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The Environment and Trade Agreements: Should the WTO Become More Actively Involved?

By MARK S. BLODGETT* AND RICHARD J. HUNTER, JR.**

I. Introduction

The confluence of international trade and the environment¹ was brought into sharp focus during the difficult NAFTA² negotiations, in which the United States aggressively insisted on negotiating “side” agreements with the government of Mexico in order to

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1. WTO: Understanding the WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited July 28, 2009) (indicating that there are 153 members of the WTO and thirty observer governments that, with the exception of the Holy See, must start accession negotiations within five years of becoming observers).

2. North American Free Trade Agreement, Dec. 8, 1992, 32 I.L.M. 289 [hereinafter NAFTA]. NAFTA was approved by Congress by means of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 3311, 107 Stat. 2057 (1993). See THE NORTH AMERICAN FREE TRADE AGREEMENT 5-7 (Judith H. Bello et al. eds., American Bar Association, 1994) (providing an overview of the expected results of NAFTA). Another important issue was that of jobs; more specifically, the loss of American jobs as a direct result of NAFTA dislocations. Consider this statement: “Empirical estimates of NAFTA’s impact on aggregate employment range from gains of 160,000 jobs to losses of 420,000 jobs.” See RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 638 (2nd ed. 2001) (citing U.S. Int’l Trade Commission, *The Impact of the North American Free Trade Agreement on the U.S. Economy and Industries: A Three-Year Review* (U.S. ITC Pub. 3045, June 1997)).

protect American citizens from environmental degradation emanating from "Maquiladora"³ production facilities.⁴ Six years later, the debate had progressed well beyond the arguments raised during the NAFTA debate. "Environmental activists" staged a series of vocal protests at the 1999 WTO Ministerial meeting demanding the incorporation of environmental standards on the WTO agenda.⁵ Many argued that the inclusion of environmental standards in trade agreements would be the most effective way to ensure that individual nations establish and enforce these standards.⁶

In retrospect, the 1999 negotiations may have been doomed to failure from the outset because of a combination of a lack of will or a lack of real interest on the part of representatives from both the developed and industrialized world and less developed or newly industrialized countries. Industrialized nations asserted that the incorporation of a "tough" environmental regime would damage their prospects for continued growth, imposing costly technologies

3. See Aureliano Gonzales Baz, *Manufacturing in Mexico: The Mexican In-Bond (Maquila) Program*, <http://www.udel.edu/leipzig/texts2/vox128.htm> (last visited July 28, 2009). As indicated, the word *maquiladora* was derived from the period of colonial Mexico when *maquila* was the charge that millers collected for processing other people's grain. Today, the term is used to describe a company which processes, assembles, or transforms product parts imported into Mexico, largely, but not exclusively, from the United States. These components are subsequently exported back to the United States. See also *Maquiladoras: Get the Facts From Made in Mexico, Inc.*, <http://www.madeinmexicoinc.com/FAQs.htm> (last visited July 25, 2009) (noting that other synonymous terms for *maquiladora* are: "offshore operation, production sharing, twin plants, and in-bond.").

4. See POLITICAL ECONOMY AND THE CHANGING GLOBAL ORDER 592 (Richard Stubbs & Geoffrey R.D. Underhill eds., 2006); See also Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty Making*, 8 TEMP. INT'L & COMP. L.J. 257, 260-83 (1994) (discussing the environmental side agreement attached to NAFTA). See also *Bill Would Axe NAFTA*, Union Label & Service Trades Department Letter (2008), http://www.unionlabel.org/Label%20Letter%20Uploads/MA_08_LabelLetter.pdf (indicating a more negative appraisal and noting that Ohio Rep. Marcy Kaptur introduced a bill in Congress that required the President to withdraw the United States from NAFTA unless certain benchmarks — including targets relating to U.S. job growth, increased living standards, increased U.S. domestic manufacturing, and stronger health and environmental standards — were met).

5. See Steven Suranovic, *International Labour and Environmental Standards Agreements: Is This Fair Trade?* 25 THE WORLD ECON., 231, 231-35 (2002) (noting that "the 1999 Seattle WTO Ministerial meeting involved the inclusion of labour and environmental standards.").

6. *Id.*

and processes which would further expose their competitive disadvantage vis-à-vis their manufacturing sectors. On the other side of the equation, many newly industrialized countries, sometimes referred to as NICs,⁷ are in many cases desperate for an infusion of foreign direct investment. Yet, they may regard the imposition of environmental standards by the developed world as just another form of economic protectionism, further eroding their chances of economic development.⁸ Many newly industrialized countries have also argued that the imposition of more stringent environmental standards would hinder their ability to be competitive in a globalized market,⁹ although many NICs recognize that the practices of foreign investors designed to keep costs and sometimes standards low are “a primary culprit in the social

7. Newly industrialized nations generally include Hong Kong, Singapore, Taiwan, and South Korea — which are known as Asia's “Four Tigers” — Pakistan, Malaysia, Indonesia, Thailand, Mexico, Brazil, Chile, Venezuela, Israel, South Africa, and Hungary. Brazil, Russia, India, and China are sometimes referred to as the BRIC nations. See The Global Market and Developing Nations: The World's Economies, <http://www.infoplease.com/cig/economics/world-economies.html> (last visited July 27, 2009) (arguing that rather than take the traditional three-world view, economists classify the world's economies as industrial or developed nations, newly industrialized nations, and developing nations according to per capita GDP).

8. See PETER DICKEN, *GLOBAL SHIFT: RESHAPING THE GLOBAL ECONOMIC MAP IN THE 21ST CENTURY* 594 (2003). See also Christopher Johnson & Danielle Kriz, *Global Assessment of Standards Barriers to Trade in the Information Technology Industry*, U.S. International Trade Commission Staff Research Study 23, Pub. No. 3141 (1998), available at http://www.usitc.gov/publications/332/working_papers/pub3141.pdf (discussing whether some standards may in fact be barriers to trade, Article 2 of the GATT established the rules regarding the preparation, adoption, and application of technical regulations by member governments). See Uruguay Round Trade Agreements, Statement of Administrative Action, Agreement on Technical Barriers to Trade, H.R. Doc. No. 103-316, 776-89 (stating that under Article 2.2 of the GATT, technical regulations are not to be more trade-restrictive than necessary to fulfill a legitimate objective, taking into account of the risks of non-fulfillment would create). Article 2.2 provides an illustrative list of “legitimate objectives” that include the following: national security requirements; prevention of consumer deception; and protection of human health or safety, animal or plant life or health, or the environment. *Id.*

9. Suranovic, *supra* note 5, at 239. See also The World Bank, *Country Classifications*, <http://web.worldbank.org> (last visited July 28, 2009) (“The Atlas conversion factor for any year is the average of a country's exchange rate (or alternative conversion factor) for that year and its exchange rates for the two preceding years, adjusted for the difference between the rate of inflation in the country, and through 2000, that in the G-5 countries (France, Germany, Japan, the United Kingdom, and the United States). For 2001 onwards, these countries include the Euro Zone, Japan, the United Kingdom, and the United States. A country's inflation rate is measured by the change in its GDP deflator.”).

dislocation and negative environmental consequences that accompany globalization."¹⁰

At the same time, it is ironic that developing nations may be the strongest proponents of "free trade," asserting that "free trade" leads to welfare maximization and a general increase in wealth.¹¹ This view, however, is not universal. Professors Huang and Labys, for example, argue that free trade may not always be the panacea it is advertised to be, asserting that "free trade" at the expense of environmental degradation in fact *lowers* welfare maximization and national income.¹² Although the traditional basis for international trade — comparative advantage¹³ — might actually encourage a

10. Stubbs & Underhill, *supra* note 4, at 251.

11. Free trade is based on a belief in which the trade flows of goods and services between or within countries should be unhindered by government-imposed restrictions such as taxes or tariffs, or other non-tariff barriers such as quotas on imports, the imposition of illegitimate product standards, or improper subsidies for producers. Free trade is often said to encompass free access to markets, free access to market information, the inability of individual firms to distort markets through government-imposed monopoly or oligopoly power, the free movement of labor between and within countries, and the free movement of capital between and within countries. See The World Bank, Glossary <http://www.worldbank.org/depweb/english/beyond/global/glossary.html> (last visited Nov. 6, 2009). See also ROBERT W. MCGEE, A TRADE POLICY FOR FREE SOCIETIES 13-14 (1994) (critiquing the concept of "free trade" and discussing the concept known as "fair trade").

12. See Haixiao Huang & Walter C. Labys, *Environment and Trade: A Review of Issues and Methods*, 2 INT'L J. GLOBAL ENVTL. ISSUES 100, 1-107 (2001), <http://www.rri.wvu.edu/pdf/filesd/labys2001-1.pdf> (last visited July 26, 2009) (providing an overview of the major issues concerning economic interactions between environmental and trade policies). Such a review is necessary because of the pressure that the accelerated pace of globalization is placing on environment and trade. Not only is world trade increasing rapidly but global industrialization related to trade has spawned severe environmental degradation. As a consequence, growing numbers of researchers have attempted to analyze the linkages between these areas. This study attempts to provide a perspective on received and future research by employing a dual approach economic studies of the major environmental and trade issues are analyzed first and then progress in the methods necessary to analyze their interactions is assessed second. The conclusions suggest new possibilities for research design and policy goals.

13. Comparative advantage exists when a country has an advantage or a *margin of superiority* in the production of a good or service. The basic theory of comparative advantage was developed by the British economist, David Ricardo (1772-1823). Ricardo's theory of comparative advantage was further developed by economists Eli Heckscher, Bertil Ohlin, and Paul Samuelson who argued that countries have different factor endowments (usually referred to as the factors of production) of labor, land, and capital inputs. Countries should base their economic decisions on comparative advantage by first specializing in production and then exporting only those products which use the factors of production which

country to manufacture a “pollution intensive commodity,” this type of production will inevitably contribute to the deterioration of a country’s long-term environmental quality,¹⁴ yet provide a much needed immediate or short-term capital infusion. As Huang and Labys noted:

There is a trade off between gains from trade and environmental deterioration in this country, compared to a country producing non-polluting goods, since income will increase only if gains from trade over-compensate welfare losses from environmental damage. Stricter environmental policies in the first country would thus affect its comparative advantage and consequently its economic growth.¹⁵

Stubbs and Underhill concur that trade liberalization in fact undermines the environment and sabotages international environmental agreements, while significantly exacerbating ecological damage.¹⁶ In order to implement transnational or worldwide standards, proponents of what we term a “*worldwide environmental ethical imperative*”¹⁷ propose that the WTO extend its mandate to include the possibility of trade sanctions in environmental treaties.¹⁸ Opponents of standards contend, on the other hand, that WTO rules do not hinder the ability of sovereign nations¹⁹ to adopt environmental standards through the normal

they are most endowed in the best possible ways. In terms of international trade, the theory of comparative advantage holds that if each country specializes in producing and exporting those goods and services where they have a comparative advantage, then total output and the general economic welfare of all nations can be increased. See, e.g., tutor2u, *Comparative Advantage and International Trade*, http://tutor2u.net/economics/content/topics/trade/comparative_advantage.htm (last visited Aug. 3, 2009). For a critique of the theory of comparative advantage and a discussion of “the new trade theory,” see Paul Krugman, *Empirical Evidence of the New Trade Theories: The Current State of Play*, in *NEW TRADE THEORIES: A LOOK AT THE EMPIRICAL EVIDENCE* 12-23 (Center for Economic Policy Research, Bocconi University, Milan ed., 1994).

14. Huang & Labys, *supra* note 12, at 3.

15. *Id.*

16. See Stubbs & Underhill, *supra* note 4, at 111.

17. See Mark S. Blodgett, Richard J. Hunter, Jr. & Hector R. Lozada, *A Primer on International Environmental Law: Sustainability as a Principle of International Law and Custom*, 15 ILSA J. INT’L & COMP. L. 15-31 (2008) (discussing the issue of sustainability in the development of international environmental law).

18. Suranovic, *supra* note 5, at 241.

19. The traditional characteristics of sovereignty generally include each of the following: independence of political and economic institutions; an effective governmental structure (including the existence of independent executive,

bilateral or multilateral treaty process because environmental issues are already considered and have been sanctioned by the WTO Committee on Trade and Environment (CTE).²⁰ For example, opponents of *imposed* worldwide environmental standards point to the 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*,²¹ the 1973 *Convention on International Trade in Endangered Species of Flora and Fauna*,²² the *Convention on Biological Diversity*,²³ the *Framework Convention on Climate Change*,²⁴ and the *Kyoto Protocol on Climate Change*²⁵ as examples of voluntary international environmental agreements that are fully consistent with WTO principles.²⁶

II. Background: Trade and Development

There is growing concern about the necessity for trade policies to address directly environmental issues. There is also little doubt that the negative effects of environmental problems extend well

legislative, and judicial branches); a defined physical territory; the capacity to enter into and conduct foreign relations; and a population. See Nkambo Mugerwa, *Subjects of International Law*, in *MANUAL OF PUBLIC INT'L LAW* 253-55 (Max Sorensen ed., 1968). See GARY BURTLESS, ROBERT Z. LAWRENCE, ROBERT E. LITAN & ROBERT J. SHAPIRO, *GLOBAPHOBIA* 110, 112-120 (1999) (discussing the interrelationship of international trade and sovereignty).

20. See Suranovic, *supra* note 5, at 241.

21. See 26 I.L.M. 1541, *reprinted in* 52 Fed. Reg. 47515 (1987). See also UNITED NATIONS ENVIRONMENT PROGRAMME, *HANDBOOK FOR THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEplete THE OZONE LAYER* (7th ed. 2006).

22. *Convention on Int'l Trade in Endangered Species of Flora and Fauna*, Mar. 3, 1973, 27 U.S.T. 1087, *available at* www.cites/eng/disc/text.shtml (last visited August 2, 2009).

23. *Convention on Biological Diversity*, June 5, 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818, *available at* <http://www.biodiv.org/convention/convention.shtml> (providing an example of a voluntary agreement in the environmental area).

24. See *United Nations Framework Convention on Climate Change* art. 2, May 9, 1992, S. Treaty Doc. No. 102-38 (1992), 1771 U.N.T.S. 165, 168 (defining greenhouse gases as "natural and anthropogenic" gases in the atmosphere that "absorb and re-emit infrared radiation").

25. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998). For a complete listing of the most important environmental treaties, see University of Minnesota, *Frequently-Cited Treaties and Other Int'l Agreements*, <http://local.law.umn.edu/library/pathfinders/most-cited.html> (last visited Aug. 4, 2009) (containing important information on: General International Law, Human Rights Law, Environmental Law, European Union, Trade and Economic Law, Criminal Law, Intellectual Property, and Abbreviations and Sources).

26. Suranovic, *supra* note 5, at 241.

beyond national borders. Professors Kubasek and Silverman²⁷ note that recognition of this concept is “best exemplified by Principle 21 of the Stockholm Declaration,” which reads:

States have, in accordance with the Charter of the United Nations and the principles of international law, the *sovereign right* to exploit their own resources pursuant to their environmental principles, and the *responsibility* to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.²⁸

Three examples are especially expositive. Peter Decker notes that “[a]cid rain produced by certain types of energy-creation is carried by the wind beyond its points of origins to create environmental damage.”²⁹ The ozone layer is damaged by “the use of certain chemicals that retain their stability over long periods of time and move upwards into the stratosphere, expelling chlorine that destroys ozone molecules.”³⁰ And, greenhouse gasses have contributed to rising temperatures across the world. As a result of recognition of these problems, environmental concerns have already led to the creation of a *global regulatory regime* through the normal treaty process that addresses environmental issues that cannot be solved by the national legislatures of one country acting alone.

In particular, the Kyoto Protocol included environmental standards and provided sanctions against countries that do not adhere to the established standards.³¹ For instance, countries failing to meet their first set of targets by 2012 will have to add the shortfall to the next commitment period plus a 30% penalty. They will also be excluded from carbon trading and will have to take corrective measures at home.³² Despite these potentially negative aspects, it is

27. NANCY N. KUBASEK & GARY S. SILVERMAN, ENVTL LAW 441 (Jeff Shelstad ed., Prentice Hall 2002).

28. *Id.* at 333 (citing Article 21 of the Stockholm Declaration on the Human Environment). See also Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. J. ENVTL. L. 423, 423-515 (1973).

29. DICKEN, *supra* note 8, at 595.

30. *Id.*

31. *Id.* at 596.

32. See W. David Montgomery, *Markets in Licenses and Efficient Pollution Control Programs*, 5 J. ECON. THEORY 395 (1972). Emissions trading is an attempt to provide an economic incentive for achieving reductions in the atmospheric emissions of pollutants and is very controversial, especially in the United States. The process is sometimes referred to as “cap and trade.” A government or an international body

indeed surprising that most developing countries assented to the Kyoto Accords.³³

The most recent round of WTO negotiations, termed the Doha Round,³⁴ has refocused international attention and raised significant

sets a limit or a cap on the total amount of a pollutant that can be emitted into the atmosphere. Companies or other groups (usually involved in manufacturing) are issued emission permits and are required to hold an equivalent number of allowances (or credits) which represent the right to emit a specific amount of pollutants. The total amount of allowances or credits cannot exceed the cap, thus effectively limiting total emissions to that level. A company that may need to increase its emissions must buy credits from those parties possessing allowances or credits that pollute less. The transfer of allowances is referred to as a trade. Thus, the buyer of the credits is paying a charge or price for polluting, while the seller will be rewarded for having reduced emissions by more than was required. In theory, those parties that can more easily reduce emissions most cheaply will do so, and will achieve the pollution reduction at the lowest possible cost to society-at-large.

33. As of January 2009, 182 parties have ratified the Kyoto Protocol. Of these, thirty-six developed countries (including the European Union as an entity) are required to reduce greenhouse gas emissions to the levels specified for each of them in the treaty, thus representing over 61.6% of emissions from a list termed *Annex I countries*. Under the terms of the protocol, these countries have accepted greenhouse gas emission reduction obligations and must submit an annual greenhouse gas inventory. One hundred and thirty-seven developing countries have ratified the protocol, including Brazil, China, and India, but have assumed no obligations beyond monitoring and reporting emissions at this time. This seeming dichotomy has proved a major flash-point of criticism for opponents of the Kyoto Protocol in the United States. According to experts from the United Nations Environment Programme, The Kyoto Protocol is an agreement under which industrialized countries will reduce their collective emissions of greenhouse gases by 5.2% compared to the year 1990. Compared to emissions levels that would be expected by 2010 without the Protocol, this limitation represents a 29% cut. The goal of the Protocol is to lower overall emissions of greenhouse gases by specified percentages by 2008-2012. National limitations range from 8% reduction for the European Union; 7% reduction for the US; 6% reduction for Japan; 0% reduction for Russia; and permitted increases of 8% for Australia and 10% for Iceland. See Press Release, United Nations Environment Programme, Industrialized Countries to Cut Greenhouse Gas Emissions by 5.2% (Dec. 11, 1997).

34. The Doha Development Round commenced at Doha, Qatar in November 2001 and is still ongoing. The objectives of this round of trade negotiations were to continue to lower trade barriers around the world, and encourage free trade between countries of varying economic backgrounds and stages of economic development. As of 2008, talks stalled over a divide between the developed nations led by the European Union, the United States, and Japan and several of the major developing countries (represented by the G20 developing nations), led and represented mainly by India, Brazil, China, and South Africa. Subsequent ministerial meetings took place in Cancún, Mexico (2003), and Hong Kong, China (2005). Related negotiations took place in Geneva, Switzerland, Paris, France, and again in Geneva. See World Trade Organization, An Introduction to Trade and The Environment in the WTO, [www.wto.org/english/tratop_e/envt_e/ envt_intro](http://www.wto.org/english/tratop_e/envt_e/envt_intro)

policy questions on the convergence of trade and environmental issues in *the context of the WTO*. The Doha Round essentially provides members,

[A] chance to achieve an even more efficient allocation of resources on a global scale through the continued reduction of obstacles to trade. The Round is also an opportunity to pursue win-win-win results for trade, development and the environment. For example, the Doha Round is the first time environmental issues have featured explicitly in the context of a multilateral trade negotiation and the overarching objective is to enhance the mutual supportiveness of trade and environment. Members are working to liberalize trade in goods and services that can benefit the environment. They are also discussing ways to maintain a harmonious co-existence between WTO rules and the specific trade obligations in various agreements that have been negotiated multilaterally to protect the environment. Other parts of the Doha negotiations are also relevant to the environment, for example aspects of the agriculture negotiations and also disciplines on fisheries subsidies. The Doha Development Agenda also has a section specifying the priority items in the CTE's regular work.³⁵

Interestingly, perhaps the refocus of international attention on the convergence of trade and the environment is most readily apparent with the resolution of trade restrictions placed on the importation of tires.³⁶ When Brazil inconsistently banned the importation of European Union retreads into Brazil, this action was challenged as being protectionist – although the measure had been justified as protecting the Brazilian environment. Yet, at the same time, a [WTO] “Panel decision effectively directed Brazil to impose further trade restrictions so as to advance its environmental objective. Previous WTO decisions have not gone this far in

_e.htm (last visited Nov. 5, 2009). See also Doug Palmer, *EU Urges US to Take Leadership Role in Doha Talks*, REUTERS, <http://www.reuters.com/article/AGRLIV/idUSN1837962420090318> (last visited Nov. 6, 2009).

35. World Trade Organization, *An Introduction to Trade and the Environment in the WTO*, www.wto.org/english/tratop_e/envir_e/envt_intro_e.htm (last visited Nov. 5, 2009).

36. See Julia Qin, *WTO Panel Decision in Brazil-Tyres Supports Safeguarding Environmental Values*, ASIL INSIGHTS (Sept. 5, 2007), <http://www.asil.org/insights070905.cfm> (last visited July 8, 2008). See also PANEL REPORT, *BRAZIL-MEASURES AFFECTING IMPORTS OF RETREATED TYRES*, WT/DS332/AB/R (Dec. 17, 2007), [http://www.worldtradelaw.net/reports/wtopanelsfull/Brazil-tyres\(panel\)\(full\).pdf](http://www.worldtradelaw.net/reports/wtopanelsfull/Brazil-tyres(panel)(full).pdf) (last visited Aug. 4, 2009).

safeguarding environmental values.”³⁷ However, the latest appellate ruling in this dispute is consistent with past WTO jurisprudence, wherein a sovereign’s right to protect its environment is well acknowledged under the Treaty, yet its discriminatory actions are subject to review.³⁸ Accordingly, Brazil must conform to the requirements of the Treaty that prohibit “arbitrary or unjustifiable discrimination.”³⁹

In discussing Article XX of the GATT,⁴⁰ Bradley Condon noted:

37. *Id.* at 1 (“An import ban violates the General Agreement on Tariffs and Trade (GATT) Article XX:1, which prohibits quantitative restrictions on imports or exports. The question, however, is whether the ban can be justified by one of the GATT exceptions. In this case, Brazil invoked GATT Article XX(b) that exempts measures ‘necessary to protect human, animal or plant life or health.’”).

38. Milos Barutciski, *Fresh Water: Environment or Trade?: Trade Regulation of Fresh Water Exports: The Phantom Menace Revisited*, 28 CAN.-U.S. L.J. 145, 152 (2002) (dispelling the myth that management of resources is threatened by the WTO).

39. Julia Qin, *Update: The Mercosur Exemption Reversed - Conflict Between WTO and Mercosur Rulings and its implications for Environmental Values*, ASIL INSIGHTS (Jan. 23, 2009), http://www.asil.org/insights070905_update.cfm. However, Brazil’s ban was ultimately determined to violate the Treaty’s Chapter XX that prohibits “arbitrary or unjustifiable discrimination.” *Id.*

40. The General Agreement on Tariffs and Trade (GATT) was signed in 1947. The GATT was essentially a multilateral agreement, led by the United States, regulating trade among about 150 countries. The purpose of the GATT was to enter “into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the eliminations of discriminatory treatment in international trade relations.” See World Trade Organization, Analytical Index: Marrakesh Agreement, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm (last visited Nov. 6, 2009).

There were eight rounds of negotiations under the GATT that addressed a myriad of trade issues. See, e.g., ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* 192 (1987) (discussing the original GATT negotiations in Geneva; the Annecy Round (1948-1949); the Torquay Round (1950-1951); the Geneva Round (1955-1956); the Dillon Round (1960-1962); the Kennedy Round (1962-1967); the Tokyo Round (1973-1979); and the initial results (1987) of the Uruguay Round (1986-1994)).

Prior to the creation of the WTO, the critical Uruguay Round of negotiations addressed issues such as tariffs, the inclusion of financial services in the trading rules, the trade related aspects of intellectual property (TRIPS Agreement), and the eventual inclusion of measures regulating international investments. After seven years of negotiation, the Uruguay Round, was completed on December 15, 1993. The Uruguay Round was the result of an agreement among 117 countries (including the U.S.) to reduce trade barriers and to create more comprehensive and enforceable world trading rules. The agreement, the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, was signed in April 1994. See Uruguay Round Trade Agreement, *Statement of Administrative Action, Agreement Establishing the World Trade Organization*, H.R. Doc. No. 316, 103d Cong., 2d Sess.,

"A relatively small number of disputes has arisen over the years regarding the application of Article XX exceptions to trade measures to achieve health or environmental goals."⁴¹ Prior adopted WTO decisions date to 1996 and involve trade bans on asbestos, shrimp, and gasoline.⁴² In the asbestos dispute, an Article XX(b) [health and safety] exception was invoked in order to justify such a ban.⁴³ It should also be recognized that the health and safety issues raised in Article XX(b) are closely tied to a sovereign's environmental policy.⁴⁴

As Julia Qin has noted:

Both the Panel and the Appellate Body decisions resoundingly affirm that import bans unilaterally imposed to protect health and

Vol. 1, 659-667 (Sept. 27, 1994) ("[T]he Uruguay Round agreement was approved and implemented by the U.S. Congress in December 1994, and went into effect on January 1, 1995.").

41. Bradley J. Condon, *GATT Article XX and Proximity of Interest: Determining the Subject Matter of Paragraphs B and G*, 9 UCLA INT'L L. & FOR. AFF. 137, 139 (2004); *Id.* at 143 ("In trade and environmental health/cases, the Appellate Body has adopted an analytical procedure under Article XX that first examines whether a measure can be provisionally justified under paragraph XX(b) or XX(g) and then considers whether it satisfies Article XX introductory proviso, referred to as the *chapeau*.").

42. *Id.* at 139 (asserting further the existence of three adopted GATT rulings out of six in controversies relating to trade bans involving health or the environment prior to 1995). See Barutciski, *supra* note 38, at 155 (noting France's ban on asbestos was permissible against Canada, especially with regard to cement and building materials). See also Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001).

Although a U.S. measure designed to prevent shrimp net capture of sea turtles was permissible per se, the measure was struck down by a WTO panel for arbitrary and discriminatory application. The measure was later provisionally upheld by the Appellate Body with negotiations to ensue for mutual agreement on alternative fishing methods. See Barutciski, *supra* note 38, at 154. See also Appellate Body Report, *U.S.-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

United States requirements regarding contaminants and pollutants under the U.S. Clean Air Act were challenged by Brazil and Venezuela but were upheld by both the panel and the WTO Appellate Body. "The panel said that the U.S. could legislate environmentally, even extraterritorially, by regulating the imports of Venezuelan and Brazilian petroleum by looking at how they are made However, "the treatment must be evenhanded, at least in terms of its impact and effect." Barutciski, *supra* note 38, at 153-54. See also Appellate Body Report, *U.S. Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996).

43. See Barutciski, *supra* note 38, at 154-55. See also Condon, *supra* note 41, at 161.

44. Barutciski, *supra* note 38, at 155.

the environment can be compatible with the WTO Agreement. In a sense, the Appellate Body's decision can be viewed as even more pro-environment than the Panel's since it requires Brazil's import ban to be complete and fully consistent with its environmental purposes.⁴⁵

III. WTO Involvement: Is There Really An International Consensus? "Pros and Cons"

The Website of the WTO provides the core information on the relationship between "Trade and Environment."

Sustainable development and protection and preservation of the environment are fundamental goals of the WTO. They are enshrined in the Marrakech Agreement, which established the WTO, and complement the WTO's objective to reduce trade barriers and eliminate discriminatory treatment in international trade relations. *While there is no specific agreement dealing with the environment*, under WTO rules members can adopt trade-related measures aimed at protecting the environment provided a number of conditions to avoid the misuse of such measures for protectionist ends are fulfilled.

The WTO contributes to protection and preservation of the environment through its objective of trade openness, through its rules and enforcement mechanism, through work in different WTO bodies, and through ongoing efforts under the Doha Development Agenda. The Doha Agenda includes specific negotiations on trade and environment and some tasks assigned to the regular Trade and Environment Committee.⁴⁶

The WTO Committee on Trade and Environment "(CTE)" was created in order to provide a forum in which to examine the relationship between trade policies and the environment. Specifically, the CTE was charged to advise the WTO General Council on the need for changing WTO rules. It was the very first forum created within the WTO for "making recommendations" on policy formulation in the area of trade and environment.⁴⁷ Despite this mandate, the CTE has proven to be weak because of its failure to actually alter any specific WTO agreements. The reason for this

45. Qin, *supra* note 39.

46. The World Trade Organization, Trade and Environment, http://www.wto.org/english/tratop_E/envir_e/envir_e.htm (last visited Aug. 4, 2009).

47. See Huang & Labys, *supra* note 12.

weakness may be found in the procedures of the CTE itself. In order to change or alter a WTO agreement, the CTE has to first propose rule changes to the WTO's General Council. At this point, the General Council has to decide whether the proposal should be implemented.⁴⁸ Despite the existence of these procedures, the CTE has not recommended any changes to current trading rules.⁴⁹

In general terms, Huang and Labys have noted that developing countries have shown a limited interest in pursuing environmental policies.⁵⁰ While Asian and Latin American countries have expressed some interest in an environmental agenda linking trade with the environment, African countries have to date not submitted a single proposal.⁵¹ In their analysis, Huang and Labys discovered that the level of disengagement may result from a general lack of concern for environmental issues, or as more likely, from a variety of other reasons which reflect developing nations' weak economic circumstances. Countries with limited prospects for attracting foreign direct investment may prefer to channel their negotiating resources into improving market access rather than in negotiating contentious environmental issues. Second, smaller developing nations may remain silent during negotiations so as to allow the "larger players" to take center stage in voicing their concerns about the incorporation of environmental standards that may be inimical to their economic growth. Third, some nations have voiced a more fundamental policy concern that WTO regulations concerning the environment and trade may be outside the scope of its power and mandate. Critics of imposing an environmental agenda on the WTO argue that the WTO is essentially a *trade organization* and thus, environmental issues should not be regulated through trade policies enforced by an international body like the WTO, but rather through domestic policies, national legislation, or the treaty process adopted by individual nations.⁵² These critics also have raised a "sovereignty" argument and aver that "trade experts" from the WTO who are charged with interpreting and enforcing trade rules have limited accountability to local or national governments. This

48. *Id.*

49. *Id.*

50. *See generally id.* (noting that the analysis of developing nations' negotiating strategies has been adapted from Huang & Labys).

51. *Id.*

52. *See, e.g.,* Suranovic, *supra* note 5, at 239.

grants the WTO unjustified power to rule on domestic regulations and shifts the GATT away from an instrument that ensures adequate room for domestic intervention in order to maintain economic and social stability.⁵³

On the other side of the argument, those who favor environmental regulation through the intervention or aegis of the WTO argue that the WTO must provide a normalized mechanism for creating and then enforcing environmental standards. As Suranovic notes, if "environmental standards are included in the WTO framework then countries will have the option of taking countries who fail to implement agreed standards before the Dispute Settlement Body (DSB) for adjudication."⁵⁴ In essence, trade sanctions would be available to force countries to become compliant with mutually agreed upon environmental standards.⁵⁵

53. *Id.*

54. Suranovic, *supra* note 5, at 241.

55. *See id.* *See* Raj Bhala, *Hegelian Reflections on Unilateral Action in the World Trading System*, 15 BERKELEY J. INT'L L. 159, 163-165 (1997), for a discussion of the weaknesses in dispute settlement procedures.

The Dispute Settlement Body is made up of all WTO member governments, usually represented by ambassadors or individuals holding their equivalent rank. According to the website of the WTO:

Settling disputes is the responsibility of the Dispute Settlement Body (the General Council in another guise), which consists of all WTO members. The Dispute Settlement Body has the sole authority to establish "panels" of experts to consider the case, and to accept or reject the panels' findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.

The WTO encompasses a "stage" approach to dispute resolution and provides a procedure and timetable outlined in the following table:

There is, however, also an important negative viewpoint towards the inclusion of environmental standards within the WTO. Some environmentalists argue that the WTO approach should be abandoned altogether because, as a matter of philosophy and practice, sustainable development is simply incompatible with economic development. Dicken reports that many environmentalists are concerned that the “energy costs of transporting materials and goods across the world are not taken into account in setting prices of traded goods and that, in effect, trade is being massively subsidized at a huge short-term and long-term environmental cost,”⁵⁶ even though economic growth would raise resources for “objectives such as pollution abatement and the general protection of the environment.”⁵⁷

Opponents of the inclusion of environmental standards within the mandate of the WTO maintain that many developing countries are forced to choose between two important, and perhaps mutually exclusive, options: (1) attempt to compete successfully in the global

How long to settle a dispute?

These approximate periods for each stage of a dispute settlement procedure are target figures – the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

| | |
|-----------------------|--|
| 60 days | Consultations, mediation, etc |
| 45 days | Panel set up and panelists appointed |
| 6 months | Final panel report to parties |
| 3 weeks | Final panel report to WTO members |
| 60 days | Dispute Settlement Body adopts report (if no appeal) |
| Total = 1 year | (without appeal) |
| 60-90 days | Appeals report |
| 30 days | Dispute Settlement Body adopts appeals report |
| Total = 1y 3m | (with appeal) |

The World Trade Organization, *Understanding the WTO: Settling Disputes*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Nov. 6, 2009).

56. DICKEN, *supra* note 8, at 597.

57. Huang & Labys, *supra* note 12, at 41 (indicating that studies show that international trade should help the environment because environmental indicators improve as income increases).

market; or (2) embrace environmental standards. As such, opponents maintain that developing countries should make the policy choice to forego environmental standards in order to become competitive in the global market.⁵⁸ To support this argument, Huang and Labys note that there are studies that acknowledge that "pollution abatement policies reduce pollution and this *decreases* national income."⁵⁹ This position, of course, may be countered with the argument that the incorporation of environmental standards leads to an increase in "environmental goods"⁶⁰ and, to a large extent, "their impacts are not considered in national income account evaluations."⁶¹ Additionally, "pollution abatement equipment can offset losses in industrial production due to more stringent environmental standards."⁶²

IV. On Balance . . . An Argument for the Inclusion of Environmental Standards in the WTO Regime

So, which viewpoint is most correct? Several *policy questions* must be considered. Do environmental standards help or hinder international trade and development? Should the WTO be empowered to implement environmental standards? On balance, it appears that environmental standards should be implemented or at least prominently considered in trade agreements. The major argument in favor of such a proposition is that the long-term effects of incorporating environmental standards could lead to the creation of more jobs.⁶³ The OECD,⁶⁴ representing the world's most

58. Suranovic, *supra* note 5, at 239.

59. Huang & Labys, *supra* note 12, at 11.

60. For a discussion of the concept of "environmental goods," see Center for Environmental Cooperation (CEC), *Trade in Environmentally Preferable Goods and Services*, available at http://www.cec.org/files/pfd/ECONOMY/121-03-05_en.pdf (last visited May 11, 2008) (testing the hypotheses whether liberalized rules under NAFTA serve to increase the use of environmentally preferable products building upon prior research conducted in the areas of green goods and services, financing and the environment, and "market-based mechanisms for carbon sequestration, energy efficiency, and renewable energy in North America"). See also International Centre for Trade and Sustainable Development (ICTSD), *Defining Environmental Goods and Services and their Trade and Sustainable Development Implications: a Case Study of Mexico*, <http://ictsd.net/i/environment/11856> (last visited Aug. 4, 2009).

61. Huang & Labys, *supra* note 12, at 11.

62. *Id.*

63. *Id.*

64. OECD membership includes the following "high income" countries:

productive economies, maintains that there is a direct correlation between the environment, and trade and the economy, arguing that "employment levels rise with pollution-control expenditures."⁶⁵ The OECD points to the experiences in such countries as the United States, France, and Norway⁶⁶ and the clear connection of environmental considerations with the growth of productivity. Huang and Labys cite the United States Environmental Protection Agency which maintains that "environmental policies induce 'more cost-effective processes that reduce both emissions and the overall cost of doing business.'"⁶⁷ Of course, these comments represent the viewpoint of the developed world.

Second, the WTO must take on frontally anti-environmental incorporation arguments raised by developing nations concerning "market access." One such argument deals with the issue of protectionism under the guise of environmental protection. "Under the guise of environmental policies, foreign products might be prohibited from access to markets where domestic products are more expensive."⁶⁸ Thus, the inclusion of standards relating to issues such as "auto emissions, agricultural regulations controlling pesticide residue, or product component quality, have been criticized by trading countries that believe these policies are designed to restrict market access for foreign products under the guise of insuring food safety or promoting cleaner air."⁶⁹ In order to

Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States.

According to the website of the organization, "The OECD brings together the governments of countries committed to democracy and the market economy from around the world to: support sustainable economic growth; boost employment; raise living standards; maintain financial stability; assist other countries' economic development; contribute to growth in world trade." OECD, *About OECD*, <http://www.oecd.org> (last visited May 7, 2008) (containing information on the organization, members and partners, budget, and history). Note that the preeminent position of "sustainable economic growth" as a core objective of the organization and that sustainability, as an environmental construct, is not mentioned as an organizational objective.

65. *Id.*

66. *Id.*

67. *Id.* at 12.

68. *Id.* at 28.

69. *Id.*

counter, or at least neutralize this argument, environmentalists must pressure governments to adopt reasonable international standards that will be applicable to all WTO member nations and that will guard against the adoption of unilateralism on the part of WTO member states. Huang and Labys note: "Due to the absence of an effective international enforcement mechanism, some countries have to resort to unilateral actions. Under most circumstances, unilateral actions are a violation of existing WTO jurisprudence."⁷⁰

Third, although the relationship between the environment and trade may be in dispute, there is no doubt that there is a close relationship between trade and the global business environment. Kenichi Ohmae, the Japanese management guru, coined the phrase "borderless world." Much of our understanding about globalization comes from the writings and research of Professor Ohmae. His formulation, termed the *Five Stages of Globalization*, indicate the strong correlation between international trade and globalization. Each of the five stages involves significant issues relating to international trade and many, if not all, contain critical environmental aspects. According to Professor Ohmae, a business enters the international environment through a progression of activities that can generally be described as:

1. Exporting, using the distribution system of a business found in the host country;
2. Exporting, setting up a distribution system in the host country; Manufacturing and distributing products in the host country — but maintaining a company's ties with its "home" country, perhaps by acting as a subsidiary corporation or entity of the *parent* company;
3. Insiderization, becoming like any other manufacturing concern located in the host country — acquiring the identity of a national company or entity;
4. Becoming a fully globalized company — operating in many host countries simultaneously; where it may be difficult to ascertain the country to which a fully globalized company is attached.⁷¹

In this context, for example, it is important once again to

70. *Id.* at 28-29.

71. See, e.g., KENICHI OHMAE, *THE NEXT GLOBAL STAGE: THE CHALLENGES AND OPPORTUNITIES IN OUR BORDERLESS WORLD* (2005).

examine the arguments of Professors Huang and Labys. They note, as an example, that “fuel efficient cars not only reduce air emissions in the United States but also force U.S. manufacturers to develop more fuel-efficient models.” Thus, international trade is literally shaping the agendas of world economies by “intensifying the environmental impacts of domestic production by expanding international markets.” International trade enables countries to obtain desired products from their trading partners “that are domestically either unavailable or protected by strict laws and hence effectively pass the environmental effects of consumption” to other countries. Because national policies regarding standards are often attacked as just another form of protectionism, “efforts to restore environmental quality within countries and to protect the global commons . . . are erroneously misguided.”⁷²

Because the arguments on both sides of the issue are convincing and reflect very different policy perspectives, there may not be a clear and direct answer to the conundrum at this time. However, the reality is that trade agreements and development strategies certainly impact the environment. Although the WTO may not be “the only game in town,” it is certainly *a* major player on the world scene. Thus, the WTO may be a starting point for at least eliminating the tension — real or imagined — between the global business environment, international trade, and core environmental concerns.

72. See e.g., Huang & Labys, *supra* note 12, at 40-41.

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