

Trade and the environment

The linkages and the politics

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(1) Introduction

The environment has entered the World Trade Organization against sustained resistance. The first beginning was inauspicious to say the least: In 1972 the General Agreement on Tariffs and Trade (GATT) decided to create a committee to address environmental issues in trade. This was presumably a defensive move in response to the United Nations Conference on the Human Environment, held in Stockholm that year. It was designed to ensure that any trade-related environmental matters would be decided within the purview of GATT rather than in the uncertain environment of a UN conference. This classic bureaucratic manoeuvre achieved its purpose. Discussion of the linkages between trade and environment ceased and the GATT committee was not convened for 20 years—until trade and the environment emerged again in the early 1990s, during the NAFTA negotiations and in the final phase of the Uruguay Round, which coincided with the UN Conference on Environment and Development.

The second phase of the environment and trade debate has proven much more enduring than the first, and has had a more profound impact on the GATT/WTO system. This phase was fuelled by several forces: the growing maturity of international environmental management; the move of the GATT/WTO into the uncharted waters of intellectual property rights, sanitary and phytosanitary standards; the modified regime on technical barriers to trade; and a number of high-profile trade disputes with environmental aspects. It has resulted in the steady penetration of environment and sustainable development into the WTO structure. Nevertheless, it would be decidedly premature to declare that the environment is now firmly established on the WTO agenda.

The initial response to the renewed interest in the environmental aspects of trade policy was the convening of the Committee XXX. This was followed by the working group on Environmental Measures in Trade (EMIT). In the waning moments of the Uruguay Round negotiations, a decision was taken to establish a Committee on Trade and Environment within the WTO. This Committee has worked steadily, and to not much avail, to make the somewhat inchoate trade and environment agenda more digestible in terms of traditional trade negotiations. The principal difficulty has been that the environmental agenda is essentially incomprehensible in these terms. Trade traditionally revolves around “demandeurs,” countries seeking certain changes in the trade regime and willing to make certain concessions to get them. The environment is a complex area of policy activity, but it is not the traditional economic interest seeking to improve market position, so no

country has been willing to take an active lead on the issue, particularly since the environmental agenda is like a many-headed hydra, cropping up in unpredictable places. In fact, adequate attention to environment and sustainable development would require accommodations in virtually every agreement and organ of the WTO.¹

As the Millennium Round approaches, it has become clear that the environmental aspects of trade policy must be attended to. On the one hand, there are substantive reasons that have made the environment an inescapable part of the trade regime. There can be no sustainable development from trade liberalization unless the necessary market disciplines are in place to ensure that economic growth does not harm the environment and that the economic gains are distributed equitably. Such market disciplines require the consent of all concerned if they are to be created and, more importantly, if they are to be implemented in an effective manner. On the other hand, there are powerful political reasons that leave OECD countries in particular with little choice but to grapple with the environmental challenge in trade policy.

(2) The politics of environment and trade

Over the past decade major trade policy decisions have hinged on the position taken by environmental interests. This unwelcome fact appears to be dawning on trade policy makers in many OECD countries as they consider an agenda for the proposed Millennium Round, which is to be launched in Seattle later this year. The evolving relationship between environment and trade can be described in relation to four major trade policy decisions of the '90s—arguably the four most important trade policy decisions of the decade: the North American Free Trade Agreement (NAFTA), the Uruguay Round, fast track authority for U.S. negotiators and the Multilateral Agreement on Investment (MAI).

NAFTA appears to be but one of many “regional” trade agreements. In reality it stands out among the regional agreements, because it—like the European Community and MERCOSUR—is in reality more than just another trade agreement. While the EU and MERCOSUR have an avowed agenda of political integration, NAFTA represents a unique attempt to develop a political solution to the extraordinarily difficult circumstance of the United States sharing a long border with a developing country, namely Mexico.

¹ See “The World Trade Organization and sustainability: An independent assessment” (Winnipeg: International Institute for Sustainable Development, 1996); also available on the Internet at <<http://iisd.ca/trade/wto/wtoreport.htm>>.

Moreover, NAFTA incorporates a number of innovations—notably with regard to investment and to the environment—that may prove to be benchmarks for further development of the GATT/WTO regime. NAFTA may also provide some lessons on what not to do, as in the case of investment.²

NAFTA preceded conclusion of the Uruguay Round. Failure to pass NAFTA in the U.S. Congress would have doomed the Uruguay Round. The debate in the United States was intense but ultimately NAFTA was passed with a slim majority. Six of the largest U.S. environmental organizations supported NAFTA whereas only one remained opposed. Vigorous opposition to NAFTA from all major environmental organizations may not have led to its defeat, but certainly would have made adoption much harder. In Canada, with a parliamentary system of government, it was possible to ratify NAFTA despite broad opposition from environmental organizations. NAFTA ratification was a foregone conclusion in Mexico, which has, however, not made a secret of its unhappiness at having to accept certain environmental safeguards as a condition for the agreement.³

The Uruguay Round represents an extraordinary feat of international negotiation, comparable in its dimensions only with the remarkable construction of international environmental regimes, which was occurring simultaneously.⁴ Creating the World Trade Organization, incorporating agriculture into the GATT regime, reforming dispute settlement, strengthening the agreements on sanitary and phytosanitary standards and on technical barriers to trade, holding the promise of eliminating the odious Multifibre Agreement, the Uruguay Round represents the single most important trade negotiation undertaken since the failed attempt to create an International Trade Organization (ITO), which led to the emergence of the GATT. As with the ITO, acceptance of the Uruguay Round Agreements by the U.S. Congress was the key to the entire ratification process, only that there was no “safety net” in place such as the Provisional Protocol of Application, which had transformed the ITO into GATT.

² See Howard Mann and Konrad von Moltke, “NAFTA's Chapter 11 and the environment: Addressing the impacts of the investor-state process on the environment,” working paper (Winnipeg: International Institute for Sustainable Development, 1999); also available on the Internet at <<http://iisd.ca/trade/chapter11.htm>>.

³ See Paul Marc Johnson and André Beaulieu, *The environment and NAFTA* (Washington: Island Press, 1996).

⁴ See Konrad von Moltke, *International environmental management, trade regimes and sustainability* (Winnipeg: International Institute for Sustainable Development, 1995); also available on the Internet at <<http://iisd.ca/pdf/envmanage.pdf>>.

In the United States environmental support was critical for adoption of the Uruguay Round in the Congress. Ultimately, the same coalition that had supported NAFTA also prevailed in the case of the Uruguay Round, only majorities were even slimmer and the environmental interests had not been taken into account nearly as extensively in the Uruguay Round as in NAFTA. Again, in essence, the six largest U.S. environmental organizations supported the Uruguay Round with the expectation that further environmental reforms would occur within the WTO. That promise needs to be fulfilled now, or the U.S. environmental community will oppose any agreement that emerges from the Millennium Round and does not meet some essential criteria of environmental responsiveness.

In 1997 the U.S. Administration requested “fast-track authority” from the U.S. Congress to pursue a number of minor trade negotiations within the WTO, in the Western Hemisphere, and in relation to the Asia Pacific Economic Cooperation (APEC) Forum. Fast-track authority is a parliamentary device to turn the process of ratifying a trade agreement, which is technically an international treaty, from a vote requiring two-thirds majority in the U.S. Senate into a vote requiring a simple majority in both Houses of Congress. At the same time, the U.S. Congress promises to decide on adopting a trade agreement and to pass all the necessary implementing legislation within a specified period and without possibility of amendment, provided certain conditions incorporated into the fast-track authority are met. No global trade negotiation can proceed without the United States. Indeed, every GATT round has thus far required the determined support from the United States to succeed—and no other country has comparable weight in the process, not even the European Union. At the same time, absent fast-track authority, no country can negotiate a complex trade agreement with the United States. Two-thirds of the U.S. Senate is a formidable hurdle—the ITO failed because of it. Moreover, the Senate is an independent branch of the U.S. government and does not necessarily consider itself bound by negotiations conducted by the Administration. In the process of ratifying international treaties, the Senate can, and does, impose new conditions on the parties. While this may prove a manageable problem in some cases, when it comes to trade agreements, with their characteristic give and take of concessions, attempts by the U.S. Senate to change details of the agreement would presumably make the entire deal unravel. No country can negotiate with the United States under threat of non-ratification unless revisions are undertaken after the negotiations have concluded. For this reason, the grant of fast-track authority by the U.S. Congress remains a precondition for broadly based

trade negotiations—and represents one of the abiding uncertainties as the WTO heads towards the Millennium Round.

It was arguably a mistake to seek fast-track authority without laying out an agenda that could attract the active support of major interest groups, including the environmental organizations that had played an important role in adoption of NAFTA and the Uruguay Round. Few economic interests were committed to the agenda the Administration laid out. The request hedged on environmental issues, and all U.S. environmental organizations either actively opposed or failed to support granting fast-track authority. Ultimately the Administration had to withdraw its request, fearing a defeat if the measure ever came to a vote. It appears extremely unlikely that the current Congress will vote for fast-track authority for a lame-duck president. A new Administration will be faced with a new Congress, which could have a Democratic majority in the House of Representatives and a Speaker with a long history of opposing any trade negotiations that do not take into account environment and labour concerns as a central element.

Up to this point, the politics of trade and environment were played out largely in North America. In Europe, the difficulties encountered with ratification of the Maastricht Treaty, in Denmark in particular, and the complex process leading to adoption of the Euro as a common currency for most EU member states provided some hint that there was growing public opposition to economic integration without attendant environmental safeguards. This opposition blossomed, and became politically effective, with the attempt to negotiate a Multilateral Agreement on Investment in the OECD.

With hindsight, it is clear that the implications of an MAI were not fully thought out, and certainly were never appropriately articulated in a public forum. It seems that the negotiators viewed the MAI as a technical agreement to multilateralize the large number of bilateral investment agreements. They failed to recognize that this would transpose the entire process from the domain of domestic law of two contracting parties into international law. They also failed to recognize that they were drawing on a record of research and negotiation that had been dangerously polarized—and consequently distorted—in the 1970s.⁵ At any rate, the MAI attracted vigorous opposition from environmental organizations throughout the OECD. This opposition originated in Canada and was taken up in the United States, where environmental organizations had sufficient

⁵ See Konrad von Moltke, *An international investment agreement: Issues of sustainability* (Winnipeg: International Institute for Sustainable Development), forthcoming.

clout to delay the negotiation process while the environmental implications were considered and ultimately spread throughout Europe. Environmental opposition alone would probably not have stymied the WTO, but it was environmental opposition, which launched public discussion of the MAI and attracted the coalition of interests, primarily in France and Germany, which caused the MAI negotiations to be abandoned.

The politics of trade and further development of international economic regimes have become quite straightforward: Negotiators must fashion agreements, which include sufficient environmental provisions to satisfy a significant segment of environmental opinion. The result would be to split the environmental community and render ineffective the opposition of those segments, which are unalterably opposed to any further economic liberalization. This is the strategy that succeeded in the NAFTA and Uruguay Round cases, and the strategy that was not followed in the case of fast-track authority and the MAI. It is necessary to emphasize that this is not a simple strategy. The experience of fast track and the MAI—where attempts to influence the negotiations through conventional means were blocked—has rendered the environmental community skeptical. Moreover, environmental organizations are acutely aware of the importance of maintaining solidarity. It is a strategy that can succeed because to most environmental organizations trade policy is a matter of means rather than of ends. If it can be demonstrated that trade liberalization will not contribute to greater environmental degradation, will contribute to more effective environmental management, and will contribute to sustainable development, most environmental organizations are likely to support it wholeheartedly—as they have before.

Given this history, it is hard to imagine any further trade agreement attracting the universal support that would be required for ratification, which does not seriously address environmental concerns. There are signs that this realization is dawning on political leaders in Europe and the United States. The G-8 Summit of the largest industrial countries plus Russia, held in Cologne last June, called for the full integration of environmental concerns into the coming Millennium Round. This decision, reached after acrimonious debate, will have come as something of a surprise to many trade negotiators. Nevertheless, it reflects the political realities of these countries. Sir Leon Brittan, responsible for trade in the European Commission, has set out a substantial environmental agenda for consideration during the coming Round, emphasizing in particular the need to address the precautionary principle and its application.

Countries, which have not experienced the kind of environmental opposition to further economic liberalization that has manifested itself in North America and Europe, may reasonably ask why they should be forced to deal with environmental matters in the trade regime. There are two reasons why they need to confront these issues:

- It is a waste of time to negotiate agreements that cannot be ratified. It is in the nature of international negotiations that countries must take into consideration the ability or inability of their partners to follow through on their commitments. Fast-track authority for the Administration, which is after all no more than a procedural device in domestic U.S. politics, is a matter of intense concern for the negotiating partners of the United States. Similarly, the inability of governments in Europe and North America to deliver on agreements reached in a negotiation becomes a matter of concern.
- More important, there are overwhelming substantive reasons why the environment needs to be taken into consideration in any future trade agreement. In other words, the current political situation in Europe and North America reflects a reality that will prove inescapable for all governments that take their responsibilities towards the environment seriously.

3. Why the trade regime must consider environmental issues

The trade regime is effective because of its single-minded focus on promoting liberalization and repressing discrimination. Inclusion of environmental matters risks undermining the essential source of its effectiveness; failure to include environmental matters risks its acceptance and credibility.

The first reason why the trade regime and the international environmental regimes interact is the simple fact that both require international cooperation to achieve their goals. Governments pursue many, often conflicting goals at the same time, but only very few require international cooperation as a condition of success. Unilateral liberalization, while theoretically an optimal economic strategy in practice is not an option. Similarly, environmental protection is not something states can pursue by themselves: too many factors which influence the outcomes are beyond their borders and beyond their control. The essentially international character of these two policy areas implies that overlap and conflicts must be addressed at the international level as well. It is not sufficient to point

out that states are free to adopt the environmental standards that meet their own demand for environmental quality.

That there is overlap and conflict between environment and trade can no longer be in doubt. Environmental measures have economic consequences, including consequences for trade; trade measures lead to economic change, which will in turn have environmental consequences. Unless this relationship is properly managed there will always be risk that trade contributes to environmental degradation, and that environmental protection measures have protectionist effects—whether intended or not. It is worth pointing out that in this regard the environment is dramatically different from labour standards, even though both are frequently mentioned in one breath in relation to trade policy. Labour standards can be addressed entirely by individual states; international cooperation can be a significant factor but ultimately is ancillary to national action.

It is one of the paradoxes of the trade and environment nexus—and a powerful reason for addressing it—that there are striking similarities between both areas of policy. Both trade liberalization and environmental protection measures induce structural economic change. In one instance, economically more efficient producers are advantaged; in the other producers who are more efficient in their use of natural resources will benefit. Where the two are congruent, there will be no conflict, but where they are not, conflicts will prove particularly hard to manage.

These general reasons for addressing the trade and environment linkages lead to a large number of specific issues requiring attention, ranging from the processes of standard-setting to the relationship between the WTO and the major international environmental agreements, commonly known as “multilateral environmental agreements,” or MEAs. The most intractable issue remains the need to adopt international standards governing the processes and methods of production (PPMs) and not only the characteristics of products in trade. Strongly resisted by trade policy makers, the need for PPMs remains the core conflict between trade and environment since it is manifest that trade can contribute to sustainability only if it is possible to distinguish between products produced sustainably and unsustainable products in international trade.

4. The WTO agenda on trade and environment

Some observers may be tempted to assume that the existence of a Committee on Trade and Environment (CTE) in the WTO has allowed member countries to develop a negotiating agenda, or at least to identify and structure the issues so that its work should form the starting point for any consideration of environmental matters in the WTO. Unfortunately, the CTE has done nothing of the sort. It has pursued an agenda that was both too large and too unfocused to permit useful conclusions to be drawn. This is not the occasion to critique the CTE, nor the handling of environmental issues within the WTO.⁶ Suffice it to say that the current situation calls for a political determination on the agenda to be pursued, rather than a technical analysis. That is a task for ministers rather than for the diplomatic staff and other officials who represent their countries in the CTE.

The central difficulty is that the environmental agenda does not lend itself to the process that is generally used to develop a trade-negotiating agenda. Trade negotiations are launched with “bids” from countries, indicating concessions they would like to make or receive. Environmental issues have to do primarily with the good functioning of the trade regime, with keeping it away from unnecessary conflicts and not with the economic interests that characterize most trade negotiations. That is one of the reasons why the WTO has found it so difficult to focus on the environmental agenda.

Recognizing that the environmental agenda in the next round of trade negotiations will need to be supported from the outset by a substantial consensus among member states, a number of items should be considered by the ministers as the Millennium Round approaches.⁷

4.1. *Focus on sustainable development*

The WTO Agreement opens with a ringing statement:

“Recognizing that [the member states’] relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing

⁶ See International Institute for Sustainable Development, “The WTO and sustainable development: An independent assessment” (Winnipeg: IISD, 1995); also available on the Internet at <<http://iisd.ca/trade/wto/wtoreport.htm>>.

⁷ The following is based largely on “Six easy pieces: Five things the WTO should do—and one it should not,” working paper (Winnipeg: IISD, 1999).

for the optimal use of the world's resources *in accordance with the objective of sustainable development*,* seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development..."

While preambular language cannot be compared with the legally binding text that follows it in the body of the agreements establishing the WTO, it nevertheless sets forth the vision and aspirations of the founders in establishing the "new and improved" successor to GATT in the wake of the Earth Summit in Rio. Unfortunately, the WTO has done little in its first four years to ensure that its actions match these aspirations, to ensure that trade liberalization leads not just to enrichment for some but to sustainable development for all.

The CTE agenda was developed in several stages. The Trade Negotiating Committee (the body responsible for negotiating the Uruguay Round) decided on 15 December 1993:

"to draw up a programme of work

- 1 to identify the relationship between trade measures and environmental measures, in order to promote sustainable development
- 2 to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:
 - the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; and
 - the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives, in particular Principle 12 of the Rio Declaration; and
 - surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade effects, and of effective implementation of the multilateral disciplines governing those measures"

This political declaration was transformed into a Ministerial Decision on the occasion of signing the Uruguay Round agreements in Marrakesh on 14 April 1994:

"Ministers...decide... That, within these terms of reference, and with the aim of making international trade and environmental policies mutually supportive, the Committee [on

Trade and Environment] will initially address the following matters, in relation to which any relevant issue may be raised:

- the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;
- the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
- the relationship between the provisions of the multilateral trading system and
 - charges and taxes for environmental purposes;
 - requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling;
- the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects;
- the relationship between dispute-settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements;
- the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions;
- the issue of domestically prohibited goods...

That the Committee on Trade and Environment will consider the work programme envisaged in the Decision on Trade in Services and the Environment and the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights as an integral part of its work, within the above terms of reference..."

While establishing a Committee to debate the relationship between trade and environment—effectively making it a permanent body at the Singapore Ministerial Conference in late 1996—suggests that environmental concern has been accepted as a legitimate facet of the trade debate, the limited technical nature of the Committee's mandate (confined to examining the impact of environmental regulation on trade, and not the reverse), and the near-total lack of progress in its four years of existence, suggest that environment remains part of the window-dressing rather than a significant concern within the trading system.

To make matters worse, the limited and inconclusive debate in the CTE is the only formal examination of any aspect of sustainability that has so far taken place within the regular work program of the WTO, and this has been confined to addressing environment rather than sustainable development. Sustainable development, however, remains a goal of the WTO, and trade should represent an essential component of any move toward greater sustainability—to promote the rapid diffusion of more sustainable innovations, to avoid the support of unsustainable practices through trade, and to generate the resources needed to finance the transition to greater sustainability.

The CTE was never asked to address the more difficult aspects of sustainable development, essentially the Rio Bargain: support from the developed countries for the needs of the poor, who are predominantly to be found in developing countries, and support from the South for management of environmental problems created by the unsustainable development process of the North, even though this requires apparent trade-offs with poverty alleviation.⁸ In the years since Rio, the role of public and private finance in the development process of the South has shifted dramatically. Foreign direct investment now dwarfs flows of public development assistance, albeit in a highly selective manner to the countries and projects perceived to be less risky. By definition, this leaves bilateral and multilateral development assistance with the more risky projects, and renders the political task of defending it in wealthy countries proportionately more difficult. The WTO needs to participate actively and constructively in the continuing debate on how to achieve greater sustainability—that is, greater equity and protection of environmental integrity—in a globalizing economy.

The issue of sustainability touches upon most organs of the WTO. Its work will, however, only promote sustainability when the General Council regularly addresses the issue of sustainability, requiring all subsidiary organs to submit reports on steps taken to advance sustainability.

To this end, the General Council of the WTO should commission the preparation of a “Sustainable Development Agenda” for the WTO. As a first step, the Council should establish a special Commission of independent experts—modelled on the commission

⁸ See David Runnalls, “Shall we dance? What the North needs to do to fully engage the South in the trade and sustainable development debate,” working paper (Winnipeg: International Institute for Sustainable Development, 1995); also available on the Internet at <<http://iisd.ca/trade/dance.htm>>.

which produced the sustainable development report for OECD—to prepare a report on achieving sustainable development in the multilateral trading system.

4.2 Focus on sustainable development in the South

The WTO's most important contribution to sustainable development must come on the side of development and poverty alleviation. It must go well beyond declarations that trade liberalization induces growth, which is essential for a move toward sustainability. That is almost a tautology: The challenge is, however, to ensure that growth is appropriately distributed, and “sustainable development” comes closest to defining that goal at the end of the 20 century. The WTO has thus far largely avoided the agenda of equity, instead apparently embracing the view that all economic growth is good.

For the least developed countries, the century-long decline of commodity prices represents a major challenge to their development and to prospects for confronting environmental issues. As commodity prices decline, so do the terms of trade—a process that is now well documented. The price of commodities taken from the natural environment represents an implicit pricing of the environment itself. At a time when the non-market values of natural resources are increasingly being recognized, and when efforts are underway more adequately to reflect quantifiable environmental values in market prices, the decline in commodity prices is hard to understand from the perspective of sustainable development. The imbalance between those who benefit from a special status in the trade regime, in particular through the TRIPs agreement, and those exposed to unremitting market pressures has become even more pronounced over the past decade. Ultimately this threatens the viability of the trade regime.

Despite their importance for the developing countries, over the past decade trade policy makers have given little attention to commodity prices. To make matters worse, UNCTAD has also withdrawn from the commodities issue to a considerable extent. Yet it remains a matter of overwhelming concern for the poorest countries and for those responsible for protecting valuable environmental resources, which are threatened by the processes of commodity production.

It will be necessary to explicitly recognize the link between commodity prices, terms of trade, and prospects for sustainable management of the environment.

4.3. *A Standing Conference on Trade and Environment*

The WTO—and indeed the other relevant intergovernmental organizations such as UNCTAD and UNEP—has been hindered by an insufficiently clear and forceful articulation of the environmental agenda in trade. This is attributable at least in part to the confused structure of international environmental management, involving a large number of regimes at many different levels of governance.

It is important to recognize that the structure of international environmental governance is not fortuitous. It reflects the problem structure of the material it addresses at least as accurately as the GATT/WTO in its area. “The environment” is in fact many areas of policy, reflecting the extreme difficulty in replicating natural systems in political, social and economic systems. International environmental governance addresses issues as diverse as biodiversity and hazardous substances, or as climate change and watershed management, or as long-range air pollution and migratory species. It is conceptually and practically impossible to address these issues in a unitary structure, as has sometimes been proposed. Although the mandate for the United Nations Environment Programme—to facilitate action by others in a UN system, which defies cooperation—and although UNEP is deficient in many respects and has been sorely neglected by its member states, it yet reflects a reality of environmental management.⁹ A new organization, as has sometimes been proposed, would need to look much more like UNEP than its proponents are willing to acknowledge—and would still not resemble the WTO in any material respects.

The creation of a **Standing Conference on Trade and Environment** (SCTE), proposed by IUCN and IISD, would establish a forum in which the environmental interest in international trade can be articulated clearly and some initial priorities for action set.¹⁰ The SCTE is conceived as a light institutional structure—perhaps on the model of the Antarctic Treaty or the G7—and not as a new international organization. It would gather the key environmental actors from government, convention secretariats, civil society and the private sector with an interest in trade policy, review policy objectives and proposals, and seek to formulate practical recommendations to be introduced to the WTO and other policy forums.

⁹ See Konrad von Moltke, “Why UNEP matters,” in *Green Globe Yearbook* (Oxford: Oxford University Press, 1995).

¹⁰ See International Institute for Sustainable Development and IUCN, “A standing conference on trade and environment,” working paper (Winnipeg: IISD, 1997); also available on the Internet at <<http://iisd.ca/trade/scte.htm>>.

There is no appetite at the international level for new bureaucracies, and even proposals for new forums for discussion are resisted. At the same time, it is difficult to imagine how environmental policy in respect of trade—currently dispersed among tens if not hundreds of organizations and processes—can gain the coherence necessary to influence trade policy in a positive manner, and to take on fully the environmental concerns of the developing countries, without such an initiative.

4.4 An agreement on environment in trade

Many of the conflicts that have emerged in the trade and environment debate revolve around the introduction of environmental distinctions between otherwise “like” products in trade. Almost inevitably, these products have often been natural resource-based commodities.

Despite the unpopularity of the notion in trade-policy circles, achieving sustainable development may nevertheless require a fair means of distinguishing between environmentally sound and environmentally destructive products in the marketplace. The ability to do so within the trading system remains essential, even though it would appear to go against one of the latter’s most fundamental principles (non-discrimination) and even though, from the perspective of trade policy, such distinctions always involve the risk of discrimination or of a reduction in the economic efficiency of trade.

At the same time, experience with the WTO during its initial years, and more particularly in the dispute-settlement bodies, suggests that determining the acceptability of such distinctions case by case entails several significant risks. The WTO dispute settlement process is burdened by decisions that require significant levels of environmental expertise. Decisions taken case by case will tend to attract repeated attention and conflict to the dispute-settlement process, even when they are correct; ultimately, they may contribute to a significantly weakening of the dispute-settlement process and the trade regime itself, for example, by contributing to the lack of certainty in the market.

Paradoxically, a case-by-case approach creates incentives to develop discriminatory distinctions because they may escape scrutiny and because the dispute-settlement process itself is time consuming and the measures can stay in place while it is proceeding. Ultimately the difficulty of an agreed structure of rules governing the use of environmental distinctions in trade may be outweighed by the risks of doing nothing.

Surprisingly, there has been little discussion about an aspect of the environment and trade issues, which may appear almost self-evident from the perspective of trade negotiators: that environmental measures with trade impacts should be adopted in a rules-based international system. Possibly, negotiators have been reluctant to articulate this aspect of the issue for fear of finding themselves in a *de facto* negotiation before they were ready. It is the content of these rules, which must be the essential concern of negotiations about trade-related environmental measures. Past experience suggests that the definition of these rules requires the negotiation of an Agreement on Environment and Trade-Related Environmental Measures (TREMs).

There are several precedents for this approach. To the extent that a TREMS Agreement concerns product-related standards, it needs to be modelled on, and supplement, the SPS and TBT Agreements. To the extent that a TREMs agreement concerns process and production methods (PPMs), it needs to reflect the experience gained in negotiating a prior PPMs Agreement in the WTO, namely the Agreement on Trade-Related Intellectual Property Rights (TRIPs). As the TRIPs agreement demonstrates, there is no argument that can be made based on the text of the GATT/WTO, nor of the underlying principles, against negotiating an agreement on PPMs. Such arguments are typically based on dispute-panel reports, which were flawed in their argument on PPMs, and some of which were never adopted. There is no practical reason why a WTO agreement should not encompass both product-related and PPM standards, even though the regime required to ensure that both are rule-based may have significantly different institutional requirements.

The need for such an encompassing TREMs agreement reflects the fact that “the environment” is in fact a packet of policies addressing a range of sometimes quite distinct issues. Moreover, protecting the natural environment through rules affecting only social and economic behaviour is a complex task, which needs to use all available tools to have any chance of succeeding.

One of the characteristics of the trade regime is its focus on a limited number of principles that articulate the concept of non-discrimination. This is one of the central sources of effectiveness in the trade regime. Any TREMS agreement must respect the principles of non-discrimination if it is to fit into the institutional and organizational structure of the GATT/WTO system. Environmental management, however, is based on different principles, which are less focused and always require balancing between

conflicting priorities. Moreover, the underlying rationale of environmental policy is that different environmental conditions require different responses to achieve the environmental imperative: that ecosystems must not be altered unacceptably and that the rights of future generations to the enjoyment of natural resources must be respected. In a sense, discrimination between environmental conditions is the very essence of environmental management: an arid environment requires different measures than a temperate one; a tropical rainforest is unlike a temperate or a boreal forest ecosystem. In terms of the trade regime lobsters in the (warm) waters of Nova Scotia mature faster than lobsters in the (cold) waters of Maine. Since lobster populations are typically stabilized through size limitations on the catch, a 10-inch lobster is mature in Nova Scotia waters and therefore equivalent to a 10-½ inch lobster in Maine waters. Determining the appropriate size limitation for lobsters traded between Nova Scotia and Maine requires compromise and a balancing of conflicting goals (conservation versus administrative convenience and the effectiveness of the regime).

In 1993 the International Institute for Sustainable Development convened a working group composed of representatives from trade, environment and development with the task of drafting principles for trade and sustainable development. The result was a structure of seven principles, which reflect the need for balancing conflicting priorities (see box on the Winnipeg Principles for trade and sustainable development). Clearly the regime that is implied by these seven principles is very different from the GATT/WTO regime. Rather than seeking rigid adherence to the principles of non-discrimination, together with a dispute-settlement procedure to promote enforcement, such a regime requires a continuous weighing of changing evidence concerning our knowledge of the natural environment and of human impacts on it, of shifting social and economic priorities. It also requires a degree of cooperation between all levels of governance quite unlike the hierarchical institutions and organizational structures of the trade regime.

The Winnipeg Principles for Trade and Sustainable Development

Efficiency and cost internalization

Environmentalists, development specialists and trade economists share a common interest in promoting efficiency. More efficient production reduces the drain on scarce resources such as raw materials and energy, and limits the demands placed on the regenerative capacity of the environment. Efficient use of land, labour and capital is also the heart of development efforts to combat poverty and satisfy human needs. Allowing the most efficient producers to provide the world's goods and services is the main rationale for an open trading system. Efficient resource use requires that the prices paid by producers for inputs, and by consumers for final goods and services, accurately reflect their full costs. In fact, most goods are not priced to reflect full costs (the magnitude of the distortion will vary from case to case), due to such factors as unpaid environmental costs and price-distorting trade barriers. Rectifying these problems is not easy; there are technical difficulties in evaluating unpaid environmental costs and designing instruments to deal with them. As well, some groups resist change because they benefit from these distortions, even though their net effect on the community at large may be seriously damaging, both economically and environmentally. Despite the substantial practical difficulties, high priority should be attached to accurate pricing through cost internalization, in accordance with the "polluter pays principle," and through reduction of price-distorting trade barriers.

Equity

Equity relates to the distribution both within and between generations of physical and natural capital, as well as knowledge and technology. Inequity and poverty contribute significantly to environmental degradation and political instability, particularly in developing countries. When basic needs are not met, the poor have no choice but to live off whatever environmental resources are available. At the same time, past use of natural resources already limits the choices available to present generations, particularly in developing countries. Faced with these limitations, and having limited financial, administrative and technical capacity to deal with problems of environment and development, many developing countries will require additional resources and strengthened capacities if they are to adequately protect their environmental resources, including many which are of global significance.

Trade liberalization can contribute to greater equity through the dismantling of trade barriers that harm developing countries and ultimately their environments. In particular, reduced tariff escalations for processed goods and improving trading opportunities for a wider array of industrial foods could help these countries that seek to diversify their economies and reduce their reliance on environmentally sensitive commodity production. In the context of decreasing levels of traditional foreign aid, the best alternative for increasing incomes in poorer countries by the necessary magnitudes is increased trade and investment flows, the result of more open borders in both developed and developing countries, together with appropriate domestic policies in developing countries. Other measures to achieve equity and poverty alleviation include strengthening developing country capacity to develop indigenous technologies and to manage environmental resources, and creating mechanisms for the accelerated transfer of existing clean technologies. Continued progress in resolving the debt crisis is also important, as is an increase in transfers of financial resources.

Environmental integrity

Trade and development should respect and help maintain environmental integrity. This involves recognition of the impact of human activities on ecological systems. It requires respect for limits to the regenerative capacity of ecosystems such as fisheries and forests that are vulnerable to irreversible depletion; actions to avoid irreversible harm to plant and animal populations and species; and protection for valued areas such as designated parklands or sites of internationally recognized ecological, cultural or historical significance.

Many of these aspects of the environment have values that cannot be adequately captured by methods of cost internalization, highlighting the need for other policy instruments. Such special conservation measures may represent an important exception to normal trade rules, whether in the context of trade agreements or

environmental agreements. They may take the form of trade bans or quantitative restrictions. While such measures could include unilateral trade restrictions, they should nonetheless be enacted within the context of internationally agreed criteria.

Subsidiarity

Subsidiarity recognizes that action will occur at different levels of jurisdiction, depending on the nature of the issues. It assigns priority to the lowest jurisdictional level of action consistent with effectiveness. International policies should be adopted only when this is more effective than policy action by individual countries or jurisdictions within countries.

Environmental policies in different jurisdictions can reflect differences in environmental conditions or development priorities, leading to variations in environmental standards within countries or among groups of countries. Harmonization of emission standards, ambient environmental quality standards, procedural requirements or laws, supplemented where feasible by negotiated minimum process standards, can play an important role by ensuring that these essential differences respect a common framework. But this approach will not always be possible or appropriate. In the absence of such agreements voluntarily accepted by all affected countries, and where the environmental consequences remain within domestic jurisdictions, other countries should not use economic sanctions or other coercive measures to try to eliminate differences in standards. Where there are significant transborder environmental impacts, solutions should be sought multilaterally. These might include international environmental agreements, the formulation of international standards, capacity-building, incentives for voluntary upgrading of standards and the possible use of trade measures.

Subsidiarity requires an important element of cooperation in international affairs. The responsibility of countries seeking higher environmental standards abroad to seek them multilaterally, shunning coercive measures, is matched by an obligation on the part of other countries to cooperate in such efforts.

International cooperation

Sustainable development requires strengthening international systems of cooperation at all levels, encompassing environment, development and trade policies. The most desirable forms of international cooperation will avoid conflicts through international efforts at development and environmental protection, and by improving the functioning of the global trading exchange rate and financial system. These efforts might include more initiatives aimed at technology sharing, capacity build, transfers of resources and debt relief, and an opening of protected markets. Progress in these areas of cooperation will address the root causes of many apparent trade-environment conflicts, in particular large disparities in technical capacity for environmental management and a lack of resources to invest in environmental protection. Cooperation may also take the form of multilateral agreements on the environment and new forms of cooperative cost internalization.

When international disputes arise, the procedures for handling them must be capable of addressing the interests of the environment, development and the economy together. This may involve changes to existing rules, changes to existing dispute-settlement mechanisms, or the creation of new mechanisms. Dispute-settlement procedures need to be open, effective and impartial, protecting the interests of weaker countries against the use of coercive political and economic power by more powerful countries. Unilateral action on transboundary environmental issues—an option generally available only to a few large countries—should be considered only when all possible avenues of cooperative action have been pursued.

Science and precaution

In the development of policies intended to reconcile trade, environment and development interests, science, in particular ecological science and the science of complex systems, can provide the basis for many necessary decisions, including the suitability of health, safety and environmental standards.

Action to address certain problems, however, will still have to be taken in the face of uncertainty and scientific disagreement, particularly where mistakes may have very serious consequences. It is therefore also essential in certain instances to adopt a precautionary and adaptive approach that seeks the prevention and easing of environmental stress well before conclusive evidence concerning damage exists, and which

adapts policy as new scientific information becomes available. Such an approach should include transparent efforts to identify and clarify the changing risks and to relate the risks to benefits and costs of corrective measures.

Openness

Openness comprises two basic elements: first, timely, easy and full access to information for all those affected; and second, public participation in the decision-making process. It is essential for the formulation and practical implementation of environmental and development policies, and is also important in minimizing the risk that trade policies will be manipulated to favour inefficient producers. While structures for openness are increasingly evident in dealing with problems at the national level, there has not been a comparable development for issues of an international nature. As people worldwide devote increasing attention to such issues, there is a need to find forms of participation appropriate to the different international organizations and negotiations.

National and international rule-making and dispute settlement should be transparent, seeking, when appropriate, scientific and technical advice on environmental and developmental impacts and soliciting the views of the public, including specialists in relevant areas to the dispute-settlement process. Transparency and the opportunity for interested members of the public to make submissions are also important when trade issues are involved. At a minimum, adjudicating panels should entertain written submissions from non-governmental organizations, and panel decisions should be published with a minimum of delay.

Source: International Institute for Sustainable Development, *Principles for trade and sustainable development* (Winnipeg: IISD, 1995); also available on the Internet at <<http://iisd.ca/trade/princip2.htm>>.

It is critical to recognize that the principles and structures of the trade regime, while certainly capable of improvement, reflect some essential characteristics of the activities they are designed to govern. In other words, they are essential to ensuring the effectiveness of the trade regime. A TREMS agreement needs to set the rules, which are to govern the interaction between the institutions and organizational structures of the trade regime and the actions designed to ensure environmental integrity. All the actual environmental protection activities will occur outside the trade regime, but they need to respect certain rules to limit conflicts with trade rules; in return the trade regime needs to recognize the essential degree of “discrimination” implied in effective environmental management and permit it to proceed, provided it occurs in a rule-based structure. That is the core of a TREMS agreement.

4.6. Continue promoting transparency and participation

Since its establishment, and particularly in the last year or two, the WTO has taken significant and welcome steps to promote transparency and participation in its work, especially when compared to its predecessor—GATT. This process must continue. There is still a long way to go before trade policy can be said to reflect a balanced compromise between the views of key stakeholders.

The WTO should look for appropriate ways to open its proceedings further. There is scope for creative professional input from civil society and other stakeholders, especially to the dispute-settlement process. And issues such as the 1999 review of Article 27.3 (b) of the TRIPs agreement would benefit from input from organizations working on biodiversity, community knowledge and indigenous peoples' priorities. Establishing better access to WTO documents, making the Committee on Trade and Environment somewhat more accessible, and creating events and forums where civil society and trade policy may interact are all welcome but insufficient steps.

That said, the principal problem lies at the national level, in the opaque processes that tend to lie behind trade-policy development. Indeed, the magnitude of the problem is such that the legitimacy—in democratic terms—of much of the trade policy represented at the WTO must be called into question. National trade policy—and national positions taken at the WTO—should represent a careful balance between the legitimate interests of stakeholders in society. This is rarely the case.

4.7. *Do NOT include investment in the WTO*

There is a need for a multilateral international agreement on investment, the failure of the MAI negotiations notwithstanding.¹¹ The current patterns of private investment represent a serious failure of international markets. The risks associated with investment in many developing countries seriously affect rates of return and measures are needed to ensure that these risks become more calculable and more clearly market-based. At the same time there is an overwhelming need for investment in more sustainable technologies, in the developed countries as much as in developing ones. Without an international regime, which makes risks more calculable and promotes investment in more sustainable technologies, there is little prospect for a move to a more sustainable global economy.

Nevertheless, it would be a mistake to incorporate investment disciplines in the WTO. The commercial and legal relationships between a “host country” and investors are different from those between an importing country and exporters of goods or services. Investors become economic citizens of the host country, with the corresponding rights and obligations. The GATT/WTO structure is unsuitable for the development of the needed international investment regime, and its current strengths would be put at risk by attempts to extend it into a dynamic and conflictual area such as investment.

¹¹ See Konrad von Moltke, *An international investment agreement Issues of sustainability* (Winnipeg: IISD), forthcoming.

The risks of constructing an investment regime along the lines of the trade regime—and with its institutions—has become particularly evident within the North American context. NAFTA Chapter 11 addresses investment. It provides for an investor-state dispute process, as indeed any investment regime will need to, but it uses arbitration procedures designed to handle commercial disputes about payments and delivery schedules. Evidence from recent experience with such disputes indicates that virtually every environmental measure adopted by a government becomes prone to an investor dispute under NAFTA—under procedures which make the WTO dispute settlement process appear a model of openness and accountability.¹²

5 Conclusions

Apart from the specific recommendations outlined in the previous section, a number of conclusions emerge from this brief overview of the trade and environment nexus in the lead-up to the Millennium Round.

5.1 No Millennium Round without the environment

It is clear that the Millennium Round will need to address environmental issues seriously. On the one hand, the political situation in several key countries is such that it would be imprudent at the very least to attempt to launch the new Round without adequate attention to environmental concerns. Of course it could be tried, but the opposition of a broad spectrum of environmental opinion in North America and Europe is almost certain. The stakes are very high: A failure of the Round threatens the very existence of the trade regime. Such a high-stakes gamble seems irresponsible in light of the strong substantive reasons for dealing with the environmental dimension of trade, and vice versa.

The substantive case for addressing the environment in the next Round has become very strong. When environmental issues themselves have not caused conflicts within the regime, the issues—such as beef hormones and genetically modified organisms—are structurally indistinguishable from the ones on the environmental agenda. Dealing with environmental matters is the best route toward dealing with a range of other issues while

¹² See Howard Mann and Konrad von Moltke, “NAFTA’s Chapter 11 and the environment: Addressing the impacts of the investor-state process on the environment,” (Winnipeg: IISD, 1999); also available on the Internet at <<http://iisd.ca/trade/chapter11.htm>>.

building broader support for the trade regime. Such a combination should be irresistible, if governments can muster the political will to grasp the opportunity.

5.2 The precautionary principle

The precautionary principle entered the international debate via the environment.¹³ It has now taken on a life of its own and represents a serious issue that must be confronted. It is emblematic of the kind of linkage that exists between environmental and other issues currently troubling the WTO. What emerges above all is the dependence of the trade regime on the existence of strong and effective organizations to address issues such as science assessment and the development of differentiated environmental standards, including PPM standards.

It is not sufficient to exhort others to act in a manner that conforms to the needs of the trade regime. The WTO—and with it the wider trade community it represents—will need to engage in a meaningful, supportive and continuous manner with these organizations. Its relations with the World Intellectual Property Rights Organization (WIPO) are in many respects a better example for the kind of structures that will be needed than the rather esoteric relationship with the International Monetary Fund and the World Bank. The truth is that without strong international environmental organizations the trade regime cannot function.

5.3 The role of developing countries

Arguably the greatest impediment to dealing with the environment is the deeply engrained perception of developing countries that this is a Northern issue, and their fear that it will—once again—only result in new barriers to their exports toward developed countries. This defensive attitude is justified to some extent by historical experience: Despite the efforts of the GATT/WTO, significant barriers to trade remain in the markets most important to developing countries. At the same time the deterioration of the terms of trade between commodity producers and the manufactures of the developed world appear to worsen inexorably.

It is this latter phenomenon that offers the best opportunity to fashion a viable understanding around environment and development—in a word sustainable

¹³ See Konrad von Moltke, “The *Vorsorgeprinzip* in West German environmental policy,” in Royal Commission on Environmental Pollution, *Twelfth report: Best practicable environmental option* (London: HMSO, 1988), pp. 57-70; also see London: Institute for European Environmental Policy, 1987.

development. The political constellation outlined in this paper represents a significant opportunity for developing countries. It must, however, be grasped by these countries.

5.4 Changing the analytical framework

The processes of globalization—more correctly “internationalization,” since few markets are truly global in nature—have caused dramatic changes in international society. The significance of these changes has yet to be grasped fully. In relation to trade and sustainable development, it is increasingly clear that individual governments, even of the most powerful countries, have become impotent—except perhaps the United States. Action requires the cooperation of governments, and not only of like-minded ones, such as those in the OECD. As a result, the process of policy debate in key developing countries has taken on a new importance. It is vital to ensure that this debate draws on a coherent analytical base, which embraces a range of countries. The era of attempting to transfer Northern patterns to Southern countries appears to be over—and the debate about sustainable development in the trade regime is one of the keys in which new forms of international cooperation need to be found.