

Resolving Trade-Environment Conflicts: The Case for Trading Institutions

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Introduction

Diplomats from over one hundred nations recently completed the Uruguay Round of GATT negotiations. The conclusion of this marathon task offers an ideal time to take stock of the multilateral trade system, its flaws and its prospects for the future. In particular, it offers an opportunity to reflect on the system's capacities and limitations regarding global environmental issues. In short, it is time to ask whether—and how—we can "Green the GATT."

Attempts to "Green the GATT" will fail unless they are undertaken with a keen appreciation of the institutional strengths and weaknesses of that body. Examination of these issues leads to the conclusion that, in the

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words of a recent GATT report, "[t]he GATT is not equipped to become involved in the tasks of reviewing national environmental priorities, setting environmental standards or developing global policies on the environment."¹ For these reasons, the GATT should not be the lead international institution on trade-environment issues. Rather, the environmental community should seek to move trade-environment issues into a forum expressly designed to address these difficult issues.

Part I of this article outlines the origins of the GATT and several of the objectives that the GATT was formed to achieve. It describes how the GATT's structure and "logic" were driven by a 1940s understanding of the problems confronting the international political and economic order.

Part II then discusses why some of the GATT's fundamental objectives are outmoded and hinder that body's ability to address global environmental problems. In particular, as the GATT was never designed to consider trade-environment issues, its attempts to address these issues have been deeply flawed. When environmental concerns come before the GATT, they are invariably subordinated to the economic and trade interests that the GATT is designed to serve. This subordination of environmental interests threatens to exact a high price from the planet's ecological health. For these reasons, environmentalists should look to house trade-environmental issues in a forum other than the GATT.

In response to this need, part III outlines the features of an international institution that could successfully address trade-environment issues. Finally, part IV suggests strategies for shifting the debate from one over how to change the GATT to a more appropriate debate over whether to form a separate body to consider trade-environment issues.

I. The GATT

Like many international institutions and organizations, the GATT is a product of its times.² Fresh memories of the trade wars of the 1930s and of the recently concluded World War II strongly influenced the diplomats who negotiated the General Agreement.³ Although the international community today faces problems different from those of forty or fifty years ago, few of the fundamental assumptions underlying the General Agreement have likewise changed. These dated assumptions hamper the GATT's ability to deal with contemporary problems, most notably in the environmental field.

1. Report by Ambassador Hidetoshi Ukawa, Chairman, Group on Environmental Measures and International Trade, 49th Session of the GATT Contracting Parties, at 3 (Jan. 25, 1994) (on file with author).

2. More detailed accounts of the GATT's origins can be found in JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 35-57 (1969) [hereinafter JACKSON, WTLG]; JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 9-17 (1990).

3. See, e.g., ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 4 (1975) ("The postwar design for international trade policy was animated by a single-minded concern to avoid repeating the disastrous errors of the 1920s and 1930s.").

A. Prosperity Through Liberalized Trade

Economic and trade policy during the inter-war years contributed greatly to the Great Depression. In particular, barriers to international trade helped to deepen and prolong this global economic downturn. For example, in May 1930, the United States enacted the Smoot-Hawley Tariff Act, raising U.S. duties to their highest levels ever.⁴ In response, a number of other countries raised their tariffs and imposed quotas or foreign exchange controls. As a result, the volume of international trade plummeted. In the United States alone, imports dropped from over \$4 billion in 1929 to less than \$1.5 billion in 1933.⁵ The drop in exports was even greater—from \$5.16 billion to \$1.65 billion.⁶ Other nations suffered similar drops in trade volume. This spectacular contraction of international commerce, in turn, contributed to the strength and length of the Great Depression.

The post-war trading order was designed to avoid a repeat of this experience. As the GATT's Preamble makes clear, the General Agreement is designed to eliminate barriers to trade and to eliminate discrimination in trade among nations.⁷ "The core policy assumption [underlying the GATT] was that liberal trade and other freedoms for economic transactions would best promote the welfare of all in the world, based on well-established economic theories of comparative advantage, gains from trade, and economies of scale."⁸ The theory is that, as nations reduce barriers to trade, each country will specialize in the production and export of goods that it can produce relatively more efficiently than other nations. The resulting increased trade spurs economic growth, productivity gains, and job creation. In turn, aggregate welfare increases as consumers enjoy lower prices and a greater availability of goods.

The architects of the post-war economic order believed that this increase in trade would occur, in the first instance, through the reduction of import tariffs.⁹ Thus, under the General Agreement, contracting parties are to levy no more than a stated tariff on products imported from

4. Smoot-Hawley Tariff Act, ch. 497, 46 Stat. 590 (1930).

5. I.M. DESTLER, *AMERICAN TRADE POLITICS* 11 (1992).

6. *Id.*

7. The GATT Preamble provides that the General Agreement is to reach its objectives through "mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce[.]" General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188, *reprinted in* GATT, *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* [hereinafter B.I.S.D.], 4th Supp. 1, (1969) [hereinafter GATT].

8. John H. Jackson, *Dolphins and Hormones: GATT and the Legal Environment for International Trade After the Uruguay Round*, 14 U. ARK. LITTLE ROCK L.J. 429, 441 (1992).

9. Tariffs were emphasized because "[t]ariffs have been the principal device used by governments to weight competition in their domestic markets in favor of home production, to the disadvantage of imports." George Bronz, *The International Trade Organization Charter*, 62 HARV. L. REV. 1089, 1093 (1949). The classic explanation of the political forces leading to the use of import tariffs in the U.S. remains E.E. SCHATTSCHEIDER, *POLITICS, PRESSURES AND THE TARIFF* (1935).

other GATT contracting parties.¹⁰ In addition to "binding" parties to the tariff levels listed on their schedules, the GATT institutionalizes a process of ongoing tariff negotiations.¹¹

The GATT has been largely successful in its goal of reducing tariffs on international trade. Tariff reductions negotiated at the time of the original General Agreement "undoubtedly represent[ed] the most extensive reduction of trade barriers ever achieved in history."¹² Thereafter, as a result of several "rounds" of negotiations held under GATT auspices, the average tariff on industrial goods has declined by approximately 90%.¹³ The GATT has thus been largely successful in accomplishing the primary economic objectives of increased trade, development, and growth: "[t]rade liberalization ushered in tremendous growth of world commerce, particularly between the 1950s and the 1970s. In turn, the expansion of commerce propelled a remarkable spurt of economic growth during those decades."¹⁴

B. Political Harmony Through Liberalized Trade

A related goal, although not explicitly stated in the General Agreement, was to eliminate the political frictions and conflicts that result from trade restrictions.¹⁵ The underlying theory is that the elimination of trade barriers creates international economic interdependence and eventually economic integration, which, in turn, promotes political cooperation. In contrast, trade restrictions can produce distrust and retaliation. As one GATT negotiator summarized: "[t]rade conflict breeds noncooperation, suspicion, bitterness. Nations which are economic enemies are not likely to remain political friends for long."¹⁶

Again, contemporary political realities strengthened the commitment to this assumption. Many believed that the trade frictions of the 1930s and

10. GATT, *supra* note 7, art. II. A more complete discussion of Article II can be found in JACKSON, WTLG, *supra* note 2, at 201-17.

11. GATT Article XXVIII provides that every three years, any party may "modify" a tariff concession included on an appropriate tariff schedule. In addition to these periodic renegotiations, at any time the contracting parties may authorize renegotiations due to special circumstances. GATT, *supra* note 7, art. XXVIII(4). See generally KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 81-99 (1970) (outline of discussions held pursuant to Article XXVIII); DESTLER, *supra* note 5, at 17 (ongoing international tariff negotiations provide a strong situational argument against domestic political forces seeking protectionist tariffs).

12. Bronz, *supra* note 9, at 1093 n.8.

13. Susan F. Rasky, *Groping for a New Order on Trade*, N.Y. TIMES, Aug. 30, 1987, § 3, at 1. Agreements reached during the Uruguay Round of negotiations will reduce developed country tariffs by an average of 33 percent. Office of the U.S. Trade Representative, *The Uruguay Round of Multilateral Trade Negotiations*, report of the Advisory Committee on Trade Policy and Negotiations (ACTPN) 7 (1994) (on file with author).

14. Gary Hufbauer, *Beyond GATT*, 77 FOREIGN POL'Y 64, 68 (1989-1990).

15. Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L L. 32, 39 (1992).

16. JACKSON, WTLG, *supra* note 2, at 10 (citation omitted).

1940s were partial causes of World War II.¹⁷ For this reason, many of the leading advocates of a multilateral trading system in the post-War era emphasized the negative political consequences that would result should the United States reject this proposed system. The distinguished political economist Jacob Viner, writing in 1947, declared that rejection of a multilateral trading order would result in "a return to the systematic economic warfare which prevailed in the 1930s, with its political tensions, its economic wastefulness, and its favorable setting for the launching by desperate leaders, on behalf of despairing peoples, of ventures fatal to the world at large as well as to themselves."¹⁸ Similarly, the President, summarizing the goals of U.S. trade policy, declared that "[t]he purpose of the whole effort is to eliminate economic warfare, to make practical international cooperation effective on as many fronts as possible, and so to lay the economic basis for the secure and peaceful world we all desire."¹⁹

The GATT has been largely successful at preventing the pattern of escalating trade barriers that marked the inter-war period. As discussed below, the GATT has provided a forum for nations to object to trade restrictions imposed by other nations.²⁰ Of course, the GATT has not entirely eliminated trade frictions as a source of political discord. For example, the GATT has not enjoyed significant success at mitigating the political frictions that result from non-tariff trade barriers or from persistent trade imbalances between different nations.

C. Enhanced Sovereignty Through Liberalized Trade Rules

The GATT serves goals in addition to that of promoting international trade, including the enhancement of national sovereignty. The concept of sovereignty has long been central to international law and international institutions.²¹ Sovereignty is not only a legal term,²² but it also has political implications. Given the historical context in which the General Agreement was formed, the GATT drafters shared a particular vision of state sovereignty: they sought to maximize the ability and authority of each

17. See, e.g., WILLIAM A. BROWN, JR., *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE* 37-46 (1950); CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* 3-13 (1949).

18. Jacob Viner, *Conflicts of Principle in Drafting a Trade Charter*, 25 *FOREIGN AFF.* 612, 628 (1947).

19. Recommendation for Renewal of Trade Agreements Act, Message of the President to Congress, reprinted in 12 *DEP'T ST. BULL.* 531, 533 (1945), cited in JACKSON, *WTLG*, *supra* note 2, at 39.

20. See *infra* notes 29-36 and accompanying text.

21. "The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality." IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287 (4th ed. 1990).

22. As a legal matter, sovereignty means that a nation is not subject, within its territorial jurisdiction, to the governmental or judicial jurisdiction of a foreign nation or to foreign law other than public international law. See Helmut Steinberger, *Sovereignty*, in 10 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 397, 408 (Rudolph Bernhardt ed., 1987).

nation to set its own economic and political policies without interference by other nations.

This concern with sovereignty grew naturally from at least two different sources. First, the origins of many GATT provisions and ways of thinking are found in earlier bilateral trade agreements.²³ Bilateral agreements are generally intended to further the interests of each party and to facilitate the ability of each nation to pursue its own policies. Naturally enough, negotiators of bilateral agreements typically do not consider the interests of other nations or of the community of nations.²⁴ Thus the GATT drafters, many of whom had previously negotiated bilateral agreements, brought to the negotiating table the experience of designing agreements intended to further national interests.

Moreover, the GATT negotiators, having lived through the "beggar thy neighbor" policies of the pre-War era, well understood the mischief that can result when nations attempt to shift the costs of their policies to their trading partners. During the 1930s, trade policies were used in attempts to shift unemployment, negative balance of payments flows, and other economic problems to other nations. In pursuit of these goals, "currencies were depreciated, exports subsidized, tariffs raised, exchanges controlled, quotas imposed, and discrimination practiced through preferential systems and barter deals."²⁵ One general goal of such policies was to reduce imports and promote exports. By establishing a competitive advantage at the expense of other nations, each nation sought to become a net exporter.

These policies were counter-productive. Not only was it, of course, impossible for every nation to be a net exporter, but also use of these policies prompted retaliatory actions by trading partners. Thus, after the United States raised its tariffs in May 1930, Canada, Cuba, France, Mexico, Italy, Spain, Australia, and New Zealand quickly followed suit.²⁶ A number of other countries imposed quantitative restrictions on imports.²⁷ This pattern led into a downward spiral towards global economic chaos.

The GATT sought to preclude the use of such policies through the tariff provisions discussed above as well as through a general policy of non-discrimination in international trade. This policy is expressed in two central GATT articles. GATT Article I includes a "most-favored-nation" clause, providing that whenever a nation extends a trade advantage to another nation, it is to immediately and unconditionally extend that advantage to all other trading partners. GATT Article III imposes a "national treatment" obligation on the contracting parties. Under this

23. John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249 app. A (1967); Abbott, *supra* note 15, at 39. Indeed, the authority for the U.S. executive branch to enter into negotiations on the General Agreement was granted by the Reciprocal Trade Agreements Act, which had been used to negotiate bilateral tariff reductions. *Id.* at 39 n.47.

24. Abbott, *supra* note 15, at 39 n.47.

25. WILCOX, *supra* note 17, at 8-9.

26. *Id.* at 8.

27. *Id.*

clause, nations are required to treat imported products no less favorably than they treat like domestic products. These provisions enhance the interest in economic sovereignty by broadly prohibiting the discriminatory trade policies of the inter-war period and thereby limiting the ability of nations to transfer the costs of their economic policies to other nations.

The GATT furthers the sovereignty interest in another way as well. Although GATT contracting parties largely surrender the ability to erect protectionist trade barriers, the GATT limits the ability of one contracting party to interfere in the domestic affairs of another state by prohibiting nations from conditioning market access upon another state's domestic practices.²⁸ Thus, under the GATT, a nation cannot restrict imports from country X simply because it disagrees with the structure of X's education, health, or social welfare systems.

D. Peaceful Resolution of Trade Disputes

Central to the achievement of the objectives outlined above is an agreed upon method for the peaceable resolution of trade disputes.²⁹ Although the provisions on dispute resolution received much attention during the drafting of the General Agreement,³⁰ the treaty lacks a single, well-defined dispute resolution procedure.³¹ Instead, over time, the contracting parties have built upon GATT provisions³² and institutionalized a practice whereby they appoint a panel of individuals to consider a dispute.³³ The panel receives submissions from the disputing parties and possibly also from other interested nations. It then circulates proposed reports to the contending parties on a confidential basis for their review and comments. Following consideration of the comments, the panel submits its report on

28. See, e.g., *Trade and the Environment*, GATT Doc. GATT/1529 (Feb. 3, 1992), reprinted in *WORLD TRADE MATERIALS*, January 1992, at 37, 50. An exception to this general principle is the GATT provision permitting trade measures "relating to the products of prison labor." GATT, *supra* note 7, art. XX(e). For more discussion on Article XX exceptions in the trade-environment context, see Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 *WASH. & LEE L. REV.* 1407, 1423-26 (1992).

29. A central component of the original U.S. proposal for an international trade body called for that body "to interpret the provisions, . . . to consult with members regarding disputes . . . and to provide a mechanism for the settlement of such disputes." U.S. PROPOSALS, DEP'T OF STATE PUB. NO. 2411 at 24 (1945), quoted in JACKSON, WTLG, *supra* note 2, at 167.

30. JACKSON, WTLG, *supra* note 2, at 163-71; HUDEC, *supra* note 3, at 33-43, 46-47.

31. OLIVER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* 71-73 (1985). See also JACKSON, WTLG, *supra* note 2, at 164.

32. See, e.g., GATT, *supra* note 7, art. XXIII (providing outline of various stages to be followed as a dispute advances through the GATT system).

33. *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT Doc. L/4907 (Nov. 28, 1979), reprinted in GATT, B.I.S.D., *supra* note 7, 26th Supp. 210 (1980) [hereinafter *GATT Understanding*]; *Ministerial Declaration*, GATT Doc. L/5424 (Nov. 29, 1982), reprinted in GATT, B.I.S.D., *supra* note 7, 29th Supp. 9, 13 (1983); *Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT Doc. L/6489 (Apr. 12, 1989), reprinted in GATT, B.I.S.D., *supra* note 7, 36th Supp. 61 (1990). A history of the early use of dispute resolution panels can be found in HUDEC, *supra* note 3, at 74-83.

the dispute to the GATT Council.³⁴ A report is of no force until adopted by the Council. Historically, the Council generally will not adopt a report absent consensus.³⁵

The GATT dispute resolution procedures have provided a reasonably effective forum for the management of trade disputes. However, this system is not well designed to resolve disputes that involve conflicts between trade interests and other types of interests. For example, it has not handled challenges to trade measures imposed on foreign policy grounds particularly well.³⁶ Moreover, as explained more fully below, the GATT dispute resolution system is markedly inappropriate for resolving trade-environment issues.

II. Can Old Solutions Resolve New Problems?

The world has changed dramatically since the General Agreement was negotiated in the 1940s. These changes, particularly the rise and recognition of global environmental concerns, call into question many of the assumptions behind the General Agreement. For example, is a commitment to ever expanding trade and growth a viable policy in a densely populated world of finite resources? Do transboundary environmental threats pose at least as great a risk to political harmony as do trade frictions? Is the maximization of state sovereignty an appropriate goal in the context of threats to shared resources such as the atmosphere and the oceans? I believe that the answers to these questions suggest that in addition to greening the GATT, environmentalists should seek to have trade-environment issues addressed outside of the GATT framework.

A. From Unbridled Growth to Sustainable Development

In recent years, an international consensus has developed that "[t]rade is not an end in itself; rather, it is a means to an end. The end is environmentally sustainable economic development."³⁷ From the perspective of

34. The GATT Council meets between the yearly meetings of the contracting parties. Council membership is open to all contracting parties willing to participate. JOHN H. JACKSON & WILLIAM J. DAVEY, *INTERNATIONAL ECONOMIC RELATIONS* 318-20 (2d ed. 1986).

35. *Ministerial Declaration*, *supra* note 33, para. 10. The GATT dispute resolution system will change somewhat as a result of the agreements reached during the Uruguay Round. In particular, the ability of any nation to block adoption of a panel report will be eliminated. Instead, panel reports will be adopted unless there is a consensus against such action. *General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes*, Doc. MTN/FA, Part II, Annex II, § 16.4 (Dec. 15, 1993), reprinted in 33 I.L.M. 112 (1994) [hereinafter *Dispute Settlement Rules*]. In addition, the dispute resolution system will provide for an appeals process. *Id.* § 17.

36. See, e.g., *United States—Imports of Sugar from Nicaragua*, GATT Doc. L/5607 (Mar. 13, 1984), reprinted in GATT, B.I.S.D., *supra* note 7, 31st Supp. 67 (1985) (panel report discussing U.S. cutoff of sugar imports from Nicaragua). See also JACKSON & DAVEY, *supra* note 34, at 915-28.

37. Edith Brown Weiss, *Environment and Trade as Partners in Sustainable Development: A Commentary*, 86 AM. J. INT'L L. 728 (1992). Sustainable development is understood as

environmentally sustainable development, the GATT's relatively undifferentiated commitment to increased trade and economic growth is problematic.³⁸

There can be little doubt that the liberalization of international trade may contribute to environmental degradation. Liberalized trade can lead to increased pressures on and depletion of natural resources, the growth of industrial wastelands in areas with relatively lax environmental regulations (as in the maquiladora region along the U.S.-Mexico border), the increased transportation and transfer of environmentally harmful products such as toxic wastes and other hazardous materials, and the exploitation of rare species to the brink of extinction.

On the other hand, increased trade may generate positive environmental effects. In theory, international trade should reward those who use resources, including natural resources, in the most efficient manner. Moreover, trade offers developing nations the means to generate funds that can be used for environmental protection. Liberalized trade can help developing nations earn these much-needed funds. Tariffs and other protectionist devices cost developing nations approximately "\$100 billion in lost potential revenues for agricultural products, and a further \$50 billion in lost potential textiles sales."³⁹ Reduced tariffs on finished goods can help developing nations to move beyond a dependence on extractive industries such as forest logging and mining. A liberalized global trading system can also lead to a reduction in the use of certain subsidies, such as in agriculture, that are both environmentally destructive and inefficient.⁴⁰

Thus, the appropriate question is not whether trade, or even growth, is good for the environment. Rather, it is whether the international community possesses the wisdom and the policy tools to encourage sustainable trade and to discourage trade that is environmentally destructive. However, with rules that severely limit restrictions on trade, the GATT makes it extremely difficult for nations to advance environmentally sustainable trade.

For example, the GATT's broad nondiscrimination principles can actually prevent the use of trade measures that would promote sustainable trade. The GATT does not permit nations to distinguish between otherwise identical products on the basis of the manner in which they were

economic activity designed "to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs." THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* 8 (1987) [hereinafter *OUR COMMON FUTURE*].

38. See, e.g., HERMAN E. DALY & JOHN B. COBB, JR., *FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE* (1989); John B. Cobb, Jr., *Growth Without Progress?*, 15 *LOY. L.A. INT'L & COMP. L.J.* 45, 52-57 (1992). See generally *THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* (Earth Island Press ed., 1993).

39. STEPHAN SCHMIDHEINY, *CHANGING COURSE: A GLOBAL BUSINESS PERSPECTIVE ON DEVELOPMENT AND THE ENVIRONMENT* 77 (1992) (citation omitted).

40. *Trade and the Environment*, *supra* note 28, at 72-75.

produced.⁴¹ This principle was recently applied after the United States halted the import of tuna caught in a manner that caused excessive dolphin deaths while continuing to import "dolphin safe" tuna. A GATT dispute resolution panel reasoned that this differential treatment was improper because it was not based on any difference in the product—the tuna—itself.⁴²

Although this conclusion may be sensible from the GATT perspective,⁴³ it makes little environmental sense. Process-based standards are an increasingly frequent form of environmental regulation. In an ecologically interdependent world, pollution created in the manufacturing process can be as harmful as pollution caused by the product itself.⁴⁴ Precluding the use of trade measures based upon process based standards eliminates a powerful tool that nations seek to use in the name of sustainable development.

The GATT similarly limits the ability of nations to use trade policy to protect resources located outside a nation's borders. This also applies to measures designed to protect global commons resources that are outside the jurisdiction of any nation, such as the atmosphere or the high seas. Applying this principle, a GATT panel determined that a U.S. restriction on international trade to protect marine mammals found in the high seas was inconsistent with the nation's GATT obligations.⁴⁵

This rule threatens provisions in numerous treaties and domestic laws that restrict trade that harms global commons resources. Moreover, it significantly restricts the use of one of the few effective policy tools available to address the "collective action" problems associated with efforts to protect resources that are outside the jurisdiction of any particular country.⁴⁶

These and other GATT rules directly conflict with the need to develop macroeconomic policies that actively encourage environmentally sound economic development. In short, the international community's shift to a commitment to sustainable development has not been accompanied by a shift in GATT rules or practice. Thus, while the GATT has helped to fuel unprecedented growth during the post-war era, it appears to be unable to accommodate many types of economic policies designed to further sustainable development. For this reason, and others discussed below, the GATT is an inappropriate institution to consider trade-environment issues.

41. This issue is explored in detail in William J. Snape, III & Naomi B. Lefkowitz, *Searching for GATT's Environmental Miranda: Are "Process Standards" Getting "Due Process?"*, 27 CORNELL INT'L L.J. 777 (1994).

42. *United States—Restrictions on Imports of Tuna: Report of the Panel*, GATT Doc. DS21/R (Sept. 3, 1991), 30 I.L.M. 1594 (1991) [hereinafter *Tuna Dolphin Report*]. A detailed description of this dispute and critique of the panel report is found in Dunoff, *supra* note 28.

43. See John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1243 (1992).

44. See Weiss, *supra* note 37, at 730.

45. *Tuna Dolphin Report*, *supra* note 42.

46. See Dunoff, *supra* note 28, at 1436-37.

B. New Threats to Political Harmony

As noted above, there was a strong "political harmony" rationale behind the General Agreement's focus on the reduction of trade barriers. However, the threats to political harmony have changed since the 1940s. In particular, there are a number of ways that environmental stress can cause political tensions and even military conflict.⁴⁷

First, of course, is the possibility of interstate conflict over environmental resources. "Nations have often fought to assert or resist control over raw materials, energy supplies, land, river basins, sea passages, and other key environmental resources."⁴⁸ The history of international controversy and conflict over transboundary water sources provides a sobering illustration.⁴⁹

Tensions and violence over water-use rights and river-diversion projects have already erupted in the river basins of the Mekong, which is shared by Laos, Thailand, Cambodia, and Vietnam; the Paraná, which is shared by Brazil and Argentina; the Lauca, which is shared by Bolivia and Chile; and the Medjerda, which is shared by Tunisia and Libya.⁵⁰

Moreover, as global water use doubled from 1940 to 1980 and is expected to double again by the year 2000, such disputes are not likely to diminish. Indeed, a number of commentators have suggested that, given an increasing global population and demands for higher standards of living, international conflicts over natural resources could become even more frequent in the future.⁵¹

Environmental stress can also be an indirect contributor to political tensions and instability. The economic decline caused by environmental

47. There is a rapidly expanding body of literature addressing these issues. See generally NORMAN MYERS, *ULTIMATE SECURITY: THE ENVIRONMENTAL BASIS OF POLITICAL STABILITY* (1993) [hereinafter *ULTIMATE SECURITY*]; CAROLINE THOMAS, *THE ENVIRONMENT IN INTERNATIONAL RELATIONS* (1992); Gareth Porter, *Post-Cold War Global Environment and Security*, 14 *FLETCHER F. WORLD AFF.* 332 (1990); Jessica Tuchman Mathews, *Redefining Security*, *FOREIGN AFF.*, Spring 1989, at 162; OUR COMMON FUTURE, *supra* note 37, at 290-300. But see Daniel Deudney, *The Mirage of Eco-War: The Weak Relationship Among Global Environmental Change, National Security and Interstate Violence*, in *GLOBAL ENVIRONMENTAL CHANGE AND INTERNATIONAL RELATIONS* 169 (Ian H. Rowlands & Malory Greene eds., 1992) (arguing that environmental challenges have little in common with traditional national security issues and that global environmental change is unlikely to produce interstate violence).

48. OUR COMMON FUTURE, *supra* note 37, at 290.

49. See, e.g., Stephen McCaffrey, *Water, Politics and International Laws*, in *WATER IN CRISES* 92 (Peter Gleick ed., 1993); B.R. CHAUHAN, *SETTLEMENT OF INTERNATIONAL WATER LAW DISPUTES IN INTERNATIONAL DRAINAGE BASINS* (1981); STEPHEN GOROVE, *LAW AND POLITICS OF THE DANUBE* (1964); NORRIS HUNDLEY, JR., *DIVIDING THE WATERS* (1966); LUDWIK A. TECLAFF, *THE RIVER BASIN IN HISTORY AND LAW* (1967); ADAM GARFINKLE, *ISRAEL AND JORDAN IN THE SHADOW OF WAR* (1992); Joseph W. Dellapenna, *Surface Water in the Iberian Peninsula: An Opportunity for Cooperation or a Source of Conflict?*, 59 *TENN. L. REV.* 803 (1992); Joseph W. Dellapenna, *Water in the Jordan Valley: The Potential and Limits of Law*, 5 *PAL. Y.B. INT'L L.* 15 (1989).

50. Norman Myers, *Environment And Security*, 74 *FOREIGN POL'Y* 23, 29-30 (1989). Myers has also argued that the 1967 Middle East War was, in part, a war over water supplies. *ULTIMATE SECURITY*, *supra* note 47, at 9.

51. OUR COMMON FUTURE, *supra* note 37, at 290.

degradation "leads to frustration, resentment, domestic unrest or even civil war."⁵² In addition, the deterioration of a nation's natural resource base and its resultant capacity to support the population can have effects beyond a nation's borders. For example, the international community faces a serious problem of "environmental refugees."⁵³ Throughout parts of Asia, Central America, and sub-Saharan Africa, "millions have been forced to leave their homes in part because the loss of tree cover, the disappearance of soil, and other environmental ills have made it impossible to grow food."⁵⁴ The flow of large numbers of environmental refugees across state borders heightens interstate tensions.⁵⁵

Finally, and perhaps most alarmingly, political tensions can arise from our ability to alter the environment on a global scale. Climate change illustrates this point.⁵⁶ Through deforestation and use of fossil fuels, mankind has increased atmospheric concentrations of certain greenhouse gases by roughly twenty-five percent since the start of the Industrial Revolution.⁵⁷ Unless these trends are reversed, the planet will likely become hotter on average because of the accumulation of these gases.⁵⁸

Climate change will likely cause a number of changes in the planet's physiology. For example, it will likely make climate extremes such as hurricanes, droughts, cold snaps, and typhoons more frequent and more intense.⁵⁹ Perhaps more ominously, increased temperatures could cause sea levels to rise due to the thermal expansion of water and the melting of land-based ice. The resultant loss of low-lying territory would create unprecedented human migrations.⁶⁰ Competition over resources and territory launched by those displaced by sea-level rise would almost certainly create or exacerbate regional strife.⁶¹ Similarly, famine caused by greenhouse-driven crop failures would likely create regional conflicts.⁶²

52. Mathews, *supra* note 47, at 168.

53. See generally Jodi L. Jacobson, *Environmental Refugees: A Yardstick of Habitability*, WORLDWATCH PAPER 86, Nov. 1988; ESSAM EL-HINNAWI, ENVIRONMENTAL REFUGEES (1985).

54. Mathews, *supra* note 47, at 168.

55. *Id.*

56. See, e.g., ULTIMATE SECURITY, *supra* note 47, at 171-78; CLIMATE AND SEA LEVEL CHANGE: OBSERVATIONS, PROJECTIONS, AND IMPLICATIONS (R.A. Warrick et al. eds., 1993) [hereinafter CLIMATE AND SEA LEVEL CHANGE]; Peter H. Gleick, *The Implications of Global Climatic Changes for International Security*, 15 CLIMATIC CHANGE 309 (1989); David A. Wirth, *Climate Chaos*, 74 FOREIGN POL'Y 3 (1989).

57. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE: THE IPCC SCIENTIFIC ASSESSMENT xv fig. 2 (J.T. Houghton et al. eds., 1990).

58. *Id.* at xi. See also INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 1992 IPCC SUPPLEMENT 25 (1992).

59. See Mathews, *supra* note 47, at 168.

60. The projected sea level rise of one to four feet by the year 2050 would likely displace millions in lowlying nations such as Egypt and Bangladesh. See, e.g., James M. Broadus, *Possible Impacts of, and Adjustment to, Sea Level Rise: The Cases of Bangladesh and Egypt*, in CLIMATE AND SEA LEVEL CHANGE, *supra* note 56, at 263-75; John D. Milliman et al., *Environmental and Economic Implications of Rising Sea Level and Subsiding Deltas: The Nile and Bengal Examples*, 18 AMBIO 340 (1989).

61. Mathews, *supra* note 47, at 169-71.

62. *Id.*

The stresses induced by international environmental problems such as climate change, deforestation, desertification, and increased competition for scarce natural resources pose significant threats to the international political order. Indeed, a recent study concluded that

whereas the past forty years have been dominated by the Cold War, the next forty years will surely be dominated by environmental conflicts. They will add up to a variant of World War III, a war we are waging against the Earth—and a war we are winning hands down.⁶³

Of course, unlike traditional threats to the political order, global environmental threats necessarily affect the entire international community: "Not even the most advanced nation can insulate itself from environmental impacts, no matter how strong it may be economically, how advanced technologically or how powerful militarily."⁶⁴

Reform of the international trade system is one way to address, at least in part, the global environmental stresses that threaten political harmony.⁶⁵ In particular, nations may seek to restrict trade in goods that endanger global commons resources like the atmosphere.⁶⁶ Similarly, they may seek to restrict trade in goods produced in environmentally harmful ways. However, many such measures, whether imposed unilaterally or multilaterally, would appear to be inconsistent with the GATT. We urgently need to rethink the wisdom of using trade bodies to pass upon such measures. There can be little doubt that the GATT has neither the mandate nor the expertise to evaluate the risks particular environmental threats pose to political harmony. This body simply cannot—and does not—perform the difficult balancing act of evaluating whether any particular trade restriction is justified by the environmental interest it seeks to serve. As it is not designed to factor environmental interests into the equation, it is simply not an appropriate institution to pass upon trade measures designed to further environmental ends. A more sensible approach would be to house disputes over such trade measures in a body that has the expertise to consider both trade and environmental interests.

63. *ULTIMATE SECURITY*, *supra* note 47, at 11-12. The international community has recognized the threat environmental problems pose to a harmonious international order. The heads of state of the fifteen members of the United Nations Security Council, meeting at an unprecedented summit, declared that:

The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole . . . needs to give the highest priority to the solution of these matters.

Note by the President of the Security Council, U.N. SCOR, 3046th mtg. at 3, U.N. Doc. S/23500 (1992).

64. *ULTIMATE SECURITY*, *supra* note 47, at 12.

65. *See, e.g., OUR COMMON FUTURE*, *supra* note 37, at 89-90.

66. A good example is the Montreal Protocol, which limits trade in ozone depleting chemicals. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol].

C. Global Environmental Threats Undermine State Sovereignty

The conception of sovereignty as understood in the 1940s is under sustained attack on many fronts. Sovereignty is undermined, in part, by growing economic interdependence. That is, the economic well-being of many nations largely depends on forces and events outside their borders. For example, changes in European interest rates or Japanese savings rates significantly affect international trade and investment. Such changes can constrain the ability of U.S. officials to effectively implement economic policies.⁶⁷

Global ecological interdependence is at least as strong a threat to state sovereignty as is economic interdependence.⁶⁸ Autarchy is at least theoretically possible. However, a nation's formal sovereignty does not prevent the ozone layer over its territory from being depleted or limit the amount of acid precipitation caused by emissions in other nations that reach its territory. Global environmental issues present "problem[s] to which all nations contribute, by which all will be affected, from which no nation can remotely hope to insulate itself, and against which no nation can deploy worthwhile measures on its own."⁶⁹ Thus, blissfully ignorant of state boundaries, international environmental problems are stubbornly antithetical to the doctrine of state sovereignty.

For these reasons, there have been repeated calls for new international institutions and lawmaking processes that, to more effectively address these issues, reject traditional notions of state sovereignty. For example, there have been requests in the United Nations General Assembly for the formation of an "Environmental Protection Council" empowered to make binding decisions on global environmental issues.⁷⁰ There have also been calls for a revitalization of the United Nations Trusteeship Council to act "as the forum within which the nations of the world exercise their trusteeship for the integrity of the planetary systems on which our security and survival depends, as well as for the global commons."⁷¹ More recently, others have called for a global International Environmental Organization to help define general environmental principles to guide the world community.⁷² Similarly, leaders from twenty-four nations have explicitly called for a form of international environmental lawmaking that

67. Jackson, *supra* note 8, at 439.

68. For more on the relationship between sovereignty and international environmental issues, see Susan H. Bragdon, *National Sovereignty and Global Environmental Responsibility: Can the Tension be Reconciled for the Conservation of Biological Diversity?*, 33 HARV. INT'L L.J. 381 (1992); David B. Newsom, *The New Diplomatic Agenda: Are Governments Ready?*, 65 INT'L AFF. 29 (1989).

69. ULTIMATE SECURITY, *supra* note 47, at 24.

70. *General Debate Statement of New Zealand Government*, U.N. GAOR, 44th Sess., 15th mtg. at 76-77, U.N. Doc. A/44/PV.15 (1989) (statements of Rt. Hon. Geoffrey Palmer).

71. Maurice F. Strong, National Conference on Peacemaking and Peacekeeping: Canada and the United Nations, Address at Dalhousie University in Halifax, Nova Scotia 17 (June 5, 1988), cited in Durwood Zaelke & James Cameron, *Global Warming and Climate Change—An Overview of the International Legal Process*, 5 AM. U.J. INT'L L. & POL'Y 249, 280 n.144 (1990).

72. Daniel C. Esty, *GATTing the Greens*, 72 FOREIGN AFF. 32 (1993).

does not depend on state consent.⁷³ Each of these proposals clearly contemplates a partial loss of state sovereignty in the service of urgent international needs.

Against this backdrop, the GATT rules significantly limiting the ability of nations to utilize trade measures to address global environmental problems appear seriously outdated. Trade measures are one of the few tools available to encourage the collective action that is needed to address international environmental issues. To restrict the use of this tool in the name of preserving state sovereignty is to elevate an outmoded legal fiction without substantial contemporary justification.

D. A Flawed Dispute Resolution System

Although the GATT dispute resolution system has been reasonably successful at defusing a number of trade disputes, it is not well suited for the consideration of trade-environment issues. Such issues arise when one nation restricts international trade to protect an environmental resource and another nation challenges this restriction as violative of the GATT. As recent disputes make clear, the GATT's dispute resolution process is skewed against environmental interests in several important respects.

For example, there is no formal mechanism to ensure that the panel will have access to environmental expertise. The GATT's procedures do not permit participation by nongovernmental organizations. Although panels are free to request scientific or technical assistance, calling upon outside experts is a rarity. For example, the Tuna Dolphin Panel did not hear a scientific or ecological defense of the U.S. ban on Mexican tuna from any environmental experts.

In addition, panel members are chosen for their expertise in "trade relations, economic development and other matters covered by the General Agreement."⁷⁴ Even where there is a challenge to a trade measure designed to protect environmental resources, there is no requirement that any panel members possess environmental expertise. Moreover, GATT panelists generally do not apply international law other than GATT law in any dispute.⁷⁵ They typically do not apply recent treaties or customary international environmental law that may be relevant to a particular dispute.

Finally, GATT dispute resolution is largely a closed process.⁷⁶ The parties' submissions, the oral arguments, and the transcripts of the panel's

73. Hague Declaration on the Environment, Mar. 11, 1989, 28 I.L.M. 1308. Representatives from Australia, Brazil, Canada, Egypt, Federal Republic of Germany, France, Hungary, India, Indonesia, Italy, Ivory Coast, Japan, Jordan, Kenya, Malta, Netherlands, New Zealand, Norway, Senegal, Sweden, Tunisia, Venezuela, and Zimbabwe signed the Declaration.

74. The GATT Director General maintains a list of such persons, from which panelists are selected. *GATT Understanding*, *supra* note 33, at 212.

75. Daniel Magraw, *NAFTA's Repercussions: Is Green Trade Possible?*, 36 ENV'T 14, 16 (1994).

76. This issue is explored in greater detail in Robert F. Housman, *Democratizing International Trade Decision-making*, 27 CORNELL INT'L L.J. 699 (1994).

proceedings are all confidential.⁷⁷ GATT dispute resolution procedures thus offer little opportunity for nongovernmental organizations and other interested parties to participate in trade-environment disputes. This closed process is antithetical to sound environmental decisionmaking, which is premised upon public participation and open decisionmaking.⁷⁸

There can be little doubt that GATT dispute resolution procedures are not well designed to handle trade-environment conflicts. Indeed, environmental interests have almost invariably been subordinated to trade interests when the two have been in conflict before GATT panels.⁷⁹ Why, then, continue to let these procedures limit the ability of the international community to respond to pressing global environmental problems?

III. An Institution for the Greening of International Trade Policy

No existing international institution has a specific mandate or the expertise to address trade-environment issues. However, given the importance, difficulty, and increasing frequency of these questions, they cannot simply be ignored. The inability of trade bodies to appropriately address such issues lends added urgency to the search for a forum equipped to handle them. For this reason, rather than debating how to Green the GATT, environmentalists should be attempting to define the features of a body that would be able to resolve these issues in a manner that furthers both economic and ecological interests.

I have argued elsewhere that these conflicts would most appropriately be resolved using the type of consultation, negotiation and consensus building approach that has been successful in other areas of international environmental law, such as the ozone depletion and climate change contexts.⁸⁰ In particular, I have urged the formation of a new body to house ongoing multilateral negotiations on a series of particular trade-environment issues. Over time, these ongoing negotiations will enable the international community to coordinate policy, develop legal norms, supervise the implementation of these norms, generate community pressure on recalcitrant nations, and resolve international conflicts of interest.⁸¹

77. Similarly, under the Uruguay Round agreements, the hearings of the dispute settlement panels and the appellate body are closed to the public, as are any submissions to the panels. *Dispute Settlement Rules*, *supra* note 35, § 12.1, app. 3 §§ 2-3, § 17.10, § 18.2.

78. See, e.g., *Agenda 21*, U.N. Conference on Environment and Development (UNCED), para. 8.4, U.N. Doc. A/CONF.151/26/Rev.1 (1992) [hereinafter *Agenda 21*] (need to ensure access by public to relevant information and allow effective participation on national level); *Id.* para. 8.11 (need to promote public awareness and exchange of information and views with public).

79. A more complete discussion of this issue is found in Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ and Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1042 (1994).

80. *Id.*

81. *Id.* See also PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 138 (1992) (outlining characteristics of international environmental institutions); Marc A. Levy et al., *Improving the Effectiveness of International Environmental Institutions*, in *INSTITUTIONS FOR THE EARTH* 397-426 (1993) (international environmen-

Among the institutional features that would help to ensure the success of such a body are:

- *A mandate that expressly incorporates both economic development and environmental protection.* The body that considers these issues must do so within an institutional framework that is as committed to environmental interests as it is to trade interests.⁸² As the GATT experience demonstrates, institutions designed to advance only one of these interests cannot adequately balance the divergent interests involved in trade-environment disputes.

- *Access to impartial scientific information and expertise.* Credible scientific and technological information is critical in the resolution of trade-environment conflicts. Such information promotes an understanding of the precise global environmental interests at stake in any particular dispute and the likely effects of the relevant trade measure. Scientific information also advances the formation of an effective policy response to any particular trade-environment conflict. Finally, grounding a dispute and its solution in impartial scientific findings enhances the acceptability of the proposed solution.⁸³

- *Transparent, participatory processes.* To be effective, the proposed institution must conduct its activities in a manner designed to ensure widespread participation. For instance, diffusing institutional authority throughout the membership ranks would likely enhance participation. Efforts should also be made to ensure that, despite differences in resources and capabilities, all nations can play meaningful roles in the body's operations. Finally, membership, procedures, and agenda should be structured to avoid a perception of regional or other bias.

The institution should also provide for a significant degree of participation by nongovernmental organizations (NGOs).⁸⁴ In the trade-environment area, NGOs often possess resources that are matched by few governments. Moreover, they often add a perspective different from that of any nation or group of nations.⁸⁵

tal institutions facilitate environmental protection by raising governmental concern, providing forum for negotiations, monitoring national compliance, and offering technical assistance).

82. Agenda 21, calling for an "integration of environment and development concerns" to produce a "better protected and managed ecosystem and a safer, more prosperous future" is an example of such a commitment. *Agenda 21*, *supra* note 78, para. 1.1. See also Weiss, *supra* note 37, at 728.

83. As this is a call for the injection of science into a non-adjudicatory setting, this is not equivalent to an endorsement of the use of scientific panels in GATT or NAFTA dispute settlement proceedings. A more in-depth discussion of these issues is found in David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 CORNELL INT'L L.J. 817 (1994).

84. At the Rio Conference, the international community reaffirmed the importance of integrating non-governmental organizations into international environmental policymaking. See, e.g., *Agenda 21*, *supra* note 78, ch. 27 (entitled "Strengthening the role of non-governmental organizations: Partners for sustainable development").

85. A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI.-KENT L. REV. 61, 72 (1993).

Finally, the institution should use procedures that are as transparent as possible. For example, permitting agendas to be set through an open process precludes stronger states from using the institution to address only their concerns. Similarly, discussions and deliberations must be as open as possible, rather than secret. This helps produce better substantive results and enhances the political acceptability of those results. A more open process would represent a significant change from the processes used by the GATT to resolve trade-environment disputes.⁸⁶

• *The ability to encourage compliance with its decisions.*⁸⁷ Institutions that attempt to resolve inter-state conflicts must be able to encourage compliance with their decisions. Over the years, international environmental institutions have developed a variety of techniques to encourage compliance.⁸⁸

The use of incentives like preferential access to funding sources, goods, markets, and/or technology is an increasingly common technique. Incentives such as these may be especially important to developing nations, which are frequently unwilling or unable to absorb the high short-term costs imposed by pollution control regulations or technologies without international assistance.

The various international agreements on stratospheric ozone depletion provide an example of how such incentives can be used.⁸⁹ These agreements created a Multilateral Fund to help developing nations meet the incremental costs of complying with the obligations they impose. In addition, they facilitate the transfer of technology among the parties to them.⁹⁰ Finally, these agreements offer international trade benefits to

86. See *supra* text accompanying notes 29-36.

87. See Louis Henkin, *International Law: Politics, Values and Functions—General Course on Public International Law*, 216 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 9, 67 (1989-IV) (describing necessity for a culture of compliance in international law).

88. There is a rapidly expanding literature on compliance in international environmental regimes. See, e.g., J.H. Ausubel & D.G. Victor, *Verification of International Environmental Agreements*, 17 ANN. REV. ENERGY & ENV'T 1 (1992); RONALD B. MITCHELL, FROM PAPER TO PRACTICE: IMPROVING ENVIRONMENTAL TREATY COMPLIANCE (1992); GLOBAL ENVIRONMENTAL CHANGE: UNDERSTANDING THE HUMAN DIMENSIONS (Paul C. Stern et al. eds., 1992); Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993); Abram Chayes & Antonia Handler Chayes, *Compliance Without Enforcement: State Behavior Under Regulatory Treaties*, 7 NEGOTIATION J. 311 (1991).

89. Montreal Protocol, *supra* note 66; Montreal Protocol Parties: Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer (with Annexes), June 29, 1990, 30 I.L.M. 537 (1991) [hereinafter London Amendments]; United Nations: Montreal Protocol on Substances that Deplete the Ozone Layer—Adjustments and Amendments (with Annexes), Nov. 23-25, 1992, 32 I.L.M. 874 (1993) [hereinafter Copenhagen Amendments].

90. The treaty calls for the expeditious transfer of "the best available, environmentally safe substitutes [for ozone depleting substances] and related technologies" to developing nations that join the treaty. London Amendments, *supra* note 89, art. 10A(a) (as amended). Such transfers are to occur under "fair and most favourable conditions." *Id.* art. 10A(b). Conversely, parties to the treaty are discouraged from exporting to nonparties technology for producing or utilizing ozone depleting substances. Montreal Protocol, *supra* note 66, art. 4(5).

those who join. For example, trade in certain ozone-depleting chemicals with nonparty states is severely restricted.⁹¹ Of course, as outlined above, these trade restrictions are vulnerable to challenge before trade bodies such as the GATT as impermissible non-tariff barriers to trade.

Incentives such as these provide a catalyst for developing states to join particular environmental regimes and to engage in environmentally sound activities. These (or similar) incentives will encourage developing nations to raise trade-environment conflicts in the proposed new forum, as opposed to the GATT.

• *Designed to promote shared interests in the global ecological and economic order.* As all nations share an overriding interest in a robust global ecosystem and a functioning world economy, the institution ought to do more than simply avoid or adjust differences between particular nations. It should also promote outcomes and policies that advance the interests of the international community as a whole.⁹² Particular disputes, therefore, should not be seen as simply calling for a choice between the trade or environmental policies of one or another nation. Rather, they should be viewed as an occasion to develop, elaborate and implement global environmental policy. They present an opportunity to articulate common goals, principles, and norms.

This approach, in contrast to the GATT's "rule-oriented" approach, offers the international community the flexibility to respond to new information and rapidly changing circumstances.⁹³ It also permits the use of differential obligations and selective incentives. Conceptually, such provisions recognize that nations make "different contributions to global environmental degradation" and possess different abilities to address the problem. Politically, the use of differential standards is a way to avoid the lowest common denominator result that often obtains in collective multi-lateral efforts.⁹⁴

IV. Strategies for Moving Towards a Sustainable Future

Trade and environment issues will attract substantial attention over the next several years. As these issues are relatively new to the political agenda, it is important that environmentalists focus their energies initially on ensuring that the debate is framed in appropriate terms. As a longer-

91. Montreal Protocol, *supra* note 66, art. 2. To encourage nonparties to comply with the treaty, the ban on imports from nonparties does not apply if the nonparty is in compliance with the control requirements applicable to member states. *Id.* art. 4, para. 8.

92. See, e.g., Richard B. Bilder, *The Settlement of Disputes in the Field of the International Law of the Environment*, 144 R.C.A.D.I. 139, 230-32 (1975-1); BIRNIE AND BOYLE, *supra* note 81, at 546-47 (advocating that international environmental institutions act as environmental trustees).

93. See, e.g., PETER H. SAND, LESSONS LEARNED IN GLOBAL ENVIRONMENTAL GOVERNANCE 6 (1990) ("Critical to successful international management . . . [is] the capacity to respond to frequent and rapid change.").

94. Peter H. Sand, *International Cooperation: The Environmental Experience*, in PRESERVING THE GLOBAL ENVIRONMENT 236, 242 (Jessica Tuchman Mathews ed., 1991).

term goal, environmentalists should develop strategies to ensure that trade-environment conflicts are eventually considered by international institutions other than the GATT.

Successful institutional models on the domestic level will be critical to building an international consensus for the changes outlined above. Here, the United States can and should lead by example. Significantly, the Clinton Administration has taken the first steps in the effort to integrate trade and environmental policies in the name of sustainable development. For example, the Administration last summer convened an informal inter-agency group to develop and evaluate policy recommendations on trade-environment issues. This group included representatives from the Environmental Protection Agency, the Office of the U.S. Trade Representative, the Departments of the Interior and the Treasury, and the National Economic Council. More recently, President Clinton created a new administration advisory committee on trade and environmental policies that is to include representatives from environmental, industry, trade, consumer, and agricultural groups.⁹⁵ These efforts are promising examples of the type of cross-cutting expertise that is necessary to formulate sound policy.⁹⁶

The environmental community must closely monitor these developments and act to ensure that the process of trade-environment policymaking on the domestic level evidences a commitment to sustainable development. Simultaneously, the United States should be pressing other nations on the composition of their delegations to trade negotiations. The goal in these efforts is to ensure that, in the trade-environment context, all of the appropriate voices are heard.

Similarly, successful bilateral or regional models can also spur larger, multilateral efforts. For example, the United States and Canada have developed a relatively successful model for resolving bilateral environmental issues in a non-adjudicatory forum. In addition, the environmental community should devote substantial energies towards a successful startup of the North American Commission on Environmental Cooperation (CEC), a commission authorized in the NAFTA environmental side agreement.⁹⁷ The CEC will consider allegations that a NAFTA country is not adequately enforcing its own domestic environmental laws. Although I am skeptical that this quasi-adjudicative function should be copied by a global body,⁹⁸ the CEC is potentially significant as a body sensitive to environmental issues that is also loosely affiliated with, but independent of, a trade regime.

95. *Clinton Creates Advisory Group on Trade, Environmental Policy*, Int'l Trade Daily, Mar. 29, 1994, available in LEXIS, BNA Library, BNAITD File.

96. A more detailed analysis of efforts to green the domestic trade policymaking process is found in Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631 (1994).

97. Can.-Mex.-U.S.: North American Agreement on Environmental Cooperation, arts. 8-19, reprinted in 32 I.L.M. 1480, 1485-89 (1993).

98. See Dunoff, *supra* note 79 (detailing political, doctrinal, and structural impediments to adjudication of international environmental issues).

In this respect, the CEC can be seen as a model for a multilateral body that would consider similar issues on a worldwide rather than a trilateral basis. For this reason, environmentalists ought to consider debates over the funding, composition, staffing, and responsibilities of the CEC as proxies for a debate over an international version of a CEC. It will thus be important to ensure the CEC is not undermined by insufficient funding or staff.

All of this is not an argument for ignoring the GATT. Although the GATT should not be the lead institution on trade-environment issues, environmental reform here can facilitate the formation of the body called for above. Indeed, there is clearly a measure of welcome movement in this direction. Unfortunately, this movement notwithstanding, the operative provisions of the General Agreement still do not advance environmental interests.

A GATT Ministerial Declaration is scheduled to be issued shortly before this article is published. Environmentalists should insist that this Declaration include a strong commitment to a specific environmental reform agenda.⁹⁹ The environmental community should also press for the formation of a permanent GATT/WTO committee to address trade and environment issues.¹⁰⁰

In addition, environmentalists should contribute to the agenda of the "work plan" on trade and the environment provided for in the Uruguay Round Final Agreements. There are legitimate fears that the "work plan" will cause environmentalists to re-fight battles that have already been won in other fora.¹⁰¹ The environmental community needs to consider carefully which trade-environment issues can be most profitably discussed in the GATT context. For example, a discussion about the relationship between the GATT and international environmental treaties that include trade provisions may be fruitful while one on the unilateral use of trade barriers to achieve environmental ends most likely would not.

There are also fears that the work programme could devolve into a protracted period of fruitless and marginalized negotiation. As others have suggested, one method for accelerating the pace of the work programme is to declare a moratorium on trade challenges to environmental,

99. The present text calls for a work plan on the environment but does not lay out a specific agenda for reform. *Trade, Environment Nexus Emphasized in GATT, NAFTA Implementation*, Daily Report For Executives, Jan. 25, 1994, available in LEXIS, News Library, DREXEC File.

100. Shortly after this article was completed, just such a committee was formed. See, e.g., *Trade-Environment Panel's Work to Begin Soon After Mid-April Signing*, Int'l Env't Daily, Mar. 30, 1994, available in LEXIS, News Library, BNAIED File.

101. The Work Plan provides that the "programme of work shall make appropriate recommendations on whether any modifications of the provisions of the Multilateral Trading System are required, compatible with the open, equitable and nondiscriminatory nature of the system." Trade Negotiations Committee, Trade and Environment: Draft Decision, Dec. 13, 1993, Doc. TNC/W/123, UR-93-0196. Of course, as suggested above, the proper debate is not "whether" any modifications of the trade regime are required; rather, it is over which and how many changes need to be made.

health, and safety laws during the process of the Work Plan.¹⁰² This would not only insulate environmental laws from challenge, but it would also provide some impetus for the parties to negotiate environmental reforms as rapidly as possible.¹⁰³

The environmental community should not ignore other international institutions. For example, the Organization for Economic Cooperation and Development (OECD) has been studying trade-environment issues for some time. A report by OECD's Environment Policy Committee (EPOC) highlighted the need to understand and take account of both the trade effects of environmental policies as well as the environmental effects of trade policies.¹⁰⁴ Moreover, the OECD recently completed a study on the environmental effects of international trade.¹⁰⁵ Similarly, the United Nations Environmental Programme is studying various aspects of the trade-environment matrix.¹⁰⁶ Studies like this are critical to setting the political stage for future action along the lines urged above.

Finally, the environmental community should use the upcoming fiftieth anniversary of the United Nations and the Bretton Woods Conference to focus public attention on the importance and the limitations of existing international institutions. The anniversary will provide the opportunity to highlight the fact that the existing international institutions were specifically designed to address the pressing issues of the post-war era. The environmental community already has plans to call for the adoption of an Earth Charter to coincide with this anniversary.¹⁰⁷ This is laudable, but environmentalists would be better served by using the occasion to highlight the absence of a forum with the expertise to handle trade-environment issues and to advocate for the formation of a body that has the institutional mission and competence to address them.

Conclusion

This Symposium offers an important opportunity to reflect upon a series of difficult issues that will confront the international community over the next decade. The challenge is to integrate the strategic principles that foster sustainable development with those that govern world trade. How-

102. *Legislators Seek Global Moratorium on Challenges to Environmental Laws*, Int'l Env't Daily, Feb. 15, 1994, available in LEXIS, News Library, BNAIED File; *Trade and the Environment: Hearings Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 51 (1994) (testimony of Robert F. Housman, Staff Attorney for the Center for International Environmental Law) [hereinafter Housman Testimony].

103. Housman Testimony, *supra* note 102.

104. *Members See Link of Trade, Environment as a Major Challenge Currently Facing Policy-Makers*, Int'l Env't Daily, Jan. 6, 1994, available in LEXIS, News Library, BNAIED File.

105. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *THE ENVIRONMENTAL EFFECTS OF TRADE* (1994).

106. *See, e.g., Industrialized World Must Conserve More, Use Less, Former Top UNCED Official Says*, Int'l Env't Daily, Apr. 13, 1994, available in LEXIS, News Library, BNAIED File.

107. *See Maurice-F. Strong, Statement to the Plenary, June 14, 1992, reprinted in 22 ENVTL. POL'Y & L. 242, 243 (1992) (urging adoption of "an 'Earth Charter' which could be approved on the occasion of the 50th anniversary of the United Nations.")*.

ever, this will not occur in an institutional setting designed to further only one of these interests. For this reason, it is necessary to move trade-environment conflicts to a forum sensitive to all the interests implicated by these issues.

