogging the Debate," *CORNELL INTERNATIONAL LAW JOURNAL*, forthcoming 1994.

⁹⁸ For example, see Graciela Chichinisky, "Social Diversity, Arbitrage, and Gains from Trade: A Unified Perspective on Resource Allocation," *AEA PAPERS AND PROCEEDINGS*, May 1994, at 427.

⁹⁹ General Assembly Resolution 626 (VII), 1962. See also Rio Declaration on Environment and Development, Principle 2.

¹⁰⁰ Remarks at Global Legislators for a Balanced Environment, 28 February 1994, Federal News Service Transcript.

¹⁰¹ WTO Article V:2.

¹⁰² Unlike the GATT, the WTO will be an international organization. But it is important to recognize that it will be a very limited one. There is no governing body. The WTO will have no programs (other than trade policy reviews), no field offices, and no Secretariat initiative. In other words, the Secretariat can not institute complaints against governments in the same manner as the European Commission.

¹⁰³ ITO Charter, Articles 82-83.

¹⁰⁴ For example, efficiency, sustainability, commons, compensation, polluter pays, dumping, protection, injury, comparative advantage, depletion, assimilative capacity, and property rights.

⁷⁹ ITO Charter, Article 8 (emphasis added). GATT Article XII:3(a) provides that "Contracting parties undertake, in carrying out their domestic policies, to pay due regard to...avoiding an uneconomic employment of productive resources." See also GATT Article XVIII:11.

⁸⁰ ITO Charter, Article 9 (emphasis added).

⁸¹ ITO Article 11.2 (emphasis added).

⁸² Jan Tinbergen, *LESSONS FROM THE PAST* (1963), at 41.

⁸³ The one significant exception is GATT Article XXXVIII:2e which directs the GATT to "expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations..."

⁸⁴ Jan Tinbergen, *ECONOMIC POLICY: PRINCIPLES AND DESIGN* (1967), at 178.

⁸⁵ Indian Ambassador Zutshi characterizes the list of issues that environmentalists have put forward for the new committee as an "irrelevance." He states that the "work programme is not about *greening the GATT*." See B.K. Zutshi, "Trade, Environment and Sustainable Development: The Agenda for the World Trade Organization," 1994. Zutshi is half right. But he proposes no institutions to carry forward the corollary parts of the debate.

⁸⁶ See Raymond F. Mikesell, "Antecedents of the ITO Charter and their Relevance for the Uruguay Round," September 1993, at 19 (I believe GATT and ITO will be more acceptable if its objective on nontariff barriers were defined in terms of avoiding or reducing commercial discrimination in trade. This should take the issue of the compatibility between trade rules and measures in support of the environment largely out of contention).

⁸⁷ Hilary F. French, "The GATT Blunder," *WORLD WATCH*, March/April 1994, at 2 (Unfortunately, the "do no harm" test was not met. As the agreement currently stands, it will now be easier for countries to charge that some individual nations' environmental product standards are unfair restrictions on commerce).

⁸⁸ Steven Shrybman, "International Trade and the Environment," *ALTERNATIVES*, Vol. 17, No. 2, 1990, at 20, 28.

⁸⁹ See Belinda Anderson, "Unilateral Trade Measure and Environmental Protection Policy," *TEMPLE LAW REVIEW*, Fall 1993, at 751, 754 (discussing green extraterritorial unilateral trade measures).

⁹⁰ The term was developed in a conversation with Professor Edith Brown Weiss. Borrowing on the GATT metaphor for subsidies, Professor J. David Richardson suggests that GATT might have red plums, yellow plums, and green plums.

⁹¹ Kenneth Berlin and Jeffrey M. Lang, "Trade and the Environment," *THE WASHINGTON QUARTERLY*, August 1993, at 35, 48.

- 105 The original purpose of the GATT conciliation process was to reach agreements. Since the Tokyo Round, the process has evolved in a judicial direction. To the extent that the process is judicial, there is little rationale for closed sessions. It might be better if the WTO returned to the original idea, but the Uruguay Round goes in the opposite direction by judicializing the procedures even more.
- 106 19 U.S.C. 2131(a)(4) (repealed 1988).
- 107 See NGO Statement on Trade, Environment, and Sustainable Development to the CSD Meeting, May 1994.
- 108 See Steve Charnovitz, "GATT and the Environment: Examining the Issues," INTERNATIONAL ENVIRONMENTAL AFFAIRS, Summer 1992 at 203, 220-21. See also World Commission on Environment and Development, OUR COMMON FUTURE (1987), at 332 and Christopher D. Stone, THE GNAT IS OLDER THAN MAN (1993), at 83-88 (regarding guardianships).
- 109 Ernst-Ulrich Petersmann, "International Trade Law and International Environmental Law," JOURNAL OF WORLD TRADE, February 1993, at 43, 53.
- 110 ITO Charter, Article 96.2.
- 111 UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, Report to the President (1971), at 136.
- 112 OECD, "Guiding Principles Concerning International Economic Aspects of Environmental Policies," Annex.
- 113 Stockholm Declaration, Recommendation 103(e), 11 ILM 1416 (emphasis added).
- 114 Of course, there is the Codex Alimentarius Commission and various groups of the International Organization on Standards. But these technical organizations do not focus on major public policy issues.
- 115 Daniel C. Esty, "GATTing the Greens," FOREIGN AFFAIRS, November/December 1993, at 32.
- 116 *Id.* For an earlier discussion of the need for an environmental organization, see Geoffrey Palmer, "New Ways to Make International Environmental Law," AMERICAN JOURNAL OF INTERNATIONAL LAW, April 1992, at 259.
- 117 Esty, *id.*
- 118 Esty sees a tendency for governments to engage in "damaging, beggar-thy-neighbor environmental behavior driven by competitive pressures," but he does not give any examples. See *id.*, at 34.
- 119 Many commentators see the GATT as encouraging legislation to lower tariffs and eliminate discriminatory trade provisions. That is true, but misses the bigger point. A nation with no tariffs and no protectionism would not have to take any action at home to conform to GATT disciplines.
- 120 The GATT can be viewed as a mercantilist institution that seeks deregulation to protect the rights of traders. Environmentalists want an altruistic institution that uses regulation and taxes to solve public problems.
- 121 OECD Treaty, 12 UST 1728, Article 5.
- 122 *Id.*, Articles 1(a) and 2(a) [emphasis added].
- 123 I have copied this term from Esty. But my description of the organization differs from that proposed by him. Esty also suggests that the World Intellectual Property Organization can be used as model because of its success in consolidating several treaties. See, Daniel C. Esty, GREENING THE GATT (1994), at 96.
- 124 See Roger Stone, Summary Report, Trade and Sustainable Development, Rene Dubos Center for Human Environments, May 1993.
- 125 See Michel Hanseme, "The ILO moves into the 'green' era," THE WORLD OF WORK, March 1994, at 3-13.
- 126 For further discussion of this tripartite approach, see Steve Charnovitz, "Environmental Harmonization and Trade Policy," in Durwood Zaelke et al., (eds.), TRADE AND THE ENVIRONMENT (1993), at 283-85. This idea goes back at least a generation. See Lawrence David Levien, "A Structural Model for a World Environmental Organization: The ILO Experience," THE GEORGE WASHINGTON LAW REVIEW, March 1972, at 464.
- 127 For example, ILO Convention 87 states that workers shall have the right to join organizations of their own choosing. It should be noted, however, that individual workers cannot bring actions in the ILO to enforce this right. Complaints to the ILO may be lodged by unions however, there is some possibility that the WTO may not sponsor any rounds in the future but rather conduct continuous negotiations. In the past, rounds have been driven by the need to lower tariffs. Even after the Uruguay Round agreements go into effect, however, there will still be sufficient tariffs to have at least one more round. Linking issues can also facilitate compliance. See David Mulenex, "Improving Compliance Provisions in International Environmental Agreements," in Lawrence E. Susskind et al., (eds.), INTERNATIONAL ENVIRONMENTAL TREATY MAKING (1992), at 173. This idea came from Professor J. David Richardson.
- IMF, ARTICLES OF AGREEMENT (1993), Article III.
- See Report of the International Symposium, "Sustainable Development and International Law," Vienna, April 1994, at para. 32 (wherein Peter Sand comments on the rediscovery of trusts as institutional tools for sustainable development).
- John Zarocostas, "Imports Tax Proposed to Protect Environment," *The Journal of Commerce*, 27 January 1994, at 1A.

John Zarocostas, "UN Pursues Trade Taxes to Help Poorer Countries," *The Journal of Commerce*, 2 June 1994, at 2A. 19 U.S.C. §2397 note.

See "The Extension of Fast Track Procedures," House Doc. 102-51, at 113.

Frances Williams, "GATT Joins Battle for Right to Protect," *Financial Times*, 7 July 1994, at 7.

See Jim MacNeill, "The Shadow Ecology of National Economies: Marrying Trade and Sustainable Development," *ECODECISION*, March 1993, at 14.

See Eugene Staley, *WORLD ECONOMY IN TRANSITION* (1939), at 332.

See "David v Goliath Over New Trade HQ," *Financial Times*, 18 July 1994, at 3.

It is unclear whether this further demonstrates GATT insidious influence toward downward harmonization of social standards. It is interesting to note that the president of the European Commission recently proposed a new institution.

See "U.N. Security Council Needed to Deal With Global Issues, Delors Says," *INTERNATIONAL TRADE REPORTER*, 20 April 1994, at 616. (GATT Article XXXVI:7 provides a mandate for such contacts. Karl Marx, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* (1929 translation), Vol. I, at 547-48. See Phedon Nicolaides, "Competition Among Rules," *WORLD COMPETITION*, December 1992, at 113. Some issues, such as currency stabilization and innovation policy, may be both. ILO, *ENQUÊTE SUR LA PRODUCTION*, as translated in Wallace McClure, *WORLD PROSPERITY* (1933), at 279. See Jacob Viner, "The International Economic Organization of the Future," in Howard Robinson et al, *TOWARD INTERNATIONAL ORGANIZATION* (1942), at 137 (contemplating a world order where national boundaries would be stripped of most of their capacity for economic evil but would still exist where people wanted them to).