The Advantages of Utilizing the WTO as a Global Forum for Environmental Regulation

Christopher J. Kula
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Introduction

Trade regulation and liberalization have frequently been depicted as a contrast to environmental concerns.¹ The emphasis on enforcement of international environmental matters is a relatively recent phenomenon. This is due to an increasing amount of scientific evidence of the gravity of environmental harm caused by human development. Many environmental organizations and developing countries exhibit active concern over this issue. However, there is a growing realization of the importance of having integrated global standards, across many fields, in order to balance market interests and the environment.² The inherent conflict between trade and the environment must be resolved in the same forum, rather than under the parallel approach of regulating international trade under the WTO and environmental concerns under the various international treaties that exist. Large-scale compliance in the area of international environmental regulation could be obtained under the World Trade Organization (WTO) framework via the more binding Dispute Settlement Understanding, which has become effective in securing compliance among nations participating in international trade. The protection of the global commons can no longer be successfully approached under traditional doctrines of exclusive national sovereignty and jurisdiction.

At issue is whether the WTO would be an efficient method of enforcement of international environmental regulations, as opposed to current standards administered by the General Agreement on Tariffs and Trade (GATT) or enforcement mechanisms available under other international bodies. In order to gain some understanding of International Environmental regulation and its relation to trade, it is necessary to delve into a brief history.

GATT 1947

Established in 1947, the General Agreement on Tariffs and Trade (GATT) provides a framework of rules for international trade among over 100 member nations.³ The global economic community generally regarded it as a failed attempt to create a

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² Id.

fully-fledged international trade agency. A major problem with GATT is that it lacked any sound legal binding power, as it was never ratified in member’s parliaments and enforcement under the Agreement was ad hoc and provisional by nature.\(^4\) The modes of negotiating international agreements were less efficient, initially, but evolved over many years, under the concept of multilateral "rounds".\(^5\) In terms of dispute settlement, one nation could block the GATT Council’s adoption of an adverse panel report.\(^6\) Moreover, the US could refuse to change its sovereign law to conform with GATT, in addition to blocking the imposition of any retaliatory penalties proposed by the aggrieved country or countries.\(^7\) This largely rendered GATT to be considered an Agreement without any teeth. To further the interests of the environment, GATT had created a working Group on Environmental Measures and International Trade in 1971 to consider: (1) trade provisions contained in multilateral environmental agreements; (2) Multilateral transparency; and (3) the trade effects of new packaging and labeling requirements aimed at protecting the environment.\(^8\) However, this group was rarely utilized, never having convened until 1991.

Early international environmental disputes were resolved pursuant to GATT panel reports, which summarily addressed the issue and rendered a decision that carried minimal weight. Because the concept of International Environmental Law had just begun to develop, minimal precedent or case law had been established in this area. Disputes arose mainly from the use of the GATT Article XX exception. One example is the 1991 Tuna-Dolphin proceeding which involved a GATT Article XX(b) exception,\(^9\) which allows a nation to adopt or enforce measures “necessary to protect human, animal, or plant life & health”,\(^10\) thereby allowing the imposition of an economic ban of a foreign nation’s goods for environmental protection justifications. The ultimate goal in Tuna-Dolphin was to prevent the loss of dolphin life due to capture in tuna nets. The US had imposed a ban on tuna caught by the Mexican fleet because of their lack of compliance with US Marine and Mammal Protection Act (MMPA) regulations mandating dolphin-safe nets.\(^11\) The GATT dispute settlement panel found that the ban, under Article XX(b), was inapplicable because GATT Article XI forbids extraterritorial imposition of US regulations upon Mexico.\(^12\) Such use was deemed a unilateral extension of US sovereign standards on a developing nation. This begs the question of whether disputes of this

\(^4\) WTO Official Website, *The WTO and GATT-are they the same?*, at http://www.wto.org
\(^5\) See, supra note 1
\(^6\) See, supra note 4.
\(^7\) Id.
\(^8\) See, supra note 3.
\(^9\) GATT/WTO Article XX, BISD I/48-50 (May 1952).
\(^10\) Id.
\(^11\) The Tuna-Dolphins Case, 39th Supp. BISD 155 (1993), United States’ restriction on imports of tuna from Mexico, GATT panel decision, also available at http://www.wto.org
\(^12\) Id.
nature could be avoided if international standards of process and production (PPM) were in place.

**Multilateral Agreements Concerning the Environment**

Multilateral environmental agreements (MEA’s) and treaties became the preeminent ways to garner cooperation across borders. This distinct area of international environmental law began to emerge in the early 1970’s. The seminal event was the 1972 Stockholm Conference on the Human Environment, where the fundamental principles of international environmental law were articulated in the Stockholm Declaration. The Conference also served as the impetus for the United Nations Environmental Programme (UNEP). Not long thereafter, international agreements concerning the environment began to rise into prominence. From the late 1980’s onward, there was a marked increase in the number of multilateral agreements and the subject matter of environmental protection. Biodiversity, ozone depletion, and global climate change are subjects, which received and continue to receive significant attention. However, the treaties only addressed specific areas of environmental concern and generally lacked an overarching enforcement mechanism of any substance. In addition, the potential lack of consistency between GATT provisions and those contained in numerous multilateral environmental agreements have raised issues of concern. The major MEA’s that are prevalent in the area of trade and the environment are the CITES treaty, Montreal Protocol, the Basel Convention, and the Kyoto Protocol. These MEA’s contained rudimentary, but inadequate dispute resolution provisions to properly enforce environmental regulation in today’s world.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1973 was ratified by the US and concerned biodiversity, namely the protection of wild flora and fauna in trade. Parties to the agreement managed to retain much of their sovereignty, as it was recognized that the states could best protect the species within their states. Dispute resolution under CITES consisted of negotiation, arbitration, and if those options failed, resolution at the forthcoming conference of the parties. CITES remains effective today, in dealing with the endangered species and trade. Despite its success, the general attitude and issues on the international environmental scene have changed and grown more complex since its entry into force.

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14 Id.
15 Id.
16 Id.
17 See, *supra* note 3.

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The Montreal Protocol was negotiated under the framework of the Vienna Convention of 1985, which first addressed ozone depletion concerns. At this stage, there was a general awareness of the need for international cooperation and action. The Vienna Convention outlined states’ responsibilities for protecting human health and the environment against the adverse effects of ozone depletion.\(^\text{18}\) The Montreal Protocol, signed in 1987 and amended five times thus far, is a landmark international agreement designed to protect the stratospheric ozone layer. Based on scientific evidence and enforced by trade restrictions, it stipulates that the production and consumption of substances that deplete the ozone are to be phased out pursuant to separate timetables for developed and developing nations.\(^\text{19}\)

The Basel Convention, ratified by 135 member countries and entered into force in 1992, addressed the problems and challenges posed by hazardous waste as a result of the tightening of environmental regulations in industrialized countries in the late 1980’s. Its goal was environmentally sound management (ESM), the aim of which is to protect human health and the environment by minimizing hazardous waste production whenever possible. The Basel Convention provisions permitted the parties to delegate compliance in a more unilateral manner, without much elaboration as to proper mechanisms for so doing. It enabled national governments to take appropriate measures to implement and enforce its provisions, including trade measures to prevent or punish conduct in contravention of the Convention.

The Kyoto Protocol was designed to reduce emissions of greenhouse gasses (GHG’s) in the effort to mitigate the global warming problem.\(^\text{20}\) It is also one of the most complicated environmental agreements ever adopted. However, the failure to gain acceptance by crucial nations, particularly the U.S., has caused major problems in its implementation because there is no incentive for international compliance where major players do not have to abide by its mandates. Nevertheless, the Kyoto Protocol is a historic landmark in international environmental law and policy and will inferably serve as a framework for future agreements.

**Rio Conference**

In 1992, the United Nations Conference on Environmental Development (UNCED) at Rio De Janeiro was the first meeting of a large contingency of nations specifically dealing with pertinent global environmental issues and recognizing that a

\(^{18}\) The Montreal Protocol on Substances That Deplete the Ozone Layer, at 
http://www.ciesin.org/TG/PI/POLICY/montpro.html

\(^{19}\) The Ozone Secretariat, Ozone Treaties, at http://www.unep.org/ozone/treaties.shtml

problem clearly existed. This Conference was comprised of numerous proceedings all focusing generally on sustained development, namely Agenda 21 (for the 21st Century) and the Rio Declaration on Environment and Development, the Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity, the Convention on Forest Principles, and NGO alternative Treaties. Agenda 21, adopted by 118 nations at the United Nations Conference on Environment and Development (UNCED), answered the UN General Assembly’s call for “increased national and international efforts to promote sustainable and environmentally sound development in all countries”. This comprehensive program of action was to be implemented by Governments, developmental agencies, United Nations organizations and independent sector groups in every area where human economic activity affects the environment. UNCED recognized the need to reverse environmental degradation, the importance of international cooperation, and the developmental priorities of developing countries. In particular, Agenda 21 proposals for international law focus on improving the legislative capabilities of developing countries, assessing the efficacy of current international agreements and setting priorities for the future. It recognized that the participation of all countries in global treaty-making is essential, in addition to promoting international standards for environmental protection gradually, taking into account the different situations and abilities of countries. Now the focus started to turn towards broadening and strengthening international mechanisms for settlement of disputes without unnecessarily restricting international trade.

The Rio Conference had merely recognized the need for stronger enforcement mechanisms. This was a significant step towards the development of such an international enforcement mechanism. It had become evident that, under the current system, there was a lack of sufficient authority to enforce standards internationally. In February 1992, the GATT Secretariat released a trade and environment analysis put forth for consideration by UNCED, offering several suggestions for making environmental policy consistent with GATT. It suggests that “it is no longer possible for a country to create an appropriate environmental policy entirely on its own.” It called for multilateral rules to guide countries environmental policies and also indicated that a dispute settlement procedure is needed to back up the rules. However, the report stopped short of suggesting a specific institution to undertake this function. One institution with the

22 Agenda 21 & Other UNCED Agreements, at http://www.igc.apc.org/habitat/agenda21/index.html
23 Id.
24 Id.
25 Id.
27 Id.
28 See, supra note 3.
potential to aid nations in this endeavor was the Organization for Economic Co-operation and Development (OECD).\textsuperscript{29} OECD is an international institution that developed guiding principles concerning trade and the environment, in 1973.\textsuperscript{30} OECD’s process has involved both the trade agencies and the environmental agencies to a degree unmatched by other international bodies. In fact, OECD principles were speculated as a basis for amending GATT and for new institutional approaches to reconcile trade and environment concerns. However, a major problem with the OECD was the minimal representation of developing nations. Moreover, it had a limited capacity to set and enforce policy among its members, which consist of 24 countries from the developed world, and the European Commission (EC).

WTO

After seven and a half years, the Uruguay Round established the existence of the World Trade Organization (WTO) in 1994, which was one of the greatest international reforms since the Second World War.\textsuperscript{31} The newly born WTO involved 125 “member” countries, all of which were required to ratify the collective WTO Agreements.\textsuperscript{32} It amended and incorporated the GATT 1947 agreement into the new WTO agreements while adding the new General Agreement on Trade in Services (GATS) and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).\textsuperscript{33} The new dispute settlement system provided for a more structured process with clearly defined stages in the procedure and an emphasis on prompt resolution.\textsuperscript{34} This was based on the idea that the most harmonious way to settle disputes is through neutral procedure based on an agreed legal foundation. As an international organization, the WTO has a sound legal foundation due to its permanence and its clarity of function. It is a single organization, with a single set of rules, and a single system for resolving trade disputes.

The WTO dispute settlement system is faster and more automatic than the old GATT system.\textsuperscript{35} Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling.\textsuperscript{36} WTO panel decisions were adopted automatically, and could only be blocked if there was consensus to reject a

\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{32} Id.
\textsuperscript{33} WTO Official Website, What is the World Trade Organization?, at http://www.wto.org
\textsuperscript{34} WTO Official Website, Trading Into the Future: The Introduction to the WTO, at http://www.wto.org
\textsuperscript{35} Id.
\textsuperscript{36} Id.
ruling. Despite such structure, it remains flexible in having consultation and mediation as available remedies, thereby allowing the countries to come to solutions by themselves.

The dispute settlement system has exhibited the ability to evolve, in practice, to the enhanced responsibilities it may face beyond the realm of trade liberalization. In handling the EC ban on meat production which was supported by the use of natural and synthetic hormones, the WTO dispute settlement system saw its first extensive scientific evidence hearing.\(^{37}\) In that case, the Panel held the EC’s ban was illegal as there was no concrete scientific evidence of health risks from the use of beef hormones.\(^{38}\) It is not unrealistic to foresee the WTO dispute settlement mechanism tackle similar hearings, with respect to environmental concerns, in the near future.

### Deficiencies in Current International Environmental Organizations and Treaties

As the world grows more interdependent, the lack of uniform cohesion and enforceability of the multitude of separate means of environmental governance is more evident. The emergence of global environmental problems such as ozone depletion and global warming, and the growing sense that the world environment is ecologically interconnected, has made the need for global environmental regulation increasingly clear.\(^{39}\) It is arguable whether environmental sovereignty can realistically be a defense for nations with sub-par environmental policies and practices. One nation’s pollution can, and does, contribute to damage of the global commons. Under the current system, there are too many overlapping or under-inclusive organizations and agreements, which fail to provide a solid platform upon which the international environment can be governed. In some cases, multiple treaties or organizations will cover the same environmental harm, leaving confusion over which countries are complying with what treaty. This inherent lack of transparency creates the incentive for problems with free rider nations. In other cases, there are problems with the acceptance of treaties, such as the case with the Kyoto Protocol.\(^{40}\)

In order to ascertain what kind of international regime would be optimal, we must first look at some of the deficiencies that exist today. It has become clear that the relationship between the GATT/WTO rules and Multilateral Environmental Agreements needs clarification. Most of the environmental problems that have been treated on the international level have been dealt with in a segmented and uncoordinated manner. Despite the great activity in drafting new international environmental treaties in recent years, growth and development of environmental organizations has not been significantly

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\(^{37}\) See, supra note 1.

\(^{38}\) Id.


\(^{40}\) See, supra note 20.
furthered on an institutional context. The problem with overlap has been exacerbated by the independent nature that has characterized most MEA’s, as the secretariats have failed to collaborate and are located far from one another.

Current Deficiencies under GATT

The current GATT/WTO system is a regime consisting of primarily “negative” obligations in which states agree to refrain from taking actions that could impede market access. In the interest of trade liberalization, the GATT/WTO rules are designed to encourage deregulated markets through the removal of national measures that serve as barriers to trade. This includes non-tariff barriers such as environmental regulations that restrict market access for beef and gasoline, to name two recent examples. This has led some to criticize GATT as being “asymmetric” in terms of how it addresses environmental regulation. Namely, that it provides for assessments that a given nation’s environmental standard is, in some sense, too high and a burden on trade flows. However, no comparable provision exists to allow a determination that an environmental standard is too low and is burdening other countries with pollution externalities. Judgments such as the latter are necessary to determine whether a nation is “free riding” by possibly reducing its manufacture costs and obtaining an unfair trade advantage, rather than participating in efforts to address trans-border environmental problems. The obvious end goal here was to reduce or eliminate the free-rider problem and to maximize international compliance.

Enforcement of a nation’s environmental standards under GATT is accomplished by circumventing the permissible scope of domestic regulation for goods in international trade. Primarily, this is done via the Article XX(b) exception, as a means for justifying a given nation’s environmental measure. It mandates that a nation’s environmental standard or justification for restricting import of a foreign product is “necessary” and does not “arbitrarily and unjustifiably” discriminate between countries where the same conditions prevail, or restrict international trade. The other major provision of GATT is the “National Treatment” Standard, or Article III. This allows countries to require that foreign products conform to domestic regulations as long as such regulations treat foreign

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42 Id.
43 Id.
44 See, supra note 13.
45 Id.
46 Id.
products no less favorably than "like products" of domestic origin. Lastly, prohibitions against so-called technical barriers to trade (TBT’s) have also been mentioned in reference to potential trade and environmental conflicts. All of the above focus on measures a national government can take to enforce its own environmental policies, the greater emphasis being placed on the condition that trade is not restricted unnecessarily. As the emphasis remains on promoting trade liberalization, as opposed to enforcement and development of environmental policies of a more global nature, there is little freedom for environmental standards to evolve commensurate with growing international awareness and scientific evidence reinforcing such a need.

The GATT/WTO regime approaches sustainable development in the following manner: deregulated markets promote trade, trade generates wealth, and wealthier countries have more resources to deploy for realizing environmental protection. Such an indirect approach to the environment cuts against the reality of large-scale compliance, specifically for developing nations, as this approach is an inherently long-term solution that is largely based on theory. Moreover, such a long time frame is unrealistic to address the imminence of global environmental harm. To attempt to resolve the applicable conflicts between trade and the environment, the salient issues must be addressed in conjunction with one another, under an overarching organization. The reasoning should follow that independent environmental rules, rather than trade rules favoring trade liberalization alone, are required for effective environmental governance.

Overlapping Scope of Environmental Organizations and MEA’s

A major source of conflict in the regulatory areas of trade and the environment is due to the focus of GATT rules, which aim for freer trade, and the existent environmental rules contained in the governing multilateral environmental agreements (MEA’s), which generally include measures that restrict trade or production. The GATT, institutions or organizations, and MEA’s have come to significantly overlap and converge. In order gain some clarity, the rules governing international environmental law must be addressed as one concern. In the recent 1999 WTO report, the secretariat found that “increased trade and economic integration reinforce the need for greater environmental cooperation on global and trans-border problems.”

Only one international organization has a mission that is exclusively environmental, the United Nations Environmental Program (UNEP). Since its

47 Id.
49 See, Caldwell and Wirth, supra note 41.
50 See, Strauss, supra note 13.
52 Id.
Inception, UNEP has been very instrumental in garnering international environmental cooperation. For example, UNEP was the driving force behind the 1987 Montreal Protocol, it administered the CITES Convention and in forging the Convention on Biological Diversity, it cooperated with the Food and Agriculture Organization of the UN (FAO) in 1998 resulting in the Rotterdam Convention covering trade in hazardous pesticides and chemicals. UNEP is also a driving force to engage private sector leaders in a change of course towards sustainability. Moreover, Governing Council was established in 1975 for the purpose of promoting international cooperation in the field of the environment. Despite UNEP’s important contributions to the field of international environmental cooperation and its strong influence, its institutional existence is focused largely on guidance and recommendation. There is a lack of emphasis on the enforcement of its responsibilities, thereby limiting its functional structure.

Aside from UNEP, there are numerous other organizations that play important, but distinct roles in global environmental regulation. The Organization for Economic Cooperation and Development (OECD) has been instrumental as a forum for discussing transboundary pollution and principles concerning the trade-environment nexus. The U.N. Economic Commission for Europe (ECE) has been the vehicle for negotiating a number of important agreements on traditional air pollution issues and in promoting intergovernmental cooperation with regard to Europe’s timber markets. The UN Conference on Trade and Development (UNCTAD) promotes the integration of trade, environment and development, mainly concerning developing nations, and acts as a task manager in this area for the UN Commission on Sustainable Development. The UN Food and Agricultural Organization (FAO), as mentioned above, has contributed to control of pesticides at the international level.

No tangible focal point exists to effectuate the auspices of so many conventions and organizations in a coherent and transparent manner. The result has been a lack of coordination and a high degree of fragmentation among the numerous organizations and MEA’s. An example of all the areas and linkages that involve international environmental governance include global climate change, ozone depletion, desertification and land cover change, deforestation, conservation of biological diversity, transboundary air pollution, oceans and their living resources, industry and the environment, and population dynamics. Under each of these subjects, there exists numerous treaties or agreements, which total over 150 different MEA’s encompassing the area of international environmental law. Given this, the problem of overlap and confusion becomes apparent.

53 UNEP Achievements, at http://www.unep.org/DOCUMENTS
54 UNEP Governing Bodies, Overview, at http://www.unep.org/DOCUMENTS
55 Id.
56 UNECE, Trade Division, Who We Are and What We Do, at http://www.unece.org/trade
57 UNTAD in Brief, Programmatic Focus, International Trade in Goods and Services, and Commodities, at http://www.unctad.org
The most relevant environmental multilateral agreements, in terms of trade and the environment, have addressed problems that revolve around discrete areas such as the protection of the stratospheric ozone layer, conservation of endangered species, and environmental harm from the trans-border shipment of hazardous waste. These treaties include, but are not limited to: the Basel Convention, the Convention on Biological Diversity, CITES, the Montreal Protocol, and the UN Framework Convention on Climate Change. These treaties potentially affect trade through restrictions on trade, requirements as to notification, or implementation of national laws that further the goals of the treaties. The result is a complicated interrelation between the many various treaties, organizations, and national environmental policies, which are in vital, need of clarification and organization. Despite the attention in those areas, related areas in need of more stringent environmental regulation include toxic chemicals and pesticides, forests, oceans, water resources, air quality, energy resources and land use, urban and industrial growth, to name a few. Treaties exist covering these topics, yet it is useful as an illustration of how complex and interconnected international environmental law can be.

Dispute Resolution under MEA’s

More than one-third of existing international environmental agreements contain dispute settlement provisions. Examples include CITES, the Montreal Protocol, and the Basel Convention. Despite the presence of dispute resolution provisions, they remain largely inadequate or ineffective to date, mainly due to the lack of adequate means of overarching enforcement. When compared to trade agreements, the dispute settlement provisions in MEA’s remain underdeveloped. This is due, in part, to the lack of history in negotiating environmental agreements, as opposed to negotiating trade agreements. To illustrate, some examples of these deficiencies must be brought to light.

The Montreal Protocol has served as an example of an excellent treaty, however is lacking in some degrees, namely on the issue of the discipline of its parties as opposed to non-parties. Montreal Protocol’s dispute settlement provision, Article 8, and its subsequent improvement in Copenhagen in 1992, still do not implement a stringent system for dealing with disputes between the parties. The agreed non-compliance procedure establishes an Implementation Committee of ten Parties whose main task is to seek “amicable” solutions to disputes. Everything is done via consensus. There are no time limits established, and the committee must report to the Meeting of the Parties. Punishments may include the issuance of “cautions” to the parties. There are many exceptions in treaty obligations that are allowed mostly to developing nations that could not be in compliance without such assistance, which may lead to disputes between the parties. Examples include disputes about exemptions allowed to developing or least 59 See, supra note 13.
developed countries (LDC’s), about cheating, or concerning parties who use their consumption reduction targets to justify placing a higher burden on imports from other parties. The party complained against can effectively block all progress by starting the dispute resolution negotiation process, which is slow and involved. As such, the potential for internal disputes is coupled with a lack of adequate means for resolution. Ultimately, the arbitrating process has no teeth, nor does the conciliation commissions recommendations, which only mandate that “the parties shall consider in good faith.” Parties may have their rights and privileges suspended, which is rare in practice, and are not subject to the harsh trade restrictions placed on non-parties, pursuant to Article 4. Alternatively, non-parties are presumed guilty and have their trade unilaterally determined by the terms of the protocol. The inherent weakness of such mechanisms is due to its lack of fairness to non-parties and the potential for abuse of enforcement provisions amongst parties.

The Basel Convention does not subject parties to a definitive dispute settlement process. The Basel Secretariat can prepare reports, which are critical of the breaching parties’ enforcement of the Convention’s obligations. These reports are meant to increase public pressure on the breaching party’s government to mend its ways. However, this can be insufficient to enforce another country in breach. A party can attempt to settle the matter through negotiation, and if this fails to submit the issue before the International Court of Justice or to arbitration. Although the finding of an arbitration is purported to be “final and binding” under Basel, there is no mechanism for ensuring that such a finding will be implemented and enforced. Rather, the party complained against can frustrate further action, while the complaining party is not authorized under the convention (or GATT) to impose a sanction.

As in the Basel Convention, CITES Secretariat may report a breach publicly, after an inquiry and making recommendations, in the hopes for public pressure for remedial action. Similarly, the parties may submit to arbitration by mutual consent. However, no mechanism exists to ensure that the so-called “binding” arbitrating decision is followed.

Increased “Globalization” Reinforce the Need for Greater Environmental Cooperation

In the realm of international environmental harm, the concept of environmental sovereignty is moot. Damage in one area of the globe will, in some way, manifest itself elsewhere to contribute to the overall environmental decay on a planetary scale. This has been realized, as evident by the sectoral policy approaches taken by the US, EU, and

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61 Id.
62 Id.
63 Id.
other regional entities. However, regional entities alone are insufficient, and there is a growing need for international cooperation on matters concerning the global commons.

**Regional Environmental Policies**

In addition to the conflict between the GATT/WTO regime and MEA’s, there are different trade and environment approaches taken by the GATT, NAFTA, the EU, and the US. The potential transferability of the lessons learned in each region must be addressed under a global system. In isolation, the aforementioned merely present ways in which to deal with a specific region’s environmental problems. While that might work on a small scale, it is clear that to address the substantial environmental problems being faced, regulation of the global commons must be pursued.

In the search for more encompassing and affirmative environmental regulation, NAFTA’s treatment of other multilateral environmental agreements remains a promising environmental beginning. The NAFTA environmental side agreement has been characterized by many as the “greenest trade agreement ever.” It employs trade measures, the potential inclusion of environmental expertise on dispute settlement panels, investment disincentives to discourage the formation of “pollution havens” and the emphasis to harmonize up, not down. This side agreement included a more arduous enforcement and dispute settlement provision, which provides for consultations between parties, mediation, and arbitration if needed. In addition, it established the Commission on Environmental Cooperation (CEC). The CEC is adept at identifying and addressing environmental problems, yet it seems unable to mitigate or prevent the environmental effects of the parent trade agreement due to a series of legal and structural weaknesses. These include some procedural hurdles, namely, that the dispute resolution process is relatively slow, as two-thirds of NAFTA parties must concur before the process can continue. In addition, public participation has been said to be limited, which raises certain skepticism among environmental groups and non-governmental organizations (NGO’s). Although NAFTA can be said to be a step in the right direction, the scope of such a multilateral agreement must expand from covering the North American continent, to covering the world. This carries its own attendant complexities.

European Union policy is based on environmental principles. Namely, it takes a strong approach to trade and the environment, mandating that its member states uphold

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64 Id.
65 Id.
66 Id.
67 Id.
70 Id.
tough environmental policies, and incorporates the precautionary principle.\textsuperscript{71} The precautionary principle is defined as: “action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand.”\textsuperscript{72} In the 1990’s, the EU furthered environmental protection pursuant to its Fifth Community Action Programme on the Environment (1992-2000), which emphasized the need for legislation to be complemented with market-based instruments to change environmentally damaging behavior.\textsuperscript{73} In addition, the Action Programme focuses on developing partnerships between government, business, and the general public. A future concern, that mirrors most sectorial and institutional entities at this point, is to strengthen the enforcement of environmental legislation and to expand environmental regulation into all sectors of government and legislation.

The US environmental foreign policy has more recently come to place a higher importance on global environmental policy, however, it stops short of having as rigorous or as binding principles, internally, as the EU. The State Department heads the effort to meet the world’s environmental challenges, and its initiative focuses on three basic premises: (1) the future economy and the American people; (2) world political and economic challenges; and (3) solutions resulting from partnerships with governments, NGO’s and businesses sharing a commitment to a healthier world.\textsuperscript{74} Regional environmental hubs at embassies in Costa Rica, Uzbekistan, Ethiopia, Nepal, Jordan, and Thailand have been put in place to further regional environmental policies that advance our larger national interests. In addition, environmental cooperation has become an important part of US relations with countries like Japan, India, Brazil, and China. Moreover, the US works with the Organization for Security and Cooperation in Europe (OSCE) on current international environmental issues.\textsuperscript{75}

**Environmental Sovereignty and Developing Nations**

Among developing nations, there is an interest to maintain lower environmental regulatory standards under a system of free trade. This is because the costs of meeting environmental regulatory burdens are considerably lower and the resulting profit margin

\textsuperscript{71} Frequently Asked Questions, Environment, at http://www.europa.eu.int/comm/trade/faqs/envir.htm
\textsuperscript{73} The EU and the Environment, at http://www.greeneurope.org/eu-env.htm
\textsuperscript{75} US Statement on Climate Change to OSCE, at http://www.usinfo.state.gov/topical/global/environ/01040601.htm
is larger. This “regulatory race to the bottom,” where states are forced to relax domestic environmental regulations is furthered in the hopes that businesses relocate and local human capital is utilized.\textsuperscript{76} Many developing nations have come to regard lax environmental standards as an unofficial comparative advantage. The true cost of gaining such is borne by those whose quality of life the domestic-origin pollution adversely affects.\textsuperscript{77} With the advent of the global commons concept, this sort of environmental harm is identified as an external cost of production. Any theoretical comparative advantage disappears when this cost of environmental degradation is attributed to the market cost of the product. One problem, however, is due to the difficulty of incorporating environmental harm into the market prices.\textsuperscript{78} The theory goes that this “environmental cost” or externality by nations upholding lax environmental regulations, would receive greater international attention, thereby frustrating that nation’s ability to participate in free-trade, in part due to a lack of compliance with any of the multitude of MEA’s. In terms of corporations, a good corporation will often want to maintain environmental standards higher than required because of external pressure from ecolabeling systems, the financial community, or consumer groups.\textsuperscript{79} Moreover, earlier studies have failed to substantiate a “race to the bottom,” as environmental expenditures constitute a relatively small share of the overall investment cost of large firms.\textsuperscript{80} As such, the fear of a regulatory “race to the bottom” has been largely without merit.

Developing nations are in many cases, the most in need of fostering strong global environmental policies, as they exist in areas prone to drought or in lower lying regions at the mercy of an even minor rising of the sea-level. As such, it would be in their best interest to comply. It goes without saying that international cooperation is needed and developing nations collectively play a large part.

We are increasingly coming to understand that the whole of the earth’s biosphere is ecologically interconnected and that seemingly isolated damage to local environments has complex and deleterious effects on the planet as a whole, although these effects are not immediately known.\textsuperscript{81} So-called domestic pollution, in actuality, contributes to deterioration of the global commons. For example, emissions from an automobile assembly plant in a less environmentally regulated country contributes to global warming and air pollution and/or acid raid in neighboring countries. Local deforestation (of both boreal and tropical rainforests) affects the global climate by reducing the amount of CO2 sinks available to absorb greenhouse gasses (GHG’s). A final example would be that of an oil spill, which could have ecological effects on migratory marine life and on distant

\textsuperscript{76} See, Andrew L. Strauss, \textit{supra} note 13.
\textsuperscript{77} Id.
\textsuperscript{80} See, \textit{supra} note 78.
\textsuperscript{81} Id.
shores. Because the nature of environmental degradation enables it to transcend national borders, it cannot be seen as an exclusively sovereign matter.\textsuperscript{82} Rather, environmental harm is, for all intents and purposes, a global concern that extends beyond the power of individual states to curtail.

Eco-labels

The European Union has been leading the way in furthering environmental friendly labeling of products, otherwise known as eco-labels. The EU eco-label scheme is one element of an overall strategy aimed at promoting environmentally friendly production and consumption. Its objectives are (1) promote the design, production, marketing and use of products that have a reduced environmental impact during their life-cycle; and (2) provide customers with better information on environmental impact of products and to encourage preferential consideration of Eco-labeled products in purchasing decisions. Such labels include those identifying biodegradable detergents, recycled paper products, environmentally safe batteries, and dolphin-safe tuna. As criteria for an increasing number of product groups are included under the EU Eco-label Scheme and as consumers become more aware of it, we can expect to see a greater prevalence of eco-label products.\textsuperscript{83} Aside from the EU, national label schemes have been in existence for some time, such as the German Blue Angel (20 years) and Nordic White Swan (13 years) schemes. Currently, these voluntary life-cycle management approaches primarily cover the environmental costs associated with the disposal and recycling of goods, but will increasingly pertain as standards imposed on the production of goods.\textsuperscript{84}

Ecolabels have the potential of becoming a win-win situation in the usually conflicted arrangement of trade and the environment. The hopes are for an eventual shift in consumer preference towards such environmentally friendly products.\textsuperscript{85} If the demand for environmentally friendly products increases, than the willingness of companies to develop such items will also increase.\textsuperscript{86} Products using ecolabels include virtually every major grouping, with the exception of the food, drink, and pharmaceutical groups. However, work is in progress towards development of criteria for further product groups including furniture, floor cleaning products, vehicle tires, and batteries.\textsuperscript{87} Surveys indicate that consumer interest in the environmental attributes of products is on the rise, and that at least a segment of the population in some OECD countries is willing to pay a

\begin{itemize}
\item \textsuperscript{82} Id.
\item \textsuperscript{83} EU Eco-Label Scheme, \textit{at} http://www.nsai.ie/ecolabel.html
\item \textsuperscript{84} See, C. Stevens, \textit{supra} note 78.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} \textit{State and Business Working Together for Innovation in Environmental Protection}, Press Release 26/98, \textit{at} http://www.umweltbundesamt.de/uba-info-presse-e/pressemitteilungen-e/p-2698-e.htm
\item \textsuperscript{87} See, C. Stevens, \textit{supra} note 78.
\end{itemize}
premium for environmentally sound products. Chapter IV of Agenda 21 acknowledges the potential contribution that eco-labeling can make towards changes in unsustainable consumption patterns. One problem-area is the potential of ecolabels to act as an obstacle to trade. Future guidelines for the standardization of ecolabels would easily remedy this. Thus, standardization would serve the win-win goals of non-interference with trade (trade liberalization) while furthering beneficial environmental practice.

A more recent example in shifting consumer preference towards environmentally friendly methods, is to use eco-labels to ameliorate the EU fishery crisis, where cod and whiting in the North Sea and west of Scotland are in severe danger of collapse. The Forest Stewardship Council’s (FSC) Forestry Certification Scheme is another means of regulation, somewhat analogous to eco-labeling. Certification is based on a set of internationally accepted principles of forest management that are environmentally sound, socially just, and economically viable. In the US, the “green-certification” movement is taking hold amongst logging companies must prove that they are logging in an environmentally conscious way. The logging companies may then place an eco-friendly” label on their products. As a result of such eco-friendly labels, Seven Islands Land Co., has been expanding its sales more widely around the US and in Europe. Seven Island’s president claimed that green certification has provided access to markets that wouldn’t otherwise exist for that company. Prominent among the backers of green-labeled products are Atlanta-based Home Depot, Inc., Briton’s Sainsbury PLC supermarket giant, and Sweden’s huge Stora AB forest-products group.

**International Harmonization of Environmental Policies**

Global standard setting, either within the WTO or by linking such standards in bilateral or multilateral environmental agreements to the WTO, will become of paramount importance in the process of balancing interests relating to trade, and thus market access, and the environment. The activities of one country have increasingly caused negative effects in the environment of other countries by either transboundary pollution, endangering the global environment (ozone depletion), or diminishing wildlife and natural resources. Global harmonization of standards is now necessary to effectively deal with such issues. While it is recognized that higher process standards are desirable,

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89 Id.
an argument stands that the harmonization of process standards, where the processes in question have no trans-border or global environmental effects, is not needed. As such, the case for harmonization is the strongest when dealing with trans-border or global pollution. The OECD has discussed a “harmonization agenda” identifying the most urgent areas for action and the most practical means to help environmental and trade policies converge. Now, the focus is on increasing the international compatibility of environmental policy instruments, – including ambient standards (set maximum concentrations of pollutants in media like air, water, and soil), process and production standards (PPMs), economic instruments (taxes or duties), and eco-labeling schemes. There exists the possibility for harmonization of process and production standards (PPMs), as opposed to other types of environmental policy instruments, yet the feasibility of doing so remains elusive and complicated under the current regime. Process standards are government environment regulations on production methods, technologies, and practices. They include emissions and effluent standards, performance and design standards, and practices prescribed for natural resource sectors. This difficulty is perpetuated by the reality that many developing nations and businesses oppose internationally harmonized PPMs mainly because compliance would impose additional costs. Alternatively, since harmonization would reduce the non-tariff barriers posed by testing and certification of products and the administration of standards, the private sector seeks harmonization of product standards because it is more expensive for producers to diversify products enough to meet the requirements of different importing countries. Such PPMs could be used in areas such as clean air, clean water, hazardous waste, occupational health and safety, and national resource preservation.

One of the International Organization for Standardization (ISO) Technical Committees- TC 207 on Environmental Management- is working on areas relevant to sustainable development, producing “standards” in areas such as environmental management systems (EMS), life-cycle assessment, and environmental labeling. Global environmental management (EMS) refers to an integrated management structure for proactive planning for the proper planning of all corporate environmental concerns or impacts in the home and host countries. A salient example involves the standardization of EMSs sought by ISO 14001 certification, the new voluntary international

93 See, supra note 88.
95 See, C. Stevens, supra note 78.
96 See, supra note 1.
97 See, C. Stevens, supra note 78.
98 Id.
99 See, Andrew L. Strauss, supra note 13.
100 International Organization for Standardization, at http://www.iso.ch

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environmental systems standard for industry. The most common environmental “requirements” relate to packaging, recycled paper, and ozone-depleting chemicals (recycling or waste-management techniques). Although ISO 14001 represents neither the leading edge nor the best practice in environmental management, there would be significant incentives to encourage certification as a condition to unrestricted market access (as a general market condition). However, many global firms have EMSs in place that are considered more advanced than ISO 14001 standardization.

A common fear of many environmentalists is that harmonization of product standards (PPMs) may lead to lower levels of environmental protection via the “lowest common denominator” effect. In other words, PPM standards may have to be lowered across the boards to ensure international compliance and that this would act to lower the higher environmental protection standards already observed by some developed nations. Ecology, national sovereignty, and economics all are seen to play a role to reflecting the different environmental policies and standards inherent from country to country. The Uruguay Round Technical Barriers to Trade Agreement (TBT) recognized that no country should be prevented from taking measures at the level it considers appropriate, including those, which are necessary for the protection of the environment. It follows that convergence down to a relatively lower environmental product and process standards could lower the overall degree of environmental protection. Moreover, the companies producing an environmentally “superior” product could not reap the rewards of using more environmentally sound practices, which generally involve additional costs to the company. Yet in the long term, given the worsening state of the global environment, discrimination against traded products on the basis of production method is inevitable.

This trend has been realized, to some degree, by major global firms. Leading global firms are committed to voluntary environmental management or “greening the supply chain” and sustainable industrial development. For example, Japanese firms see a strong philosophical link between corporate health and human, social, and environmental health. It is popular for many large US firms to issue reports on their performance under some of the voluntary initiatives of the US Environmental Protection Agency (EPA). Government also can play a key role, in supporting efforts to green the production chain. Leadership taken by groups of global firms can set private-sector standards for foreign suppliers and result in win-win scenarios. Microsoft’s environmental innovations, moving from purchasing a packaged product or product with manuals, etc. to licensing their products to be housed on a central server and downloaded,
retain an economic benefit for Microsoft and a waste-stream benefit for their business customers.\textsuperscript{107}

It should be noted that aforementioned environmental standards are voluntary and new. This presents problems with their enforcement, which are currently adhered to because of the positive economic influences inherent in unrestricted market access. The vast disparities among different nations economically and environmentally, are major hurdles in the development of truly harmonized standards that also allow nations with higher standards to maintain their current schemes.

**WTO as an Effective Enforcement and Negotiation Forum**

The WTO now serves as a central focal point in the trade arena with broad-gauge rule making authority potentially covering the entire range of trade-related matters, including environmental standards, among intellectual property, and agricultural areas.\textsuperscript{108} The inherent connection between many trade and environmental issues is inevitably pushing the WTO into involvement with international environmental regulation.\textsuperscript{109} The agreement establishing the WTO refers to “optimal use of the world’s resources in accordance with the objective of sustainable development. The classic problem of compelling international compliance centers on the lack of centralized adjudication and enforcement mechanisms. Presently, the WTO provides the ideal global organizational vehicle with the institutional capability to induce countries to participate in international environmental agreements.\textsuperscript{110} Highly developed adjudicative and enforcement mechanisms are distinguishing characteristics of the WTO. Additionally, all WTO member countries are required to comply with the related agreements governed by the organization. Integrating global environmental agreements into the framework of the WTO would serve to ensure compliance in order to maintain the advantages of membership.

The task of accomplishing greater environmental protection on a global scale requires an institution with sufficient means to secure that goal. Although many environmentalists are leery about the treatment of environmental concerns by the WTO\textsuperscript{111}, there is little doubt that it would provide an appropriate forum with broad enough scope to effectuate more stringent global environmental regulations. The argument for a parallel forum is delaying the inevitable issue in need of resolution, namely, ameliorating the existent disparities between trade and the environment.

\textsuperscript{107} Id.  
\textsuperscript{108} See, Douglas J. Caldwell and David A. Wirth, supra note 41.  
\textsuperscript{109} See, Andrew L. Strauss, supra note 13.  
\textsuperscript{110} Id.  
\textsuperscript{111} Id.
Under the WTO structure, the emphasis would be on getting the regulatory areas of trade and the environment to converge. Access to the benefits flowing from participation as a member of the WTO trade regime, along with the possibility of revoked privileges, could serve as a manner to enforce compliance with the already in place Dispute Settlement Understanding (DSU).\textsuperscript{112} This ability to control a WTO member nation’s market access would foster convergence between the areas of international trade and international environmental regulations, which are seemingly at odds with each other. Enforcement under the WTO could be used to impose the harmonization of international PPMs.\textsuperscript{113} This is not to say attendant difficulties are eliminated. On the contrary, many complexities exist. However, the increasing awareness of the global commons as an international effort and the unsettled conflict aims between trade and the environment must be resolved to face such challenges. The history of international environmental law has shown a strengthening of dispute resolution, as the world has gotten smaller. As consumers and the general public inevitably become more environmentally conscious, corporations continue to improve their environment management systems, and developing nations will have more at stake than the relatively minimal regulatory comparative advantage theory. It then becomes clear that provisions must be made towards a more binding international scheme.

**Securing Large-Scale Compliance**

Utilization of the WTO as a forum for compliance and resolution of disputes would offer advantages of its own. Reaching an agreement on effective globally harmonized environmental standards is undoubtedly going to be an extremely difficult task no matter what arena is chosen, and ultimately will depend upon the strength of the environmental movement.\textsuperscript{114} Including environmental negotiations as a part of WTO comprehensive trade round, would at least help assuage such opposition to global environmental production PPM standards and in the area of dispute resolution.

Larger scale compliance is feasible with the WTO. It is generally accepted that developed countries regard the WTO as essential for international trade, however, developing nations are increasingly coming to view participation in WTO multilateral agreements as an economic necessity.\textsuperscript{115} Future population and economic growth (along with corresponding increases in environmental damage) will occur most dramatically in developing countries. Acceptance of an international structure by developing nations is essential to gain global cooperation and assistance. Broad-based participation by the greatest possible number of developing nations is needed. Of the approximately 200

\textsuperscript{112} See, Andrew L. Strauss, supra note 13.

\textsuperscript{113} Id.

\textsuperscript{114} See, Andrew L. Strauss, supra note 13.

\textsuperscript{115} Id.
countries in the world, about three-quarters are WTO members. Should environmental concerns be aggregated with trade matters, such large-scale compliance could be used as a method to enforce greater protection of the global commons.

Negotiation Platform for Environmental Standards (PPMs)

In terms of coming to an understanding on environmental PPM standards, the WTO would prove to be an efficient forum for negotiation, as PPM requirements could be implemented along parallel trade agreements. Coming to an agreement on international PPM harmonization has its own complexities and difficulties to overcome. Namely, some businesses oppose the standards because of the costs and developing countries oppose the standards because they want to maintain their perceived comparative advantage. By linking harmonized PPM standards to trade pacts in future WTO negotiating rounds, a new means of securing developing countries acceptance of such standards would be available. Acceptance of international PPM standards would be conditioned on access to international markets, as an incentive for compliance. As developing nations will increasingly see membership in the WTO as a “necessity” for economic well-being, the access to new and evolving markets becomes a strong reason to comply with such WTO negotiations and mandates. Bringing PPM standards into multilateral WTO negotiations would permit environmentalists to form strategic alliances with industries that have stronger environmental management systems and policies. This would ensure that their competitors do not enjoy a cost advantage from an overseas location with more lax environmental standards. The leverage gained by coupling environmental PPM requirements with trade would motivate corporations with anti-environmental agendas to reconsider any cost advantage vis-à-vis the potential loss of market access.

Dispute Resolution

Under the WTO, the Dispute Settlement Understanding (DSU) has become an effective enforcement method in the sphere of international trade, and could be used to enforce environmental measures were they incorporated into its framework. The WTO’s adjudicative mechanisms are established in several key provisions of the “Dispute Settlement Understanding” that arose out of the Uruguay Round Agreements. There exists a coherent and regimented adjudication mechanism, consisting of clearly outlined steps. Member nations seeking to resolve a dispute may engage in consultations, followed

116 Id.
117 Id.
118 Id.
119 See, supra note 101.
120 See, Andrew L. Strauss, supra note 13.
by the establishment of a panel to hear the issue, and appellate review if the decision of
the panel is not deemed adequate. The final decision is automatic unless all members,
including the winning party, determine that it should not be adopted. After the panel
report or appellate body report is adopted, the concerned party must notify the Dispute
Settlement Body (DSB) of its intentions with respect to implementation. If it is
impossible to comply immediately, the concerned party is given a reasonable amount of
time for implementation. In the event of non-implementation, provisions of the DSU
set out the rules for compensation or the suspension of concessions to the violating
party. The transparency of the WTO rules and the streamlined dispute resolution
system is, to date, more efficient and functional than that of its predecessor, the GATT.
Prior to the WTO, dispute resolution on the international scene was much slower and less
developed. Globalization has facilitated the need for improved resolution to handle the
increasing likelihood of disputes, as the world continually becomes a smaller place to
live.

In comparison to MEA’s, the dispute resolution now present in the WTO regime
is quite effective by comparison. There is likely to be a continuing need to emphasize the
efficacy of environmental regulatory mechanisms, and also to reassert the connections
between international trade and the environment. In a bottom to top approach,
international environmental obligations require that affirmative governmental actions
address particular problems. By contrast, the overarching, centralized trade regime has
sought to eliminate governmental actions, such as tariffs. This difference in approaches
has been a cause of conflict in effectively regulating the concurrent interests in trade and
the environment. The weaknesses inherent in the mechanisms and institutions for
multilateral cooperation have been recognized by the WTO secretariat 1999 report.

The reason for WTO’s ability to enforce is inherently due to the willingness to
maintain and partake in the international trading order. The Dispute Settlement
Understanding provides that if the party, adjudicated to be in violation of WTO rules,
does not remedy the situation or pay compensation to the winning party, trade
concessions can be withdrawn from the losing party. Rescission of such trade
concessions can be very costly to a nation. Therefore, such compliance with the dispute
resolution mechanisms is effectively voluntary. Such an incentive for compliance is a
very strong reason substantiating the WTO as an appropriate forum for gaining
compliance with environmental measures, should they be included under its framework.
Moreover, in addition to facing international pressures to comply, targeted domestic

121 Legal Texts: The WTO Agreements, A Summary of the Final Act of the Uruguay Round,
at http://www.wto.org
122 See, Andrew L. Strauss, supra note 13.
123 See, supra note 121.
124 Id.
125 Id.
126 See, supra note 39.
industries can assert their own internal pressure on government to comply.\textsuperscript{127} As this applies for environmental treaty obligations, this could be a mechanism to mitigate any regulatory overlap between WTO rules and MEA’s.

**Convergence of Trade and the Environment**

A crucial issue is how both environmental and trade interests can work together to ensure the ultimate compatibility of evolving MEA dispute resolution sanctions and those of the GATT/WTO. In the activities of a variety of international institutions exploring the trade-and-environment relationship, there is a genuine hope for the achievement of balance. The fundamental finding of the WTO secretariat is that increased trade and economic integration reinforce the need for greater environmental cooperation on global and trans-border problems.\textsuperscript{128} The main reason for this is that economic integration makes it harder for government to adopt optimal environmental policies, unilaterally. “The globalization of the world economy may have reduced the regulatory autonomy of countries, thereby making it more difficult to upgrade environmental standards unless as a part of a concerted effort among nations.”\textsuperscript{129} In terms of a solution, there is a need to reinvent environmental institutions and to seek a new global architecture of environmental cooperation, said the 1999 WTO report.\textsuperscript{130} Such an “olive branch” conjecture, on the part of the WTO secretariat, signifies a changing attitude regarding the environment and the “greening” of international trade, so to speak.\textsuperscript{131} Thus, the WTO seems to be moving towards its originally stated incorporation of sustainable development as an objective. Moreover, the secretariat opined that the WTO system, based on legal rights and obligations, could potentially serve as a model for a more structured environmental scheme to garner cooperation among nations. The secretariat stops short of mentioning the methodology for obtaining such a solution.

The question between economic growth and environmental quality assume that both must be balanced against each other. More often, it is becoming evident that the two can be mutually reinforcing and consonant. “Sustainable trade” reflects the notion that trade can facilitate the ability of present generations to meet their economic needs while preserving the capacity of future generations to meet their own needs.\textsuperscript{132} If environmental agreements are grouped in conjunction with trade negotiations, the overall benefits gained from compliance with a trade deal could conceivable outweigh any contingent costs of meeting environmental standards. Thus, businesses with anti-environmental

\textsuperscript{127} Id.
\textsuperscript{128} See, supra note 79.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} See, Douglas J. Caldwell and David A. Wirth, supra note 41.
agendas would be more inclined to accept such environmental policies than if environmental agreements were not enforced by the economic benefits flowing from a trade deal. The 1999 WTO report found that the relationship between a nation's increased economic growth and its level of environmental protection, which presupposes that economic growth results in greater pollution, would be self-correcting. This relationship between trade, economic growth, and the environment was studied via the "Environmental Kuznets Curve" (EKC), which plots national income per capita against a pollution indicator. It was found that some pollution rose at the early stages of development but fell back after a certain income level was attained. Although generally true, this relationship was not evident for all polluters. Second, overall economic growth does not necessarily bring down pollution. Third, bringing down pollution requires active intervention by governments, as greater democratic decision-making tends to promote such intervention. Per se economic growth does not reduce pollution. Rather, pollution reduction requires increased income to be followed by tighter environmental standards.

As eco-labeling is voluntary, as opposed to mandatory, and is one of the least burdensome forms of regulation, the current debate is over whether this sort of environmental regulation should be encouraged, rather than just tolerated by the international trade regime. Regulation involving ecolabeling would be more consistent with the notion of "sustainable development" contained in the WTO agreement and it does not hinder trade.

Obstacles to Implementation in the Current WTO Rules

Certain issues in WTO rules must be addressed before they can move forward as an adequate forum for the global commons. The current environmental impact of WTO rules can undermine environmental quality. For example, wasteful subsidies may indirectly encourage over-fishing, intensive farming, and deforestation. The WTO rules, which are in favor of trade liberalization, can potentially prevent environment or health officials from using the needed regulations, taxes, or trade controls to further that nation's environmental policies. Even uncertainty about WTO rules can lead to "regulatory chill" as governments forego policies to avoid being involved in trade disputes. The 1999 WTO Secretariat report opined that it would be possible to change trade rules to give the WTO a more constructive role in promoting sustainable development.

133 Andrew L. Strauss, supra note 13.
134 See, supra note 79.
135 Id.
136 Id.
137 See, Douglas J. Caldwell and David A. Wirth supra note 41.
138 See, supra note 79
139 Id.

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development. In the interest of keeping environmental policies and trade constituents contented, such a change is necessary for the WTO be an adequate forum. Furthermore, the exclusionary membership policy of the WTO, preventing China and Russia from joining the organization, must be addressed. Although China has recently been admitted to the WTO, the US and EU had stymied its attempts to become a member for some time. If the world trading system were to be beneficial for the environment, it would follow that open membership in the WTO is needed.

Another problem with current GATT/WTO rules is that although they are consistent with "polluter-pays" principles and cost internalization as domestic environmental measures, the same standard should be implemented to enforce international environmental policies. With such an affirmative requirement for cost internalization contained in WTO instruments, the international trade regime could truly promote sustainable trade and environmental protection simultaneously.

Alternative Forums

As motivation for working under the auspices of an international superstructure, such as the WTO, the alternatives must be addressed. Unilateral actions could be pursued under GATT article XX or through the use of retaliatory trade restrictions, such as US §301. This approach would prove detrimental to the international trade order via the creation of inappropriate barriers to trade and would fail to garner the global environmental cooperation needed to address current problems. The isolationist approach, furthered by Ralph Nader, and unilateral enforcement of environmental standards would merely be short term approaches that would cut against the sustainment of long term international relationships that are inherently needed to prevent barriers to trade consonant under an international trade scheme. This would ultimately not bode well in terms of furthering global cooperation needed to address international environmental concerns. For example, if each country took environmental enforcement into its own hands, thereby excluding foreign products in violation, conflicting and incoherent requirements for exporting goods would be the result. Such a lack of transparency would undermine the functioning of the international trade regime. The increased cost in attempting to unilaterally assess environmental problems in countries around the world would cause numerous problems in its enforcement. Moreover, the restricting of imports in violation of local environmental regulations does not adequately address environmental harms of a global nature.

140 Id.
141 See, Douglas J. Caldwell and David A. Wirth, supra note 41.
142 See, supra note 79.
143 Id.
144 Id.
Previous alternative approaches to issues related to international trade have not been as effective when compared to the WTO regime’s approach. In the 1970’s, UNCTAD served as a means to rebalance the economic inequality between developed and developing nations.\textsuperscript{145} It was thought that UNCTAD was a far easier forum to meet this objective. Not taking away the developments obtained by UNCTAD, the true redistribution of wealth and means to further developing nation’s prosperity occurred separately, under GATT.\textsuperscript{146} In dealing with the environment, the declarations of UNCED at the Rio Conference and even many MEA’s have been judged as little more than “empty promises” due to their lack of efficacy.

**Conclusion**

The interrelationship between trade and the environment will continue to converge at an increasing rate as the world continues to grow more interdependent. The efficiency of the WTO as an overarching institution is the fruition of many decades of trial and error, in the area of trade and negotiation between nations. The product of which is inherent in the ability of the WTO to resolve disputes and serve as a forum for negotiation. At this point in time, international environmental law is reaching a maturity point where a more formal approach toward regulation is needed. Treaties and MEA’s are numerous and defragmented. The trend has been towards more binding enforcement mechanisms, as environmental issues become generally recognized as imperative. Some clash between issues involving trade and the environment has been inevitable, as trade is motivated by economic gain, and environmental interests have the effect of curtailing economic advantages in certain cases. The current system governing trade, under the GATT/WTO regime, runs parallel to that monitoring environmental concerns rather than concurrent with. While there are some fears of having an overarching system of governance, such as the WTO, it is increasingly clear that trade and environment issues must be addressed together.

I have attempted to illustrate the inherent advantages of utilizing the WTO as a global forum for environmental regulation. Large-scale compliance could be secured, as more developing nations are joining the WTO, and economic gains reinforce the incentive to become a member. Having as many nations as possible involved would reduce the “free rider” problem and ensure that adequate environmental practices are being utilized. Moreover, the implementation of more binding rules and large-scale compliance could inferably render trade and the environment to be mutually reinforcing upon each other. Namely, the economic incentives contingent upon membership could foster compliance with environmental regulation, if included under a WTO scheme. The

\textsuperscript{145} See, *supra* note 88.
\textsuperscript{146} See, Andrew L. Strauss, *supra* note 13.
real negotiations and battles would be fought in constructing the framework for such an institutional governing scheme. An intangible shift towards the “greening” of commerce could serve as some indication that a “workable compromise” between trade and the environment could be on the horizon.

To be clear, I have only suggested certain examples of where problems lie in our current scheme of environmental regulation, in addition to reasoning on how the WTO could more efficiently address those deficiencies. The precise mechanisms for so doing would involve much negotiation, effort, and substantive content than I could possibly provide for in this note.