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# **AGAINST SUSTAINABLE DEVELOPMENT GRAND THEORY: A PLEA FOR PRAGMATISM IN RESOLVING DISPUTES INVOLVING INTERNATIONAL TRADE AND THE ENVIRONMENT**

**Robert F. Blomquist**<sup>\*</sup>

## **INTRODUCTION**

At the outset of the twenty-first century, the frenetic pace of global growth in international trade and the concomitant tempo of new legal undertakings to protect the environment have spurred a variety of novel conflicts. In attempts to resolve these conflicts, some free trade enthusiasts urge that environmental concerns be trumped by the imperative of expanding international trade. In turn, some environmentalists contend that protecting biodiversity, ensuring clean air and water, minimizing hazardous wastes, and similar concerns are more important than liberalized trade and should, therefore, be accorded priority status.

On occasion, zealous environmentalists, as well as aggressive free traders, try to justify their respective paradigms by an appeal to various strains of all-encompassing sustainable development grand theory—characterized by abstract statements of the “good” and totalizing, top-down visions of the “way” to solve conflicts between trade and the environment. While such grand theorizing can be fun or exhilarating, it is not useful in the messy real world that we inhabit where trade versus the environment disputes are fact-intensive, characterized by shades of grey (instead of black and white), and subject to different legal, political, economic, and social considerations.

In this essay, I intend to sketch the downside of grand theoretical projects, in general, and then to go on to discuss some examples of grand (and misguided) theories of sustainable development. I then seek to articulate what I call a more useful “mood” of global trade/eco-pragmatism and some tentative thoughts on expressing this mood in future disputes involving trade and the environment. My purpose is to offer a first take on the importance of shifting the emphasis in international trade and environmental conflicts away from the grandly theoretical and toward the less glamorous—but more fruitful—pragmatic.

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I shall proceed as follows. In Part I, I discuss the dangerous allure of grand theory, on the one hand, and the call by philosophers and legal thinkers, on the other hand, for a more informal reasonableness and practical wisdom in approaching our worldly problems. In Part II, I turn to an illustrative examination of three examples of what I describe as grand theories of sustainable development that, while interesting, are not very useful or practical. In Part III, I offer some rough-hewn musings on global trade/eco-pragmatism as an alternative to sustainable development grand theory in unpacking and resolving conflicts between trade and the environment.

### I. THE DANGEROUS ALLURE OF GRAND THEORY

Academicians and world order pundits love theory and love grand theory even more. Indeed, theorophiles gain mental stimulation and ego-satisfaction from propounding “scheme[s] or system[s] of ideas or statements held [to be] an explanation or account of a group of facts or phenomena.”<sup>1</sup> Theory-lovers relish the spinning of “statement[s] of what are held to be the general laws, principles, or causes of something known or observed.”<sup>2</sup> Furthermore, theorophiles tend to be unduly impressed by the apparent certainty and sweep of mathematical and mechanical reasoning and irrationally exuberant with sets of theorems forming abstract connected systems.<sup>3</sup> Examples of such mathematical-mechanical theories are equation

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1. XII THE OXFORD ENGLISH DICTIONARY 902 (2d ed. 1989) (defining the word “theory”).

2. *Id.*

3. Interestingly, one can discern a style of certitude and ambition analogous to mathematical and mechanical reasoning in the realm of literary theory as practiced in academic English departments over the last several years. As explained in a recent review of the book *After Theory*:

Anyone who served on the academic front of the culture wars in the closing decades of the twentieth century is likely to prick up his ears and experience a kind of mental salivation at this conjunction of author and title. “Theory” (with a capital T, and/or scare quotes) is the loose and capacious term generally used to refer to the academic discourses which arose out of the impact of structuralism, and more particularly post-structuralism, on the humanities (or “human sciences” as academics in continental Europe, where it all started, prefer to call them). Key figures in its evolution were Roland Barthes, Jacques Lacan, Louis Althusser, Jacques Derrida, and Michel Foucault, who subjected the methodologies of the founding fathers of structuralism, such as Saussure and Lévi-Strauss, and the work of other seminal modern thinkers like Marx and Freud, to a scrutiny that was at once critical and creative. One might say that Theory began when theory itself began to be theorized—or, in the buzz word of the day, “deconstructed.”

In due course the movement’s center of gravity moved from France to America where it was developed and promulgated . . . . On both continents it assimilated and theorized the nascent movement of feminist criticism. It extended the scope of traditional literary criticism to take in the whole range of cultural production,

theory, function theory, number theory, probability theory, theoretical physics, and Kant's a priori concepts and criterion of empirical truth.

As argued by philosopher Stephen Toulmin in his brilliant 2001 book, *Return to Reason*, practical reason, or rationality, has come under attack in recent years because of the undue influence of classical mechanics and abstract mathematical methods on our idea of what intelligent problem-solving should be.<sup>4</sup> As Toulmin points out, deduction in the style of Euclidean geometry, mechanically predictable and rigorous laws in the style of Newton and Galileo, and indubitable certainty in the style of Descartes' "I think, therefore I am" mentality, all exert a troublesome cultural influence insofar as they overshadow a looser, more pragmatic, and less abstract concept of reasonableness.<sup>5</sup> What we need in the twenty-first century, according to Toulmin, is less abstract (mathematically-inspired) theorizing and grand-theorizing, and more open-minded, informal reasonableness in a return to Aristotelean *practical wisdom* (a combination of practical reason and productive reason).<sup>6</sup>

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and it spawned a number of new, nonaesthetic approaches to this material under a bewildering variety of names—the New Historicism, postcolonial studies, subaltern studies, queer theory, and so on, each with its own jargon, periodicals, and conferences. Most of these projects were seen, and saw themselves, as belonging to that even looser and larger phenomenon known as "postmodernism."

One very controversial effect of Theory on the academic study of literature was to undermine the authority of the traditional canon and to install in its place a set of alternative subcanons such as women's writing, gay and lesbian writing, postcolonial writing, and the founding texts of Theory itself. It found its warmest welcome among smart young recruits to the academic profession, eager to try out this bright new methodological gadgetry with which they could dazzle and disconcert their elders.

David Lodge, *Goodbye to All That*, N.Y. REV. BOOKS, May 27, 2004, at 39, 39 (reviewing Terry Eagleton, *AFTER THEORY* (2004)).

4. See STEPHEN TOULMIN, *RETURN TO REASON* 1–13 (2001) (discussing how science and mathematics have impacted rational thought).

5. See *id.* at 48–50 (providing an example of the application of pragmatism with an anecdote about a theologian identifying a weakness in Newtonian theory by looking outside of mathematical models and scientific theory).

6. See *id.* at 108–14 (arguing that practical and clinical knowledge should be used to inform theory).

Theoretical reason is traditionally distinguished from *practical reason*, a faculty exercised in determining guides to good conduct and in deliberating about proper courses of action. Aristotle contrasts it, as well, with *productive reason*, which is concerned with "making": shipbuilding, sculpting, healing, and the like.

Kant distinguishes theoretical reason not only from practical reason but also (sometimes) from the faculty of understanding, in which the categories originate. Theoretical reason, possessed of its own a priori concepts ("ideas of reason"), regulates the activities of the understanding. It presupposes a systematic unity in nature, sets the goal for scientific inquiry, and determines the "criterion of empirical truth" (*Critique of Pure Reason*). Theoretical reason, on Kant's

In the realm of legal theory, prominent commentators have, generally and particularly, pointed out the dangers of totalizing/foundational theory. In general, Judge Richard A. Posner (a U.S. Circuit Court Judge since 1981 and a prolific judicial opinion writer and academic legal writer) has persuasively argued against what he refers to as legal mystification *qua* grand theory.<sup>7</sup> According to Posner, the law should be freed from moral theory, “a great mystifier.”<sup>8</sup> In Posner’s view, the grand theoretical approach to trying to solve important problems through law is misguided and an evasion of the real need of law, which is to achieve a more nuanced and complete grasp of the social, political, and economic facts from which legal conflicts grow.<sup>9</sup>

In particular, legal scholars like Daniel A. Farber and Suzanna Sherry have criticized two specific areas of legal/cultural grand theory—radical multicultural theories and American constitutional theories.<sup>10</sup> For example, in pointing out the “perils of foundationalism”<sup>11</sup> in constitutional grand theory, they observed:

[I]n their search for foundations, [American constitutional grand theorists have] proposed ever more novel and less plausible solutions. In consequence, some of the most prominent [American] constitutional theorists of our day [have] reached simple, elegant, and utterly wrong conclusions almost at every turn.

. . . In trying to make constitutional interpretation simple, certain, and coherent, [these grand theorists] mischaracterize both the Constitution and the judicial enterprise. Both are human creations, and thus both are complex, uncertain, and sometimes

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conception, seeks an explanatory “completeness” and an “unconditionedness” of being that transcend what is possible in experience.

THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 796 (Robert Audi ed., 1995).

7. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY*, at vii (1999).

8. *Id.* Posner has pursued the theme of demystifying law in a number of other books, including RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990) and RICHARD A. POSNER, *OVERCOMING LAW* (1995). See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 2–3 (2003), for a fact-based, pragmatic approach to solving legal problems.

9. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY*, *supra* note 7, at viii.

10. See DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 5 (1997) (defining radical multiculturalism as containing a patchwork of ideological adherents who are united by their rejection of universalism and objectivity, instead believing “western ideas and institutions are socially constructed to serve the interests of the powerful, especially straight, white men”); DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS*, at ix (2002) (criticizing the tendency of modern constitutional scholars to use foundational theories to provide simple answers and attempting to unify all constitutional doctrines).

11. FARBER & SHERRY, *DESPERATELY SEEKING CERTAINTY*, *supra* note 10, at ix.

inconsistent. Judicial interpretation of the Constitution is a constantly evolving process of accommodation, and it cannot be constrained by artificial [abstract centralizing] theories . . . .<sup>12</sup>

For the reasons explained in the balance of this text, “grand sustainable development theory” is—like other grand theoretical approaches to a complex world—dangerously alluring but ultimately misguided.

## II. THREE EXAMPLES OF GRAND (AND MISGUIDED) THEORIES OF SUSTAINABLE DEVELOPMENT

Three prominent examples of what may be viewed as grand sustainable development theory are discussed below: (a) global codification of general principles of international environmental law into a proposed international environmental law covenant; (b) suggestions to centralize international institutions governing the environment and sustainable development; and (c) a call for strict adjudicatory interpretation of norms governing international trade and environmental conflicts. While these ideas for fostering grand sustainable development theory are interesting, stimulating, and thought-provoking, they are wrong-headed in their attempts to make the jumbled world of international trade and the environment simple, elegant, and predictable.

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12. *Id.*; cf. Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 2 (1998) (demonstrating the ineffectuality of constitutional law decisions made without empirical support and based instead on constitutional theory). While Posner appears to condemn constitutional theory in toto, Farber and Sherry do not reject all constitutional theory—just grand, foundational constitutional theory. FARBER & SHERRY, *DESPERATELY SEEKING CERTAINTY*, *supra* note 10, at ix. Moreover, they are willing to extract kernels of edification from grand constitutional theoretical approaches. See *id.* at x (noting that the radical constitutional theorists are only flawed “in part” by their rejection of pragmatism). In the realm of international politics, there is a plethora of grand theories. See, e.g., GARY HART, *THE FOURTH POWER: A GRAND STRATEGY FOR THE UNITED STATES IN THE TWENTY-FIRST CENTURY*, at vii (2004) (juxtaposing the imperial political strategy of the United States with a principled grand strategy applying “our economic, political, and military powers to the large purposes of providing security, enlarging opportunity, and expanding liberal democracy”); ZBIGNIEW BRZEZINSKI, *THE GRAND CHESSBOARD: AMERICAN PRIMACY AND ITS GEOSTRATEGIC IMPERATIVES*, at xiii–xiv (1997) (highlighting the importance of geopolitical strategy in maintaining global supremacy). See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004), for a more fact-specific, pragmatic analysis of international policies.

*A. Global Codification of General Principles and Concepts of  
International Environmental Law into an Overarching International  
Environmental Law Covenant*

A variety of proposals have been advanced over the past decade and a half to elaborate and clarify basic principles of sustainable development, including the codification of a set of binding international environmental principles.<sup>13</sup>

Perhaps the most prominent paragon of these global sustainable development codification proposals is the International Union for the Conservation of Nature's Commission on Environmental Law, *International Covenant on Environment and Development* proposal (IUCN Draft Covenant), promulgated in March 1995.<sup>14</sup> In the ringing, idealistic, and totalizing language of grand sustainable development theory, the IUCN Draft Covenant espouses the following policy rationales<sup>15</sup> for a binding international environmental and sustainable development covenant:

- (1) [T]o provide the legal framework to support the further integration of the various aspects of environment and development;
- (2) [T]o create an agreed single set of fundamental principles like a "code of conduct", as used in many civil law, socialist, and theocratic traditions, which may guide States, intergovernmental organizations, and individuals;

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13. DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 375 (2d ed. 2002) [hereinafter *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY*] (citing EXPERTS GROUP ON ENVTL. LAW OF THE WORLD COMM'N ON ENV'T & DEV., *ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS* (1989); D. Hunter et al., *Concepts and Principles of International Environmental Law: An Introduction* (UNEP Environment and Trade Monograph No. 2 1994); Philippe Sands, *International Law in the Field of Sustainable Development: Emerging Legal Principles*, in *SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW* 53, 66 (Winfried Lang ed., 1995); UNEP, *Position Paper on International Environmental Law Aiming at Sustainable Development*, Annex I to the Final Report of the Expert Group Workshop on International Environmental Law Aiming at Sustainable Development, UNEP/IEL/WS/3/2 (Oct. 4, 1996)).

14. Wolfgang E. Burhenne & Parvez Hassan, *Foreword to the First Edition* of COMM'N ON ENVTL. LAW, INT'L UNION FOR THE CONSERVATION OF NATURE, *DRAFT INTERNATIONAL COVENANT ON ENVIRONMENT AND DEVELOPMENT*, at xv (3d ed. 2004) [hereinafter *IUCN DRAFT COVENANT*], available at [http://www.i-c-e-l.org/english/EPLP31EN\\_rev2.pdf](http://www.i-c-e-l.org/english/EPLP31EN_rev2.pdf).

15. I use the term "policy" to mean the simple "statement of [an] objective." HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 141 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) [hereinafter *LEGAL PROCESS*]. This is to be jurisprudentially distinguished from a "principle" which "also describes a result to be achieved" differing "in that . . . the result *ought* to be achieved and includes, either expressly or by reference to well-understood bodies of thought, a statement of *the reasons why* it should be achieved." *Id.* at 142.

- (3) [T]o consolidate into a single juridical framework the vast body of widely accepted, but disparate principles, of “soft law” on environment and development (many of which are now declaratory of customary international law);
- (4) [T]o facilitate institutional and other linkages to be made between existing treaties and their implementation;
- (5) [T]o reinforce the consensus on basic legal norms, both internationally, where not all States are party to all environmental treaties, even though the principles embodied in them are universally subscribed to, and nationally, where administrative jurisdiction is often fragmented among diverse agencies and the legislation still has gaps;
- (6) [T]o fill in gaps in international law, by placing in a global context principles which only appear in certain places and by adding matters which are of fundamental importance but which are not in any universal treaty;
- (7) [T]o help level the playing field for international trade by minimizing the likelihood of non-tariff barriers based on vastly differing environmental and developmental policies;
- (8) [T]o save on scarce resources and diplomatic time by consolidating in one single instrument norms, which thereafter can be incorporated by reference into future agreements, thereby eliminating unnecessary reformulation and repetition, unless such reformulation is considered necessary; and
- (9) [T]o lay out a common basis upon which future lawmaking efforts might be developed<sup>16</sup>

Despite the grandeur of the IUCN Draft Covenant’s environmental and development goals for humankind,<sup>17</sup> the entire project is an exercise in grand sustainable theory that—even if it conceivably could be accomplished—would involve great expenditures of time and effort, would be divisive, would result in a watered-down covenant (to meet the innumerable concerns of a wide assortment of negotiating parties

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16. IUCN DRAFT COVENANT, *supra* note 14, at xvi (numbering added).

17. Cf. ERVIN LASZLO ET AL., GOALS FOR MANKIND, at vii–xv (1977) (describing the great panoply of human social goals).



throughout the planet), and because of the project's excessively abstract nature, it would not be useful in specific contexts.<sup>18</sup>

*B. Centralization of International Institutions Governing the Environment and Sustainable Development*

Many theorists have called for reform of the United Nations (UN) institutional structure to handle better the challenges of sustainable development we now face around the world. Most of these proposals suggest the need for one central global environmental organization.<sup>19</sup>

The most prominent recent proposals for centralizing international institutions governing the environment and sustainable development have been the following two documents: (1) the United Nations Environment Programme's (UNEP) Governing Council Resolution of 1997; and (2) a 1998 report to the UN Secretary General from the United Nations Task

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18. INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, *supra* note 13, at 375.

19. See, e.g., DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 78 (1994). Individual international governmental organizations (IGOs) "have been given narrow mandates, small budgets, and limited support. No one organization has the authority or political strength to serve as a central clearinghouse or coordinator" over environmental and development concerns. *Id.*; Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 264 (1992).

If an institutional [centralized] home for the conduct of the negotiations themselves could be devised, it would cut the substantial costs of dealing with the global issues. Instead of having a new group of nations assemble to discuss each problem by holding a series of international meetings at different locations around the world in an effort to hammer out a consensus on the provisions of a multilateral convention, there could easily be a uniform method for bringing the nations together, conveying the relevant scientific information to them and conducting the negotiations. Such procedures offer the possibility of appreciably reducing the cost of all the present diplomatic activity, as well as increasing the coherence of the rules.

*Id.*; see also Frank Biermann, *The Case for a World Environment Organization*, ENV'T., Nov. 2000, at 22, 26 (noting the argument that a centralized environmental body could improve compliance through enhanced monitoring and establishing "a common comprehensive reporting system on the state of the environment and on the state of implementation in different countries as well as by stronger efforts in raising public awareness"); W. Bowman Cutter et al., *New World, New Deal*, FOREIGN AFF., Mar./Apr. 2000, at 80, 94-95.

No vehicle exists for nations to negotiate new multilateral pacts on environmental issues. That is one big reason why environmentalists have focused on the WTO [World Trade Organization]. But using the WTO as the forum for multilateral environmental negotiations both endangers further trade liberalization and raises the risk that trade will be restricted in the name of environmentalism but in the service of protectionism. To head off these risks [the international community] should . . . creat[e] a new Global Environmental Organization to develop and enforce new international agreements on specific problems, using the successful Montreal protocol on slowing ozone depletion as a model.

*Id.*

Force on Environment and Human Settlements. Regarding the former—the 1997 UNEP Governing Council Resolution—the proposal boldly asserts that:

[The UNEP] has been and should continue to be the principal United Nations body in the field of the environment . . . .  
. . . the role of the United Nations Environment Programme is to be the leading global environmental authority that sets the global environmental agenda, that promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system and that serves as an authoritative advocate for the global environment[.]<sup>20</sup>

Turning to the latter document—the 1998 report from the United Nations Task Force on Environment and Human Settlements, headed by Klaus Toepfer (*Toepfer Task Force Report*)—identifies a proliferation of environmental institutions that have changed the UN’s environmental structure.<sup>21</sup> This proliferation of institutions has given rise to “substantial overlaps, unrecognized linkages and gaps.”<sup>22</sup> According to the *Toepfer Task Force Report*:

These flaws are basic and pervasive. They prevent the United Nations system from using its scarce resources to best advantage in addressing problems that are crucial to the human future; harm the credibility and weight of the United Nations in the environmental arena; and damage the United Nations working relationship with its partners in and outside of Government.<sup>23</sup>

As one commentator has opined in explaining the *Toepfer Task Force Report*:

A variety of reasons can be found for this multiplicity of institutions, including the growth in ad hoc, piecemeal, and sectoral environmental law-making, which [has been] represented

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20. *Nairobi Declaration on the Role and Mandate of the United Nations Environment Programme*, Governing Council, U.N. GAOR, 52d Sess., Supp. No. 25, at 30, U.N. Doc. A/52/25 (1997).

21. *Report of the United Nations Task Force on Environment and Human Settlements*, U.N. GAOR, 53d Sess., Annex, Agenda Item 30, at ¶ 20, U.N. Doc. A/53/463 (1998) [hereinafter *Toepfer Task Force Report*]. This report was included in the Secretary General’s report to the General Assembly in 1998. See *Report of the Secretary-General on Environment and Human Settlements*, U.N. GAOR, 53d Sess., Agenda Item 30, U.N. Doc. A/53/463 (1998), for the full text of the report.

22. *Toepfer Task Force Report*, *supra* note 21, at ¶ 20.

23. *Id.*

by the MEAs [multilateral environmental agreements]; periodic efforts at “global conferencing” on environment and sustainable development, which was represented by the Rio and Johannesburg summits; as well as the creation of more permanent structures with mandates that overlap with UNEP’s existing or potential mandate, such as the Global Environment Facility (GEF) and the Commission on Sustainable Development (CSD).<sup>24</sup>

Despite the surface attractiveness of grand sustainable development theories for centralizing international environmental governance into one global super-agency, for three reasons, it is naïve to expect that these centralizing/totalizing/top-down institutional schemes would lead to better coordination and coherence of international environmental standards, in general, or would result in better, more satisfactory resolution of trade versus environmental disputes. First, global environmental governance and sustainable development are problems that are primarily political and economic rather than structural. It seems highly doubtful that a global super-agency would be any more successful than the ad hoc progress that has been achieved (or any more adept at resolving future problems). Geopolitical “dog fights” are a realistic feature of international environmental and sustainable development disputes and will not go away by reconfiguring lines and boxes on an organization chart.<sup>25</sup> Second, there is an inherent conflict between calls for a more powerful, centralized global environmental organization and increased citizen and nongovernmental organization (NGO) participation. Effective international sustainable development participation is probably more likely to occur in ad hoc settings and more workable on an issue-by-issue basis.<sup>26</sup> Third, it seems likely that the creation of centralized global governing bodies with greater powers to craft international environmental law would hinder sustainable development, rather than promote it. Sustainable development, as Michael Jacobs has pointed out, is primarily important as a “contestable concept,”<sup>27</sup> and “[u]ltimately, agreement over the precise definition of the term [is] less

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24. Bharat H. Desai, *Mapping the Future of International Environmental Governance*, in 13 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 43, 46 (2002) (footnote omitted).

25. See INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, *supra* note 13, at 252 (suggesting that because the WTO derives its power “directly from nations’ willingness to subject themselves” to its authority, its power may be limited).

26. See *id.* at 253 (hypothesizing an “inherent conflict” in the creation of a powerful central authority while simultaneously attempting to increase public participation).

27. Michael Jacobs, *Sustainable Development as a Contested Concept*, in FAIRNESS AND FUTURITY: ESSAYS ON ENVIRONMENTAL SUSTAINABILITY AND SOCIAL JUSTICE 23 (Andrew Dobson ed., 1999).

important than the debate that is sparked by its brilliant ambiguity”—a debate that can more fruitfully take place in numerous fora and varying contexts.<sup>28</sup>

*C. Strict Adjudicatory Interpretation of Norms Governing International Trade and Environmental Conflicts*

As a third noteworthy example of grand sustainable development theory, consider the criticism of the World Trade Organization (WTO) Appellate Body's interpretative methodology in finding political agreement between nation states outside of the text of WTO instruments, regarding international environmental protection norms.<sup>29</sup> John H. Knox, writing in the *Harvard Environmental Law Review*, claims that the WTO Appellate Body's "ad hoc use of interpretive tools as a means to that end . . . has been incoherent and unpredictable."<sup>30</sup> In one significant respect, however, Knox lauds the WTO's Appellate Body decisions in the *Hormones*,<sup>31</sup> *Asbestos*,<sup>32</sup> and *Shrimp Turtle I*<sup>33</sup> cases for

look[ing] beyond the text before it to cite three substantive principles on which there is widespread agreement among WTO members, but for which the trade agreements themselves provide little or no substantive support: (a) each WTO member has the right to determine its own level of protection of health and safety; (b) natural resources are generally understood to include living

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28. INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, *supra* note 13, at 209.

This search for a unitary and precise meaning of sustainable development is misguided. It rests on a mistaken view of the nature and function of political concepts. The crucial recognition here is that, like other political terms (democracy, liberty, social justice, and so on), sustainable development is a 'contestable concept'.

Jacobs, *supra* note 27, at 25 (footnotes omitted).

29. John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 3 (2004) ("[W]hen the language [of an agreement] was unclear, the Appellate Body found evidence of political agreement outside [the agreement], including in environmental treaties and declarations.").

30. *Id.* at 59.

31. WTO Appellate Body, Report on EC Measures Concerning Meat and Meat Products (*Hormones*), WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998), available at [http://www.worldtradelaw.net/reports/wtoab/ec-hormones\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-hormones(ab).pdf).

32. WTO Appellate Body, Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (Mar. 12, 2001), available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/135ABR.doc>.

33. WTO Appellate Body, Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/58ABR.doc>.

natural resources; and (c) actions to protect the international environment should normally be based on multilateral agreement.<sup>34</sup>

Moreover, Knox defends the WTO Appellate Body's "goal of finding extratextual political agreement in the absence of clear textual language as an appropriate way to compensate for the lack of a strong legislative arm in the WTO"<sup>35</sup> observing that:

The Appellate Body's resolution of trade/environment conflicts concerning the transboundary or global environment is not only clever politically. It is also probably the optimal solution from an environmental point of view, since it furthers multilateral cooperation, the best long-term approach to environmental protection; at the same time it does not unduly restrict unilateral action, which may be the only feasible short-term approach.<sup>36</sup>

Yet, Knox's admiration of the pragmatic ways of the WTO Appellate Body stops with its interpretive methodology.<sup>37</sup> As he explains:

[The WTO Appellate Body] has used an ad hoc assortment of interpretive tools, including in dubio mitius, the principle of effectiveness, and "evolutionary" terms (as well as, occasionally, no clear interpretive rule at all). These rules are not found in the Vienna Convention [on the Law of Treaties]. Alone, that would not be enough to disqualify them, since the Vienna Convention does not purport to codify every customary norm of interpretation. *Their more fundamental flaw is that none of them is suited to coherent, consistent application.*<sup>38</sup>

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34. Knox, *supra* note 29, at 52–53.

35. *Id.* at 59.

36. *Id.*

37. *Id.* at 62.

38. *Id.* (emphasis added) (footnote omitted). Professor Knox favors the approach of Article 31(3) of the Vienna Convention on the Law of Treaties: "When the ordinary meaning [of a trade agreement] is not clear and indicia of extratextual political agreement could help to support or supply a potential interpretation . . ." *Id.* at 65. According to Knox:

Article 31(3) of the Vienna Convention . . . instructs the interpreter to take into account, together with the context of the terms of the treaty:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the

While Knox may well be correct that the WTO's Appellate Body engages in sloppy or unpersuasive reasoning on occasion, I do not wish to quibble with him on this point. My main bone of contention is to disagree with his presupposition that international trade/environmental disputes are subject to simple, certain, and coherent foundational rules of interpretation. Notwithstanding Knox's call for reliance on the interpretational calculus embedded in the Vienna Convention on the Law of Treaties, for three reasons it is unsophisticated and foolish to expect simplicity, certainty, and coherence in judicial decisions involving international trade and the environment battles. First, in trying to make resolution of international trade/environment dispute interpretation simple, certain, and coherent, Knox and other interpretative foundationalists mischaracterize both the international web of trade and environmental laws, as well as the judicial enterprise. Second, international trade law and international environmental law, as well as the judicial enterprise itself, are human creations and thus, will tend to be complex, uncertain, and occasionally inconsistent.<sup>39</sup> Third, interpretation by jurists and arbitrators of international trade and environmental laws should be conceived of as a constantly evolving process of accommodation that relies upon situational intelligence to interpret the language and structure of international undertakings in order to carry out the often multiple, overlapping, and conflicting purposes of the corpus of international law.<sup>40</sup>

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parties.

*Id.* (quoting Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3), 1155 U.N.T.S. 331).

39. This observation is inspired by a similar statement regarding the American Constitution and judicial interpretation. FARBER & SHERRY, *DESPERATELY SEEKING CERTAINTY*, *supra* note 10, at ix.

40. *See generally* LEGAL PROCESS, *supra* note 15, at 1374–80 (summarizing the basic mood and craft of judicial interpretation of statutes). Some of the more illuminating comments in this classic book include: “The words of a statute, taken in their context, serve both as guides in the attribution of general purpose and as factors limiting the particular meanings that can properly be attributed.” *Id.* at 1375; “Interpretation requires a conscious effort when the words . . . will be seen to play a double part, first, as a factor together with relevant elements of the context in the formulation of hypotheses about possible purposes, and, second, as a separately limiting factor in checking the hypotheses.” *Id.*; “Purposes may be shaped with differing degrees of definiteness.” *Id.* at 1377; “Purposes . . . may exist in hierarchies or constellations.” *Id.*; “*The purpose of a statute must always be treated as including not only an immediate purpose or group of related purposes but a larger and subtler purpose as to how the particular statute is to be fitted into the legal system as a whole.*” *Id.* (emphasis added).

### III. TOWARD A MOOD OF GLOBAL TRADE/ECO-PRAGMATISM

#### A. *Let Us Conceive of Pragmatism as More of a “Mood” Than a Theory*

Properly understood, pragmatism is “compatible with, indeed a kind of continuation of, key philosophical methods and findings of Plato, Aristotle, and other proponents of classical natural law theory.”<sup>41</sup> “The term ‘pragmatism’ was introduced into the discourse of philosophers by Charles Sanders Peirce in 1878, to express a complex of ideas about logic (good thinking) which he had developed since 1867.”<sup>42</sup> At the invitation of William James in 1903, Peirce gave a series of lectures at Harvard University with the imposing title “Pragmatism as a Principle and Method of Right Thinking,”<sup>43</sup> which over the course of the next 102 years to date has had an enormous impact<sup>44</sup> on philosophy in general,<sup>45</sup> and on the philosophy of law in particular.<sup>46</sup>

We need not be obsessive about the various forms that pragmatism has taken since Peirce’s nineteenth-century application of the term to ideas about logic<sup>47</sup> or its evolutionary modification by philosophers like Richard

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41. John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 31 (Jules Coleman & Scott Shapiro eds., 2002).

42. *Id.*

43. *Id.* (citing CHARLES SANDERS PEIRCE, PRAGMATISM AS A PRINCIPLE AND METHOD OF RIGHT THINKING: THE 1903 HARVARD LECTURES ON PRAGMATISM (Patricia Ann Turrissi ed., 1997)).

44. Interestingly, the etymology of this use of the word “pragmatism” antedates Peirce’s use of the term. See XII THE OXFORD ENGLISH DICTIONARY, *supra* note 1, at 279 (detailing the definitions of “pragmatism” and its historical development). Moreover, the cognate word “pragmatic” meaning “relating to civil affairs” was used in English as early as 1643, and “pragmatic” was used to mean “[b]usy,” “interfering,” or “meddling” by Ben Johnson as early as 1616. *Id.* at 277–78. The cognate word “pragmatica” meaning “[a] royal ordinance having the force of a law” goes back in English usage to 1652. *Id.* at 278. The cognate word “pragmatical” meaning “[o]f, pertaining to, or dealing with practice (as opposed to theory, etc.); practical” was used in English as early as 1597. *Id.* The cognate word “pragmatical” meaning “[c]onceited, self-important; opinionated, dogmatic; doctrinaire, crochety” goes back in English usage to 1704. *Id.* See also early English usage of the following cognate words before deployment of “pragmatism”: “pragmatically,” “pragmaticalness,” “pragmatist,” “pragmatitioner,” “pragmatize,” and “pragmatizer.” *Id.* at 279.

45. See generally CHRISTOPHER HOOKWAY, PEIRCE, at x (1985) (discussing Peirce’s philosophical views and how those topics fit together as a whole); THE CAMBRIDGE COMPANION TO PEIRCE 1–2 (Cheryl Misak ed., 2004) (noting that one of Peirce’s philosophical contributions, the creation of pragmatism, created “a methodological principle for formulating [the] philosophical theories of truth, [and] reality”).

46. See Finnis, *supra* note 41, at 31–32 (summarizing how Peirce’s conception of pragmatism varies from the way legal scholars, such as Richard Posner, have conceived of pragmatism).

47. Finnis has thoughtfully pointed out that Charles Sanders Peirce’s seminal 1903 Harvard lecture talked about “abduction” as a third mode of inference (other than induction or deduction). *Id.* at 31.

Peirce’s explains [sic] abduction as insight into data, into a mass of facts before

Rorty<sup>48</sup> or legal thinkers like Richard A. Posner,<sup>49</sup> Joseph Singer,<sup>50</sup> and

us, which we find a confused snarl, an impenetrable jungle, until it occurs to us that if we were to assume something to be true that we do not know to be true, these facts would arrange themselves luminously. That is *abduction*. The core of Peirce's abduction is (we can say) what Aristotle called *nous* and Aquinas *intellectus*: insight, understanding that is neither deduction nor induction in the modern senses of that term, but is into data of experience, not a mere data-less intuition.

Peirce understands logic as properly normative, as directed and directing towards and by the good of truth, as the object(ive) of the human activity of thinking. Every man is fully satisfied that there is such a thing as truth, or he would not ask any question. That truth consists in a conformity to something *independent of his thinking it to be so*, or of any man's opinion on that subject. Since logic is a human activity guided by and towards a good to be attained (the logical goodness of enabling attainment of the cognitive good of truth), logic is subordinated to (though not a mere instrument of!) another, wider knowledge of normativity: ethics. And ethics, considered as norms of human action, is in turn based upon what Peirce (eccentrically) calls aesthetics—a knowledge of what is admirable *per se*. Truth and knowledge of it is, therefore, one of these *per se*, intrinsic goods.

*Id.* at 31–32 (internal quotation marks and footnotes omitted).

48. See, e.g., RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY*, at xiii–xvi (1989) (hypothesizing that values, beliefs, and practices are contingent upon the particular time, place, and culture and that irony exists when people can realize this assertion and still desire and work for general human goals of solidarity and freedom); RICHARD RORTY, *OBJECTIVITY, RELATIVISM, AND TRUTH* 1–3, 12–14 (1991) (contending that objectivity is intersubjective and universal validity should be discounted in favor of utility for the purposes of community). As Richard Warner has pointed out, Rorty's conception of pragmatism is different from Peirce's version:

Intellectual history is, in part, the history of the rejection of old norms for new ones, so the question inevitably arises, "What makes the prevailing norms the right ones? How do we know that the assertions and actions they apparently justify *really* are justified?" Pragmatism provides a way to answer this question: we can turn our norms of justification on themselves. Of course, we cannot evaluate all our norms at once; some have to serve as the standard against which to assess the others. The important point is that such assessment is always *internal* to the norms in question. We assess how well our norms work by using *those very norms*. There is no *external* standard of evaluation: *our norms of justification neither have nor need a ground outside themselves*. This is the distinctive pragmatic claim about justification.

An essential point: the norms I mean are the norms we *actually* use day in and day out. . . . The focus on actually-in-use norms is a *Rortyan* version of pragmatism. Not all pragmatists endorse this version. Some—notably C.S. Pierce [sic]—allow evaluation of actual norms in light of a standard that we do not use, an *ideal* norm that we do not have but could in principle construct. Piercean [sic] pragmatism makes sense against the background of Pierce's [sic] views about rational inquiry. Pierce [sic] envisions different inquirers beginning their investigations with different and conflicting views, and he contends that, if all inquirers follow correct methods of rational inquiry, their views will—in the infinite long run—converge on a single theory. According to Pierce [sic], this theory will contain what we are ideally justified in believing.

Richard Warner, *Legal Pragmatism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 385, 385–86 (Dennis Patterson ed., 1996) (citations omitted).



Catherine Pierce Wells.<sup>51</sup> Indeed, we need not be unduly concerned about the “one true pragmatism” or “best” pragmatic approaches to human problem solving exemplified by the following eloquent (but misguided) argument:

True pragmatism is . . . worlds removed from the ‘pragmatism’ of those, such as Richard Rorty or Richard Posner, on whose lips the term signifies a . . . scepticism about truth, and a wilful embrace of logical incoherence and other forms of overt arbitrariness in assertion. Such ‘pragmatism’, since it openly reduces assertion to an instrument of want-satisfaction or other drives, is no part of philosophy. (Of course, just as an unjust law is part of the law, and bad science is part of science, so base pragmatism *is* part of philosophy!) What needs to be said about it, for philosophical purposes, has been said in Plato’s analysis of base rhetoric, in the first of his primary discussions of natural law, the *Gorgias*. True pragmatism, recalled albeit incompletely by Jürgen Habermas, understands that there is a fruitful investigation of the presuppositions and preconditions of the human actions (freely chosen) of thinking

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49. See, e.g., POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, *supra* note 7, at 227 (“I am interested in pragmatism as a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities.”); see also POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 8, at 26–28 (discussing how Odysseus in Homer’s *The Odyssey* embodied the “pragmatic mood”).

His dominant trait is skill in coping with his environment rather than ability to impose himself upon it by brute force. He is the most intelligent person in the *Odyssey* but his intelligence is thoroughly practical, adaptive. Unlike Achilles in the *Iliad*, who is given to reflection, notably about the heroic ethic itself, Odysseus is pragmatic. He is an instrumental reasoner rather than a speculative one.

*Id.* at 27.

50. See, e.g., Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 543 (1988) (stating that “[t]here is no single best way” to judge competing social visions and “[o]ur goal should be to generate competing visions of social justice” by “talk[ing] with each other about our competing visions of the good society”); Joseph William Singer, *Should Lawyers Care About Philosophy?*, 1989 DUKE L.J. 1752, 1757 (1989) (“Truth and justice are both partly a matter of experimentation, of finding out what works and trying out different forms of life.”).

51. See, e.g., Catherine Pierce Wells, *Improving One’s Situation: Some Pragmatic Reflections on the Art of Judging*, 49 WASH. & LEE L. REV. 323, 331–32 (1992).

Theory and practice evolve together within a context of human purpose and activity; the practice informs the theory while the theory, in turn, informs the practice. Thus, the hallmark of a pragmatic method is its continual reevaluation of practices in the light of the norms that govern them and of the norms in the light of the practices they generate.

....

... [Legal] decisionmaker[s] locate the controversy within a web (or several different webs) of relevant normative analysis.

*Id.*

reasonably (accurately, logically, responsibly) and discoursing authentically. And among the first of those preconditions is that one understand, by an unmediated *insight* into one's experience of inclination and possibility, that understanding, reasonableness, and knowledge are not merely possibilities but also an opportunity of participating in a basic human good, and thus a true *reason* for action. The occurrence of such insights and their consolidation and unfolding in practical reason is a child's reaching the age of reason.<sup>52</sup>

Contrary to the aforementioned view,<sup>53</sup> I think that the Rortyan and Posnerian brand of pragmatism—because it is a loose, adaptive, and interactive approach to social problems in the spirit of Toulmin's call for a return to practical wisdom<sup>54</sup>—is more edifying, fruitful, and more likely to lead to better resolutions of global trade and environment disputes than a foundationalist brand of pragmatism that claims to be the “one true pragmatism.” Drawing upon Posner's metaphor of Odysseus in Homer's *The Odyssey*,<sup>55</sup> what we need in the realm of global trade and the environment conflict resolution, institution building, and future evolution of legal norms is *skill in coping* with the complexities of globalization<sup>56</sup> and

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52. Finnis, *supra* note 41, at 32 (footnote omitted).

53. See *supra* note 52 and accompanying text.

54. See *supra* notes 4–6 and accompanying text.

55. See *supra* note 49.

56. The complexity of globalization is illustrated, first, by the “blinding pace of international economic activity around the planet” in recent years. INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, *supra* note 13, at 1126. Thus:

In 1999, world exports of goods and commercial services topped \$5.5 trillion and \$1.3 trillion, respectively. Capital flows have also seen a spectacular increase. Private capital flows from developed to developing countries—including both foreign direct investment and speculative capital—increased five-fold from \$48 billion to \$244 billion between 1990 and 1996. This rapid growth has been driven in large part by international efforts to remove barriers to the flow of goods, services, and capital. The growing economic interdependency among nations created by such liberalization has important consequences for the relationship between the global economy and the global environment.

*Id.* Second, the “relationship between international trade and investment, on the one hand, and the environment on the other” is extremely “complex and multifaceted.” *Id.* Initially, there are powerful arguments for continued liberalized international trade:

International trade has fueled much of the economic growth in the developed world during [the past] century, particularly following the implementation of global financial and trade reforms after World War II. More recently, trade advocates have argued that liberalized trade (i.e., reducing trade barriers) promotes sustainable development. . . . [T]he arguments supporting this claim fall into four main categories: (1) trade liberalization enhances geopolitical stability by binding nations' economies together and reducing the chance of armed conflict; (2) trade promotes efficient use of the world's scarce resources and allows more to be produced from less; (3) trade promotes wealth maximization

improvement in our collective capacity to reason instrumentally and concretely about these complexities rather than speculatively and abstractly.

### *B. Global Trade/Eco-Pragmatism: Some Tentative Thoughts*

In order to embrace global trade/eco-pragmatism, we need to do four key things: (1) recognize the importance of both international trade law and international environmental law; (2) applaud those ad hoc legal-political success stories that have both liberalized trade and created the potential for environmental improvement; (3) understand that the postwar trends of increased trade and increased concern about the environment will, at times, conflict and, at times, need to be coordinated better; and (4) develop a set of experimental working principles of a new global trade/eco-pragmatism.

#### 1. Recognizing the Importance of Both Trade Law and Environmental Law

Global decision-makers need to acknowledge the rapid change and flux of both international trade law and international environmental law. *Both* areas of law are vital to human flourishing.<sup>57</sup>

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and poverty alleviation through economic growth which, in turn, may eventually increase demand and capacity for environmental protection and clean up; and (4) trade enhances communication and sharing of knowledge and technologies.

*Id.* at 1127; *see also id.* at 1127–29 (providing more detailed arguments in favor of liberalized trade); CONGRESSIONAL QUARTERLY INC., *TRADE: U.S. POLICY SINCE 1945* 1–59 (1984) (discussing benefits of free trade, in general, and specific benefits to the United States); MARK SATIN, *RADICAL MIDDLE: THE POLITICS WE NEED NOW* 144 (2004) (“The evidence shows that, on the whole, free trade improves labor and environmental standards.”). However, there are also strong arguments against liberalized trade: (1) free trade, given the environmentally destructive nature of economic growth, will inevitably lead to destructive growth; (2) trade liberalization will tend to threaten domestic social preferences of individual nation states, like environmental protection and labor rights; (3) liberalized trade will tend to create pressure to lower existing environmental standards and to “chill” new environmental standards and organizations like the WTO “may actually strike down national environmental regulations as protectionist trade barriers”; (4) liberalized trade will diminish the ability of nation states to protect their national defense and sovereignty by creating undue reliance on external producers of armaments; and (5) trade liberalization will tend to create an inequitable distribution of wealth and unsustainable impacts on the environment. *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY*, *supra* note 13, at 1131–34. *See* LORI WALLACH & PATRICK WOODALL, *WHOSE TRADE ORGANIZATION?: A COMPREHENSIVE GUIDE TO THE WTO* (2004), for arguments that the WTO has chilled nation states from fighting sweatshops, making lifesaving drugs available, protecting endangered species, providing safe meat inspection, and avoiding media concentration.

57. *Cf.* NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 128 (1995) (discussing John Dewey’s 1910 writings, which argued that pragmatism required thinkers to change their attention from the permanent to the changing, and instead of seeking to establish universal certainties to think in terms of moral and political diagnosis and prognosis, as well as Joseph Bingham’s call to conceive of the law not as a static body of rules and principles but as a phenomenon constantly in flux from changing social facts).

## 2. The “Good” Is the Enemy of the “Perfect”

We need to celebrate those “good,” ad hoc, legal-political success stories in recent years—and to do the same in future years—that have lowered trade barriers, opened markets, and set in motion processes and institutions to improve environmental quality, even if these efforts at international legal coping are far from “perfect.” At least seven prominent candidates for such praise exist to date.

First, President William Jefferson Clinton’s signing of Executive Order 13,141 in 1999, committing the U.S. government for the first time to conduct environmental reviews of trade agreements.<sup>58</sup> Second, the Free Trade Agreement (FTA) signed between the United States and the Hashemite Kingdom of Jordan on October 24, 2000—the first U.S. trade agreement to include both environmental and labor obligations in the body of the text.<sup>59</sup> Third, the successful negotiation and agreement between Canada, Mexico, and the United States in the North American Free Trade Agreement (NAFTA) and its Environmental Side Agreement in the early 1990s.<sup>60</sup> Fourth, the encouraging progress to date of a new institution under the NAFTA Environmental Side Agreement: the Commission for Environmental Cooperation (CEC).<sup>61</sup> Fifth, the impressive accomplishments under the 1993 U.S.–Mexico Environmental Cooperation Agreement (BECA) in building the capacities of two new institutions to work exclusively on the environmental and developmental needs of the border region: (1) the Border Environment Cooperation Commission (BECC); and (2) the North American Development Bank (NADBank).<sup>62</sup>

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58. Exec. Order No. 13,141, 3 C.F.R. 235 (1999), *reprinted in* 19 U.S.C. § 2112 (2000).

59. *See* INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, *supra* note 13, at 1143–44 (providing excerpts of the FTA). Article 5 of the FTA provides, in part, that “each Party shall strive to ensure that its laws provide for high levels of environmental protection and shall strive to continue to improve those laws.” *Id.* at 1144.

60. *See generally id.* at 1190–252 (discussing the positive change in the trade negotiations process from an old method of international lawmaking to a newer, more open process that included a wider array of participants, which led to a new treaty regime that struck a better balance between the competing interests at stake).

61. *See id.* at 1227–42 (describing the inception and role of the CEC in providing a “forum for environmental cooperation”). Some success stories of the CEC include CEC SECRETARIAT, FINAL FACTUAL RECORD FOR SUBMISSION SEM-97-001: BC ABORIGINAL FISHERIES COMMISSION ET AL. (May 2000); CEC SECRETARIAT, REPORT OF THE DEATH OF MIGRATORY BIRDS AT THE SILVA RESERVOIR (1994–1995) (1995); CEC SECRETARIAT, RIBBON OF LIFE: AN AGENDA FOR PRESERVING TRANSBOUNDARY MIGRATORY BIRD HABITAT ON THE UPPER SAN PEDRO RIVER (1999). Another success story is the increasing sophistication of CEC’s citizen submission process. *See* David L. Markell, *The Commission for Environmental Cooperation’s Citizen Submission Process*, 12 GEO. INT’L ENVTL. L. REV. 545, 546 (2000) (providing a history and detailed explanation of the citizen submission process, as well as an update on its “current status”).

62. *See* INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, *supra* note 13, at 1245–47

Sixth, the interesting approach that has evolved in the European Union (EU): providing guidance to prospective members to redesign and strengthen their national environmental laws before they are eligible to join the EU so that their laws “approximate” EU environmental laws.<sup>63</sup> And, a seventh good, ad hoc, legal-political success story in melding international trade and international environmental concerns—despite persistent setbacks—is the impressive recent accomplishments of the WTO’s Committee on Trade and Environment (CTE).<sup>64</sup>

### 3. What Is Past Is Prologue

We need to understand that “[t]he growth of policy linkages between the formerly distinct policy areas of trade and environmental regulation is related to the convergence of two critical postwar trends: an increase in the volume of world trade and an increase in the amount and scope of environmental regulation”<sup>65</sup>—two positive developments for the world’s

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(detailing BECC’s role in certifying environmental infrastructure projects along the border and securing financing from the NADBank).

63. Ritt Bjerregaard, *Preface* to COMM’N OF THE EUROPEAN COMMUNITIES, GUIDE TO THE APPROXIMATION OF EUROPEAN UNION ENVIRONMENTAL LEGISLATION 3 (2d ed. 1998), available at <http://www.europa.eu.int/comm/environment/guide/guidfin.pdf>.

64. See David Vogel, *International Trade and Environmental Regulation*, in ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY 371, 380–81 (Norman J. Vig & Michael E. Kraft eds., 5th ed. 2003).

The CTE [to date] has been unable to address any of the critical substantive issues surrounding the impact of WTO rules on environmental regulations. Part of the reason for this standstill is the inability of the EU and the United States to agree on how specifically the WTO should be made greener. . . . But a far more important reason is the sharp divisions between developed and developing nations. . . . In this context, it is worth recalling that three of the most controversial trade-environment disputes to come before the GATT/WTO—namely, the tuna-dolphin, reformulated gasoline, and shrimp-turtle disputes—pitted less developed countries against a coalition of U.S. environmentalists and domestic producers.

Nonetheless the [WTO’s] CTE has had some accomplishments. It has increased the visibility of environmental issues within the WTO bureaucracy as revealed, for example, by the steady stream of reports on the impact of trade liberalization on environmental protection that have flowed from the organization’s headquarters in Geneva since the mid-1990s. It has also promoted increased coordination between the WTO and the secretariats of international environmental meetings and treaties. Finally, it has helped provide states with more information about each other’s domestic regulations that affect trade.

*Id.* (footnotes omitted). For a comprehensive analysis of the impact of the CTE, see Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 74–81 (2001).

65. Vogel, *supra* note 64, at 371 (footnote omitted).

people, but two developments that cry out for coordination, systematization, and reconciliation.

#### 4. Toward Global Trade-Eco-Pragmatism

Building on the incisive insights of Daniel A. Farber and other observers, we need to focus our attention more on solving particular trade and environmental conundrums in a pragmatic fashion that builds legal principles up from concrete facts of particular cases, rather than down from abstract, centralizing, foundational grand theories.<sup>66</sup> Some key points of a new global trade/eco-pragmatism might include the following:

a. “[H]ard policy issues will [not] magically become simple.”<sup>67</sup> Indeed, “there is no escape from the need to wrestle seriously with the particulars of a given problem.”<sup>68</sup> There are, alas, no ready answers to hard problems like reconciling the economic aspirations of developing countries and the global environmental aspirations of developed countries. Of dealing with global warming. Of preserving global biodiversity.

b. Policymakers should attempt to use multiple environmental baselines in trying to come to grips with global, trans-boundary, and in-state pollution and environmental degradation “tempered by the use of cost-benefit analysis as a test of reasonableness.”<sup>69</sup>

c. In interpreting MEAs, bilateral environmental agreements, global trade treaties, regional free trade agreements, bilateral free trade agreements, and the like, I suggest that courts and arbitrators try to grapple with combining and reconciling *both* a “green” canon of interpretation (“construing ambiguous [treaties] in favor of as much environmental protection as is reasonably feasible”)<sup>70</sup> and a “blue” canon of interpretation (inspired by the open blue, borderless planet floating in space—construing ambiguous treaties in favor of as much liberalized and free trade as is reasonably feasible).

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66. See DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* 11 (1999) (“Rather than rigid rules or mechanical techniques, we need a framework that leaves us open to the unique attributes of each case, without losing track of our more general normative commitments.”).

67. *Id.* at 11.

68. *Id.*

69. *Id.*

70. *Id.* at 12.

d. In fashioning future international legal agreements, and in implementing new ones, we should strive for legal empowerment of international institutions to be environmentally protective but maximally flexible so that when we learn that an international environmental regulatory scheme is outmoded, the relevant international regulatory institutions can take fresh, effective approaches that follow deregulatory paths.<sup>71</sup>

e. In groping to find appropriate international institutions to achieve expanded and liberalized trade that is environmentally appropriate, we should imaginatively open ourselves to the possibilities of both governmental and quasi-governmental institutions playing roles—as well as private-public partnerships. In this regard, as one commentator aptly remarked in describing the outcome of the 2002 Johannesburg, South Africa World Summit on Sustainable Development:

[T]his Summit will be remembered not for the treaties, the commitments, or the declarations it produced, but for the first stirrings of a new way of governing the global commons—the beginnings of a shift from the stiff formal waltz of traditional diplomacy to the jazzier dance of improvisational solution-oriented partnerships that may include non-government organizations, willing governments and other stakeholders.<sup>72</sup>

f. Finally, as part of our first steps toward global trade/eco-pragmatism, we should seek to better document the positive and negative environmental consequences of particular liberalized trade measures, as well as any positive or negative economic consequences of these measures. This information should be freely and easily available on the Internet.

#### CONCLUSION

Sustainable development grand theory—illustrated by three prominent examples of a proposed overarching international environmental law covenant, an idealized and centralized global sustainable development agency, and strict adjudicatory canons for interpreting international

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71. *Id.*

72. Charlotte Streck, *The World Summit on Sustainable Development: Partnerships as New Tools in Environmental Governance*, in 13 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 24, at 63, 65 (quoting Press Release, World Resources Institute, WRI Expresses Disappointment Over Many WSSD Outcomes (Sept. 4, 2002), available at [http://newsroom.wri.org/newrelease\\_text.cfm?NewsReleaseID=135](http://newsroom.wri.org/newrelease_text.cfm?NewsReleaseID=135)).

trade/environmental treaties—is misguided. Rather than sustainable development grand theory, a more sensible and workable approach—what I call global trade/eco-pragmatism—would eschew the top-down, unified, foundational tendencies of grand theory in favor of bottom-up, fact-intensive, intelligent problem solving.

Global trade/eco-pragmatism recognizes that treaties dealing with trade and the environment, as well as interpretation and implementation of these treaties, are human creations; therefore, results will be complex, uncertain, and sometimes inconsistent. Liberalization of international trade and protection of the global environment both involve a constantly evolving, difficult process of accommodation and cannot be managed by artificial grand theories built from abstract principles from on high.