

# **The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters**

*by Gregory Shaffer, Professor, University of Wisconsin Law School  
The final version was published in  
25 Harvard Environmental Law Review 1-93 (Winter 2001).*

## I. Theoretical Approaches to the WTO's Treatment of Trade and Environment Matters: The Confrontation of Empirics

- A. An Intergovernmental Approach
- B. A Supranational Technocratic Approach
- C. A Civil Society/Stakeholder Approach

## II. Why Was the WTO Committee on Trade and Environment Formed?

## III. What Accounts for the Agenda of the Committee on Trade and Environment?

- A. Market Access Issues of Concern to All
- B. Environmental Issues of Primary Concern to the United States and EC
- C. Environmental Issues of Primary Concern to Developing Countries

## IV. Alternative Explanations of the Current Status of the CTE Process: Contending States, Neoliberal Networks, Conflicted Stakeholders

- A. Why Negotiation of the 1996 CTE Report Mattered
- B. The Predominant Role of States
  - 1. Intra-State Conflicts
  - 2. State Power
  - 3. Divisions between Powerful States
  - 4. Divisions between Developing Countries
  - 5. Attempts to Change Southern Norms
- C. Role of Neoliberal Interests and Ideas
  - 1. Role of State Trade Bureaucracies
  - 2. Role of Business Interests
  - 3. Role of the WTO Secretariat
- D. Role of Other Stakeholders: Environmental and Developmental Non-governmental Organizations
- E. Relation of State and Stakeholder Positions

## V. Legacies of the WTO Committee on Trade and Environment: Spillover Effects Within and Outside of the World Trade Organization

- A. The CTE as a Laboratory for Increasing WTO Transparency: Enhancing the Role of Civil Society?
- B. The CTE as a Mechanism for Overseeing Environmental Policy: Enhancing the Role of Technocratic Elites?

VI. Conclusions: The World Trade Organization as a Conduit for States Responding to Domestic Pressures; The Prospects of a World Environment Organization

A. A Two-Level Intergovernmental Game: The WTO as an Agent of States

B. A Possible Byproduct of WTO Trade-Environment Conflicts: The Practicable Role and Limits of a World Environment Organization

Table 1. The Agenda of the WTO Committee on Trade and Environment and State Participation

## **The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters**

*by Gregory C. Shaffer<sup>1</sup>*

“Hey-Hey! Ho-Ho! The WTO has got to go!” chanted a potpourri of protestors at the third Ministerial Meeting of the World Trade Organization (WTO), held in Seattle, Washington in December 1999.<sup>2</sup> Mainstream U.S. environmental groups were a core part of the protests, having taken the lead throughout the 1990s in challenging the legitimacy of WTO decision-making. Their central claim is that WTO decisions on trade and environment issues are anti-democratic and thus lack legitimacy.<sup>3</sup> This article takes their charges seriously, assessing the

---

<sup>1</sup> By Gregory C. Shaffer, Professor, University of Wisconsin School of Law. The primary support for this project came from grants from the National Science Foundation Law and Social Science Program and the Smongeski Fund of the University of Wisconsin Foundation. This was complemented by support from the University of Wisconsin graduate school research competition, the University of Wisconsin CIBER fund (U.S. Title VI grant) and the University of Wisconsin World Affairs and the Global Economy (WAGE) Initiative. Earlier versions of this article were presented at the American Society of International Law 1999 annual meeting in Washington DC, March 27, 1999, and at the ASIL International Economic Law Group biannual conference on February 20, 2000 in Washington DC. Thanks go to Francesca Bignami, Steven Charnovitz, Jeffrey Dunoff, Daniel Esty, Robert Hudec, Neil Komesar, Richard Parker, Kal Raustiala and Andrea Schneider for their helpful comments, and to Sonia Brown, Matthew Kim-Miller and Michael Mosser for valuable research assistance. All errors of course remain my own.

<sup>2</sup> Joe Sharkey, *Word for Word/Protest Studies, Skywriting, Collective Disappearance and Other Ways to Up the Revolution*, N.Y. TIMES 7 (Dec. 5, 1999).

<sup>3</sup> See e.g. LORI WALLACH AND MICHELLE SFORZA, WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY (Public Citizen: 1999) (the Preface by Ralph Nader refers to “an autocratic system of international governance that favors corporate interests,” and concludes that “Under the WTO, the race to the bottom is not only in standard of living and environmental health safeguards but in democracy itself” *Id.*, at ix, xi) (underlining included in text); Steven Greenhouse, *Trade Ministers Sidestep a Sticky Issue: Secrecy*, N.Y. TIMES 6 (Dec. 4, 1999) (quoting Lori Wallach, director of Public Citizen’s Global Trade Watch and noting demonstrator’s signs such as “Where Have You Gone, Joe Democracy?”); Henry Holmes, *The World Trade Take-Over*, EARTH ISLAND JOURNAL 38 (winter 1999-2000) (referring to “the WTO’s masterplan,” including its “seeking to expand its ability to override environmental laws); and the statement of WWF-World Wide Fund for Nature, “The WTO remains an institution captured by the special interests of multinational corporations and free trade technocrats.” Don Knapp, *WTO Rejects U.S. Ban on Shrimp Nets That Harm Sea Turtles*, CNN (Oct. 12, 1998) available in <<http://www.cnn.com/US/9810/12/world.trade.ruling/>>. See also the full page advertisement in the New York Times taken out by a consortium of non-governmental organizations, including Friends of the Earth, Sierra Club, the Humane Society of the USA, and Greenpeace USA, under the “Turning Point Project,” entitled *Invisible Government*, A14 (Nov. 29, 1999) (stating “The World Trade Organization (WTO) is emerging as the world’s first global government... and its mandate is this: To undermine the constitutional rights of sovereign nations”).

relative representativeness of those partaking in WTO negotiations to define a legal framework for addressing the interaction of trade and environmental policies. The basic question is who is represented and how they are represented in determining law's contours through the political process at the international level.<sup>4</sup>

This article examines how the World Trade Organization has addressed trade and environment issues through the creation of a specialized Committee on Trade and Environment (CTE), treating the Committee as a site to assess central concerns of governance—that is, who governs—in a globalizing economy. Northern environmental interest groups and many northern academics<sup>5</sup> criticize the WTO Committee on Trade and Environment for failing to propose substantive changes to WTO law in order to grant more deference to national environmental policies having extraterritorial effects.<sup>6</sup> The article, through its focus on the positions and roles of

---

<sup>4</sup> This article addresses the issue of representation in the negotiation and creation of WTO rules, and not the interpretation of existing WTO rules by WTO judicial panels, which is the subject of a separate on-going study

<sup>5</sup> This article expressly adopts the term *northern*—and not western—non-governmental organizations, academics, media, and governments to emphasize that these are predominantly north-south, and not east-west, issues that often divide not only governments, but also their respective constituencies, in reflection of their respective interests, values and priorities.

<sup>6</sup> See, e.g., Steve Charnovitz, *A Critical Guide to the WTO's Report on Trade and Environment*, 14 ARIZONA J. OF INT'L & COMP. L. 341, 342 (1997) (stating “hopes were dashed. When the CTE issued its report in November 1996, it became clear that two years of inter-governmental deliberations had yielded little output.”); World Wide Fund For Nature (WWF), *Introduction to The WTO Committee on Trade and Environment Is it Serious?* (maintaining that the Committee is not serious about “making appropriate recommendations on whether any modifications of WTO rules” are required to accommodate environment policies) (visited Oct. 31, 1999) <<http://www.panda.org/resources/publications/sustainability/wto/intro.htm>>; International Institute for Sustainable Development (IISD), *The World Trade Organization and Sustainable Development: An Independent Assessment*, (maintaining that the Committee has failed to fulfill its primary task of recommending necessary changes to WTO provisions) (visited Oct. 31, 1999) <<http://iisd.ca/trade/wto/wtoreport.htm>>.

A number of U.S. and European academics have recommended a modification of WTO substantive and/or procedural rules in order to grant more deference to national environmental policies having extraterritorial effects. See e.g. DANIEL ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 113-136 (1994) [ESTY, GREENING THE GATT] (proposing a three-prong test to address trade-environment issues in a more balanced manner); Jeffrey Dunoff, *The Death of the Trade Regime*, 10 EJIL 733 (proposing new procedural mechanisms whereby WTO dispute settlement panels would avoid controversial trade-environment cases on standing, ripeness, political question and related ground, thereby permitting domestic trade restrictions imposed on environmental grounds to remain unchallenged before the WTO); Jeffrey Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, supra note 5, at 1043 (recommending an institutional alternative to the GATT for the resolution of trade-environment conflicts); Philip Nichols, *Trade Without Values*, 90 Nw. U.L. Rev. 658 (proposing the creation of “an exception that would allow certain laws or actions to exist if they violate the rules of the World Trade Organization,” provided that “the impediment to trade must be incidental,” and the measure must be “undertaken for the purpose of reflecting an underlying societal value,” at 660); James Cameron, *Dispute Settlement*

state and non-state actors, provides an empirical grounding to better assess the democratic accountability of the WTO's handling of trade-environment matters. It examines the representativeness of national trade agencies before the Committee on Trade and Environment, the impact of a sophisticated WTO international secretariat in framing debates, shaping knowledge and the appreciation of alternatives, and the role of powerful commercial interests and transnational environmental advocacy groups pressing for their conflicting goals.

Understanding the Committee on Trade and Environment is essential for three primary reasons. First, for those challenging the correctness and legitimacy of GATT and WTO panel decisions in trade-environment cases, the CTE discussions highlight how most countries (and their constituencies) believe panels *should* apply GATT and WTO rules. It is simply disingenuous to challenge the legitimacy and democratic accountability of WTO judicial decisions without recognizing how representatives in the WTO's *political* body (the CTE) believed that the rules should be interpreted and/or modified. One of this Article's central aims is to explain how most of the world outside of the United States feels about this issue, and why.

Second, this analysis shows how the World Trade Organization as a whole works in practice, and, in particular, why trade-environment discussions are often more polarized within the WTO than in other fora. Third, although this study focuses on a WTO political body, it has significant implications for understanding the law and politics of trade-environment linkages addressed in other international and regional fora. Many environmental groups and trade policymakers, including the outgoing WTO Director General Renato Ruggiero, call for the creation of a World Environment Organization.<sup>7</sup> This article concludes by assessing the constraints and prospects of discussions in such complementary and alternative fora.

The article's analysis is based on a sociolegal approach, focusing on the role of the contending players within the WTO's institutional context and their relationship to domestic

---

*and Conflicting Trade and Environment Regimes*, in *Trade and the Environment: Bridging the Gap* (eds. Agata Fijalkowski and James Cameron (1998) (critiquing the CTE for its failure to produce more environmentally sensitive policy solutions for addressing trade-environment disputes under WTO law). Not surprisingly, for reasons examined in this article, there is little to no support of such environmental accommodations among academics from developing countries.

<sup>7</sup> See Daniel Pruzin, *WTO Chief Outlines Plans for Increased Transparency*, 15 Int'l Trade Rep. (BNA) 1263 (July 22, 1998). See also *infra* notes 338 and 349.

policy debates.<sup>8</sup> Its central premise is that larger “macro” theoretical and public policy analyses and normative legal prescriptions about “legitimacy,” “democracy” and “accountability”<sup>9</sup> offer little value without a “micro” understanding of the underlying roles of power, access and interests in shaping legal outcomes.<sup>10</sup> As the legal realist Karl Llewellyn maintained in the 1930s,

---

<sup>8</sup> The evaluation of law in terms of actor behavior as opposed to formal rules was advocated in US legal circles by the legal realists during the intra-war period and, more recently, by “law and society” scholars. Sociolegal, or “law and society” scholarship, addresses the interactions of law and social phenomena, giving rise to what University of Wisconsin Professor Stuart Macaulay calls the “law-in-action.” For an introduction to “law and society” scholarship, see *LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW* (Stuart Macaulay, Lawrence Friedman, John Stokely, eds) (1995). See also, Stuart Macaulay, *Law and the Behavioral Sciences: Is There and There There?* 6 *LAW & POLICY* 149 (1984) (noting some of the achievements of law and society scholarship and responding to critiques from critical legal studies scholars). For a legal realist approach, see e.g. Karl Llewellyn, *Some Realism about Realism- Responding to Dean Pound*, 44 *Harv. L. Rev.* 1222, 1247-49 (1931) (maintaining that scholarship need focus on “the effects of their action [of courts, legislators and administrators] on the laymen of the community”).

<sup>9</sup> For important assessments of international governance in terms of legitimacy, accountability and democratic, see e.g. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 *AMERICAN J. OF INT’L L.* 596 (July 1999) (assessing legitimacy in terms of state consent, transparency and public participation, and technocratic expertise resulting in “good” decisions); Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium (ed. Joseph Nye, papers at a conference at the John F. Kennedy School of Government, June 1-2, 2000, forthcoming with Brookings, 2001); Robert Howse, *The Legitimacy of the World Trade Organization*, at 21-25, 1999) (manuscript on file) (referring to the epistemic power and illegitimacy of the “network of trade experts” in GATT and WTO policymaking, while maintaining that the WTO Appellate Body has somewhat curtailed their previous influence. GATT refers to the General Agreement on Tariffs and Trade, the predecessor to the WTO); ABRAHAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 127-34 (1995) (on the legitimacy of norms such as “fairness”); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 *CORNELL INT’L J.* 631 (1994); David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 *IOWA L. REV.* 769 (1994); Kal Raustiala, *Democracy, Sovereignty, and the Slow Pace of International Negotiations*, 8 *INT’L ENV’T AFF.* 3 (1996); Jonas Ebbesson, *The Notion of Public Participation in International Environmental Law*, 1997 *Y.B. INT’L ENV’T L.* 51 (1998); DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995); Paul Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 *N.W. J. INT’L L. & BUS.* 681 (1997); Grainne de Burca, *The Quest for Legitimacy in the European Union*, 59 *Mod. L. Rev.* (1996); J.H. Weiler, *European Democracy and its Critique*, 18 *W. EUR POL.* 4 (1995).

<sup>10</sup> In international relations scholarship, there is an on-going debate as to whether such microfoundations should be based on an *economic* model of *actors/agents* rationally pursuing their self-interests, or on a more *sociological* approach that assesses the impact of the overall international *structure* in which agents interact. See e.g. Alexander Wendt, *Collective Identity Formation and the International State*, *American Political Science Review* 384, 385 (June 1994) (arguing that, under a structural constructivist model of international relations, “state identities and interests are in important part constructed by these social structures.”). This controversy is sometimes referred to as the agent-structure debate. While this article is based on an actor-centric approach, it also integrates an assessment of the impact of the overall WTO system on outcomes (see model 2 described in *infra* note 17 and accompanying text).

“The argument is simply that no judgment of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing.”<sup>11</sup>

Part I provides an overview of three competing theoretical perspectives on the WTO’s treatment of trade-environment matters, in order to set up a subsequent examination of their relative explanatory power. The three perspectives are a *two-level intergovernmental model*, a *supranational technocratic model*, and a *civil society/stakeholder model*.<sup>12</sup> The first focuses on national representatives as advocates of national positions; the second on the role of international bureaucrats (the WTO secretariat) and transgovernmental networks of trade officials in shaping options; and the third on the role of non-governmental actors intervening directly at the international level.

These competing theoretical frames are then applied to the article’s empirical assessments. Parts II, III and IV respectively address why the WTO Committee on Trade and Environment was formed, what accounts for its agenda and what accounts for the current status of Committee deliberations. Part IV addresses such competing explanations as the roles of state power, intra-state conflicts, a neoliberal-oriented WTO secretariat, state trade bureaucracies, business interests, and national and transnational environmental and developmental activist groups. It concludes by examining the relation of national “stakeholder” positions with those of their respective states, finding that divisions between northern and southern states have largely mirrored divisions between northern and southern non-governmental organizations. In short, the World Trade Organization is not such an anti-democratic institution as its critics, including U.S.

---

<sup>11</sup> Llewellyn called for “the temporary divorce of Is and Ought for purposes of study.” See Karl Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236-37 (1931). The data for this study are drawn from interviews with the major participants in the Committee process, a comprehensive review of internal WTO-CTE documents submitted by members, the WTO secretariat and representatives of other intergovernmental organizations, and statements from business associations and environmental and developmental activist groups from around the world. These documents comprise thousands of pages of position-taking, analysis and information exchange. See *infra* notes 121-122, 148 and 219 and accompanying texts.

<sup>12</sup>See *infra* notes 16-18 and accompanying text.

academic critics, holding predominantly parochial views,<sup>13</sup> claim.

Part V addresses the spillover effects of the CTE process outside of the Committee, in particular through its enhancement of the transparency<sup>14</sup> of WTO decision-making, and its facilitation of inter- and intra-state coordination of trade-environment policy. This broader, more diffuse impact (not the failure to agree to legal amendments to WTO rules) will be the primary legacy of the WTO's Committee on Trade and Environment. Part VI, the conclusion, assesses the rationale for, and prospects and constraints of, moving beyond the current stalemate within the Committee on Trade and Environment through the creation of a World Environment Organization. It notes that these constraints are significant because trade-environment tensions reflect differing social values, priorities and interests between and within states, and that their resolution will be determined neither by an "international civil society of stakeholders" nor by a technocratic international elite with a particular ideological orientation.

The article finds that, while an intergovernmental model best explains the formation and operation of the WTO's Committee on Trade and Environment, the notion of the state must be disaggregated to assess conflicts within states among interest groups and state agencies. It assesses how powerful WTO members, such as the United States and the European Union, have

---

<sup>13</sup> See e.g. reports on the Seattle demonstrations in the Indian press, as in C. Rammanohar Reddy, *Globalization Bottoms Out*, THE HINDU (Dec. 19, 1999), noting "The Seattle demonstrators were not articulating any global concern about WTO-driven intrusion into public space. The campaign was almost entirely driven by the interests of local U.S. groups. This was why the demonstrations were making demands on environment and labour standards that seemed to be inimical to the interests of the poor countries, a feature of the street action that many have already commented on." The article found that "One aspect of the street protests during the recent WTO conference was apparent and disconcerting-- the ignorance of Third World issues."

<sup>14</sup> The term "transparency" is a buzzword used in public discourse to assess public access- or lack thereof- to deliberations and dispute settlement hearing within the World Trade Organization over trade and trade-related policies. This public access could be either (i) direct, through the provision of access of non-governmental groups to WTO negotiating rooms, committee meetings and dispute settlement hearings; or (ii) indirect, through making the minutes of meetings and transcripts of hearings, as well as all position papers, secretariat studies and legal briefs submitted to them, publicly available over the Internet and by other media on an expeditious basis. The existing WTO rules concerning public access to documents are set forth in WTO General Council Decision, *Procedures for the Circulation and Derestriction of WTO Documents*, WT/L/160/Rev.1 (July 22, 1996). For an overview of these rules prepared for non-governmental groups, see e.g. John Weiner and Brennan Van Dyke, *A Handbook for Obtaining Documents from the World Trade Organization*, Center for International Environmental Law (undated) (on file), and Brennan Van Dyke and John Weiner, *An Introduction to the WTO Decision on Document Restriction*, Center for International Environmental Law (undated) (on file) (both published by the International Centre for Trade and Sustainable Development).

been driven and constrained by conflicts among influential political constituencies that work with and through their state representatives, consistent with a two-level intergovernmental approach. The divisiveness within the WTO's two most powerful members has significantly contributed to the stalemate within the WTO Committee on Trade Environment, and thus the disaffection of U.S. and EU environmental activist groups who are more concerned about outcomes than process. This stalemate does not, however, mean that decision-making within the WTO Committee has been anti-democratic, or would be more democratic were an alternative "stakeholder" model implemented. Rather, the blockage within the CTE has been caused in large part by divisions between and within the very governments in which northern-based non-governmental organizations are based, governments which, in turn, are the two most powerful members of the World Trade Organization.

This article's findings demonstrate that, despite critics' claims, the World Trade Organization is not an autonomous neoliberal dominated organization that is (by nature) anti-environment and anti-democratic.<sup>15</sup> Rather, decision-making processes within the World Trade Organization are, for the most part, properly based on an "intergovernmental" model that, compared to the "civil society/stakeholder" and "supranational" alternatives, represents the best bet for ensuring relatively unbiased participation of disparate interests around the globe in an international fora. The article finds that implementation of a "civil society/stakeholder" model in which non-governmental groups play a direct role in determining policy outcomes at the international level is fraught with much greater problems of over- and under-representation than the model's advocates admit. This is particularly the case for developing country constituencies whose stakeholders, from the standpoint of direct participation, are always under-represented internationally. While there is certainly continued room for improvement, the WTO's Committee on Trade and Environment has facilitated the coordination of trade and environment policies domestically and internationally, and served as an important laboratory for enhancing the

---

<sup>15</sup> For support from a developing country non-governmental commentator, see B.S. Chimni, *WTO and Environment: Shrimp-Turtle and EC-Hormone Cases*, 35 *Economic and Political Weekly*, 1752 (May 13, 2000) ("The WTO is far from being the anti-environment organisation it is portrayed to be by northern NGOs and academics."). Ironically, the paper was financially supported by World Wide Fund for Nature-India, which in turn is supported by its northern parent organization.

transparency of the World Trade Organization as a whole. In this way, domestic constituencies may interact, in the future, on a somewhat more informed basis with their national representatives in determining state negotiating positions in international fora that implicate domestic concerns.

### **I. Theoretical Approaches to the WTO's Treatment of Trade and Environment Matters: The Confrontation of Empirics**

This article applies three “ideal types” as alternative frames of analysis to respond to normative critiques of the WTO's treatment of trade and environment matters as anti-democratic. The three examined perspectives are:

- (i) an *intergovernmental perspective* which holds that the creation of the WTO Committee on Trade and Environment represents an attempt by states to take control of the trade and environment debate by bringing it to an organization which is state-dominated. Under a *two-level intergovernmental model*, this first perspective incorporates portions of the latter two, maintaining that national positions are shaped by national political processes involving competition among business and other stakeholder interests attempting to influence government, as well as competition among governmental actors attempting to respond to and shape constituent demands;<sup>16</sup>
- (ii) a *supranational technocratic perspective* which appraises the WTO's handling of trade and environment matters as a cooptation of policy-making by a technocratic network of trade policymakers having a *neoliberal*<sup>17</sup> policy orientation; the network is composed of national trade

---

<sup>16</sup> The two-level intergovernmental model (in its ideal type), however, does not incorporate the entirety of the latter two models since it does not address the impact of international institutions on national identities and interests. Rather it maintains (i) that state representatives—and not supranational bureaucrats such as members of the WTO secretariat—are the primary determinants of outcomes negotiated in the WTO; (ii) that governments ultimately take a single national position (despite inter-agency divisions) on issues of importance, as determined by domestic political processes; and (iii) that non-governmental stakeholders do not directly shape outcomes at the international level, but rather only have indirect effects to the extent their views are adopted as national positions, in particular by powerful states.

<sup>17</sup> The term “neoliberal” refers to a model of societal relations where government regulation of trade is constrained in order to foster the play of market forces driven by private enterprises pursuing profit maximization. Neoliberal commentators often rely on “public choice” theory, which maintains that trade protectionism is best explained by self-interested public authorities responding to well-organized minoritarian domestic producer interests.

officials working with the WTO secretariat, in turn supported by large private transnational businesses, all acting within the structure of the WTO trade regime; and (iii) a *stakeholder/civil society perspective* which views the creation of the Committee on Trade and Environment as a response to ongoing systematic pressure from non-governmental advocacy groups before international and domestic fora to change the norms of the world trading system.<sup>18</sup>

These three models respectively focus on the roles of different players in determining political outcomes: states (as ultimately represented by chiefs of government), international and national trade bureaucrats (working through a transgovernmental trade policy network), and transnational non-governmental actors. These three “ideal types” are used as alternative frameworks for analysis because they incorporate the terms and concepts most prevalently used and abused by commentators on the World Trade Organization. This Article examines their relative explanatory power as applied to the WTO, assessing (i) why the WTO Committee on Trade and Environment was formed; (ii) what accounts for its agenda; (iii) what explains the current status of CTE discussions; and (iv) what external developments has the CTE internal process spurred. This evaluation in turn permits us to better assess the democratic accountability of the World Trade Organization as a whole, and the prospects and limits of forming alternative international fora, such as a World Environment Organization, to address these same issues. By examining *What Is*, the article provides us with the tools to better assess proposals for *What Ought*. The three models offer not only positive predictions, but also have normative aspirations

---

*See e.g.* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE, Ronald Jones & Anne Kreuger, eds. (1990). On public choice theory, *see* MANCUR OLSON, THE RISE AND DECLINE OF NATIONS 77-79 (1982) (noting how protectionist interest groups can skew domestic policymaking, reducing national welfare) and, more generally, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

The use of the term “neoliberal” in this context should not be confused with the term “neoliberal institutionalism” (sometimes referred to as “rational internationalism”), a theory of international relations that is state-based, addressing why states agree to create international institutions to advance state goals. *See infra* notes 21-22.

<sup>18</sup> In international relations theory, the stakeholder/civil society model can be viewed as a version of transnational relations theory, which focuses on the role of private actors, including business and non-business actors in directly determining policy outcomes. See presentation of transnational relations theory in Mark Pollack and Gregory Shaffer, *Transatlantic Governance in Historical and Theoretical Perspective*, in TRANSATLANTIC GOVERNANCE IN A GLOBAL ECONOMY (Mark Pollack and Gregory Shaffer, eds.) (2001) [POLLACK AND SHAFFER, TRANSATLANTIC GOVERNANCE].

and implications,<sup>19</sup> which I also examine.

### A. A Two-level Game Intergovernmental Approach

Scholars taking an intergovernmental approach view international organizations as formed and controlled entirely or predominantly by states to further state interests— and not those of non-state actors, whether corporate or otherwise, or semi-autonomous lower level government officials. From a classical realist perspective, international institutions reflect the interests of the most powerful states, and do not constrain their operations.<sup>20</sup> Rational institutionalists, on the other hand, maintain that even powerful states often agree to constraints imposed on them by international institutions in order to further national goals.<sup>21</sup> In their view, states create

---

<sup>19</sup> The three chosen perspectives have been employed to a different extent, and from a predominately a normative perspective, in the important and oft-cited article by Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 828, 838 (1995) [hereinafter Shell, *Analysis of the World Trade Organization*], in which Shell advocates a “stakeholder” model as “a blueprint.” Unlike Shell, however, this Article takes a sociolegal approach, assessing the subsoil (players, power dynamics and institutional context) on which the foundations of any normative model (such as a stakeholder model) would be built. In addition, the Article presents each of the models in a slightly different manner than does Shell. While Shell, borrowing from regime theory, refers to a “regime management model” of WTO policy-making, this Article adopts a two-level intergovernmental perspective into its analysis of state-state negotiations, thereby incorporating the impact of commercial and other interests in the formation of national positions. As for the stakeholder model, this Article addresses its functional and normative limits in light of the relative stakes and power positions of stakeholders that, in fact, would best take advantage of such model, were it implemented. These stakeholders, of course, do not work in a vacuum, but may make alliances with representatives from the more powerful states, where in fact, the wealthiest and best organized stakeholders are located.

<sup>20</sup> See, for example, the articles in *NEOREALISM AND ITS CRITICS* (Robert Keohane ed., 1986), and in particular, the chapters by Kenneth Waltz; ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* (1987); JOSEPH M. GRIECO, *COOPERATION AMONG NATIONS: EUROPE, AMERICA, AND NON-TARIFF BARRIERS TO TRADE* (1990) (while Grieco agrees that institutions matter, as a neorealist, he focuses on state power and the importance of relative, as opposed to absolute, gains in the negotiation of trade liberalizing agreements). A reflection of a realist approach to international environmental politics is seen in Hurrell and Kingsbury, *Introduction* 11 *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT* (Andrew Hurrell & Benedict Kingsbury eds., 1992), one of whose three central themes is “the nature and significance for international environmental protection of the conflicts between states over power, over the distribution of the costs of environmental management, and over questions bearing upon state sovereignty and freedom of action”).

<sup>21</sup> See, e.g., ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Ken Abbot, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. OF INT’L L. 335 (1989). Rational institutionalists are sometimes referred to as “neoliberal institutionalists.” There are, of course, a number of variants of these theories, a fruitful overview of which is provided in *THEORIES OF INTERNATIONAL REGIMES* (Andreas Hasenclever, Peter Mayer, Volker Rittberger, eds., 1997) (contrasting those theories of international regimes which are “interest-based” (i.e. rational institutionalist accounts), from those which are “power-based” (i.e. realist accounts) or “knowledge-based” (i.e. constructivist accounts)). The term “neoliberal institutionalism” is purposefully not used in this article to avoid confusion with the more common use of the term “neoliberal” in critiques of the World Trade Organization and other developments in international policy-making.

international institutions to reduce the transaction and information costs of negotiating and monitoring agreements, thereby helping ensure that reciprocally beneficial bargains are sustained.<sup>22</sup>

A variant of intergovernmental theory broadens this analysis by focusing on a two-level game that combines competition between domestic private interests leading to the formation of national positions, with competition between states that promote those interests internationally.<sup>23</sup> National positions are first formed “liberally” through domestic political processes, often involving conflicts among competing interest groups. These national positions are then defended by state representatives in bilateral and multilateral “intergovernmental” negotiations. For liberal intergovernmentalists, national positions are not abstract or static, but contingent, shaped by internal pressures from competing stakeholder interests. International institutions, such as the World Trade Organization, offer new possibilities of confrontation not only among, but also within, states.<sup>24</sup> The WTO is not simply a neutral arena for facilitating reciprocally beneficial

---

For a definition of the more popular use of the term neoliberal, as used in this article, *see supra* note \_\_\_.

<sup>22</sup> Rational institutionalists borrow from game theory and neo-institutional economics. In a two-player “prisoners’ dilemma” game, for example, each player is worse off from cheating unless both players cheat, in which case both are worse off. If the game is repeated into the future, both players will have an incentive not to cheat. *See* discussion in Abbot, *supra* note 21. *See also* Robert Axelrod & Robert Keohane, *Achieving Cooperation under Anarchy: Strategies and Institutions*, 31 *WORLD POL.* 226 (1985); Duncan Snidal, *Coordination Versus Prisoners’ Dilemma: Implications for International Cooperation and Regimes*, 79 *American Political Science Review* 923 (1985). As Douglas North, the neo-institutional economist, writes, “Effective institutions raise the benefits of cooperative solutions or the costs of defection, to use game theoretic terms.” Douglas North, *Institutions*, 5 *J. EC. PERSP.* 97, 98 (Winter 1997).

<sup>23</sup> *See e.g.*, Robert Putman, *Diplomacy and Domestic Politics: The Logic of Two-level Games*, *INT’L ORG.* 427 (1988); *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* (Peter B. Evans et al., eds., 1993). *See also* Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 *J. COMMON MKT. STUD.* 473, 483 (1993) (“Groups articulate preferences; governments aggregate them.”). Moravcsik names his theoretical approach “liberal intergovernmentalism,” since he focuses on how domestic constituents shape state positions in a “liberal” process, with state representatives then advancing such positions in interstate bargaining within the EC. For an application of the model to international environmental politics, *see e.g.*, *GLOBAL ENVIRONMENTAL POLITICS* 22, 31-37 (Gareth Porter and Janet Welsh Brown, eds, 2<sup>nd</sup> ed., 1996) (noting that “state actors are the final determinants of global environmental issues,” but that a theoretical explanation for global environmental regime formation or change... must incorporate the variable of state actors’ domestic politics.”).

<sup>24</sup> *See e.g.* Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 *International Organization* 661, 687 (summer 2000) (“To paraphrase E.H. Carr, legalized institutions offer a new meeting place for ethics and power, among , as well as within, societies.”).

intergovernmental outcomes, but a new institutional means for domestic actors to attempt to obtain their demands.<sup>25</sup>

In a two-level intergovernmental game, heads of national governments may be caught between a rock and a hard place—that is, between the demands of domestic constituencies and conditions required by their foreign counterparts. Nonetheless, they may also retain considerable flexibility on account of their unique position at both negotiating sites. They may thus be able to shape international and domestic outcomes through employing such strategies as offering side payments to domestic groups in order to win support,<sup>26</sup> targeting threats or concessions at foreign interest groups to modify foreign positions,<sup>27</sup> linking issues to rally support of key domestic and foreign constituencies,<sup>28</sup> or manipulating information about domestic political constraints,<sup>29</sup> or manipulating domestic ratification procedures or information about an

---

<sup>25</sup> Cf. Helen Milner, *Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics*, 52 *International Organization* 759, 784 (Autumn 1998) (noting that, under her version of rational institutionalist analysis, “Institutions are not viewed as neutral arenas for cooperation, rather they are political means to realize one’s preferences.”).

<sup>26</sup> Examples include the EC’s use of sectoral side-payments to the Portuguese textile industry to secure the assent of a reticent Portuguese government for the conclusion of the Uruguay Round and creation of the WTO. See the description in Youri Devuyt, *The European Community and the Conclusion of the Uruguay Round*, in 3 *THE STATE OF THE EUROPEAN UNION* 449-467 (Carolyn Rhodes & Sonia Mazey eds., 1995).

<sup>27</sup> See, e.g., *Bananas: U.S. Issues Final List of European Imports to Be Hit with Higher Duties in Banana Row*, *Int’l Trade Daily (BNA)* (April 12, 1999) (listing the United States’ retaliatory targets in its dispute with the EC over its implementation of the WTO decision EC–Regime for the Importation, Sale and Distribution of Bananas).

<sup>28</sup> By incorporating trade in services and the protection of intellectual property rights into the WTO and NAFTA trade regimes, for example, the Office of the United States Trade Representative garnered support from powerful domestic constituencies to lobby for the ratification of these politically-sensitive trade liberalization agreements.

<sup>29</sup> U.S. trade representatives may refer to, and possibly even instigate, hard-line declarations from the U.S. Congress to coerce foreign negotiators. See, e.g., I.M. DESTLER, *AMERICAN TRADE POLITICS* (3rd ed. 1995) (noting how USTR Robert Strauss worked Congress when negotiating with the Japanese in the late 1970s). Similarly, the European Commission may refer to French hard-line positions on agricultural negotiations to constrain the demands of U.S. and other negotiators for eliminating subsidies and other protective measures favoring EC agricultural producers. Cf. *infra* note 176 (discussing French suspicion of the EC acting as its bargaining proxy).

agreement's terms.<sup>30</sup> In other words, a two-level game can work in both directions, with domestic constituencies "liberally" shaping state positions and state representatives attempting to manipulate domestic preferences advocated in domestic fora. Two-level intergovernmental analysis thereby combines the domestic and international arenas into a single bargaining model.

A two-level intergovernmental approach would predict that states largely respond to domestic pressures in forming their positions within the World Trade Organization on trade and environment matters, in particular when these issues become politicized. To the extent that commercial interests have higher per capita stakes in the outcome of trade negotiations than other stakeholders, the model predicts that they indeed play a more predominant role at the national level in the formation of national positions. However, it cautions that positions of national commercial constituencies are not necessarily *neoliberal*, since many national sectors—such as agriculture, steel and textiles—often have protectionist proclivities. Thus, the model predicts that national policy over trade and environment matters tends to have a more nationalist, mercantilist orientation, attempting to exploit environmental arguments to limit imports into its jurisdiction, on the one hand, and wary of environmental arguments wielded by other countries that prejudice its export interests, on the other. While the two-level intergovernmental approach is primarily positive, it also has important normative implications, first in assessing the democratic legitimacy of decision-making within the WTO's Committee on Trade and Environment, and second, in enabling a more critical examination of alternative institutional models advocated by the WTO's critics.

### **B. A Supranational Technocratic Approach**

A competing perspective on international relations maintains that networks of mid-level technocratic officials may be able to shape international policy through working within supranational regimes, such as the World Trade Organization, in a manner independent of national political processes. Keohane and Nye, for example, define "transgovernmental" relations

---

<sup>30</sup> See, for example, U.S. "fast track" procedures pursuant to which the U.S. Congress cannot amend the results of a negotiated agreement, but must approve or reject it in an up or down vote. See Harold Koh, *The Fast Track and United States trade Policy*, 18 BROOK. J. OF INT'L L. 143 (1992).

“as sites of direct interaction among sub-units of different governments that are not controlled by the policies of the cabinets or chief executives of those governments,” at least with respect to the details of negotiated outcomes.<sup>31</sup> These relatively autonomous networks of lower level governmental representatives can work with members of international secretariats in specific policy areas to define appropriate policy options and thereby determine policy outcomes.<sup>32</sup> A supranational technocratic approach predicts that WTO outcomes reflect the bureaucratic interests and ideological and epistemological biases of a network of trade elites, and thus do not reflect national interests as determined through national political processes, ultimately reflected in the positions of national heads of government.

The identity, background and outlooks of the predominant players in such networks, and the structure in which they operate, would determine the network’s policy orientation. Since the primary aim of the World Trade Organization is to facilitate trade liberalization, to the extent that international civil servants at the World Trade Organization play the predominant role in a WTO policymaking network, such network would likely have a *neoliberal* bias. In the trade-environment policy context, the network would tend to view environmental regulations as non-tariff barriers to trade, as opposed to appropriate environmental protection measures. Network members would particularly scrutinize environmental regulations that have a more adverse impact on foreign trading interests than domestic producers. However, to the extent that national trade officials, and not WTO civil servants, play the dominant role in this network, the network’s

---

<sup>31</sup> Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 *WORLD POL.*, 39, 45 (1974). Keohane and Nye note that “lack of control of subunit behavior by top leadership is obviously a matter of degree.” *Id.* See also *Introduction to TRANSNATIONAL RELATIONS AND WORLD POLITICS*, at ix-xxix (Robert O. Keohane & Joseph S. Nye, eds., 1972). For an overview of “transgovernmental relations” theory, see Mark Pollack and Gregory Shaffer, *Transatlantic Governance in Historical and Theoretical Perspective*, in *TRANSATLANTIC GOVERNANCE IN A GLOBAL ECONOMY* (Mark Pollack and Gregory Shaffer, eds.) (forthcoming Rowman and Littlefield: 2001).

<sup>32</sup> These policy-making networks are sometimes referred to as “epistemic communities,” defined as “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue-area.” See Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 *INT’L ORG.* 1, 3 (1992). On the way institutions (such as the WTO) can shape state behavior through defining “logics of appropriateness,” see James March & Johan Olsen, *The Institutional Dynamics of International Political Orders*, 52 *International Organization* 943, 951-952, 964 (noting that international institutions are not only sites for intergovernmental strategic negotiations, but also “institutions for socializing individuals and creating meaning and for promoting specific concepts,” such as the “role... of markets”).

orientation will not necessarily be neoliberal, since trade officials represent protectionist producer interests as well as neoliberal export interests.

As this article will show, national officials indeed play a more predominant role in the formation of policy within the World Trade Organization on trade and environment matters. Thus, from the perspective of this technocratic model, it is more accurate to examine the WTO Committee on Trade and Environment as a *transgovernmental process at the supranational level* involving mid-level government representatives. These representatives are, in turn, in close contact with well-organized national economic interests. The WTO's Committee on Trade and Environment, in other words, could be seen as a forum for national trade bureaucrats to directly and regularly contact their foreign counterparts, thereby facilitating the maintenance of an ongoing network that monitors international and national environmental regulatory developments. Better informed through the agency of the World Trade Organization, national trade officials can more easily intervene to limit the impact of environmental policy on trading interests.

Viewing trade-environment policy-making within the World Trade Organization as that of a technocratic network forging policy through the agency of a supranational organization lies at the center of normative debates over the legitimacy, accountability and democratic representativeness of WTO decision-making. On the one hand, it is precisely why the World Trade Organization is pilloried by its critics as an undemocratic, neoliberal institution independent of national democratic control.<sup>33</sup> On the other hand, libertarians and public choice theorists, including some former members of the GATT secretariat, unabashedly advocate a neoliberal policy role for the World Trade Organization through which networks of national and international trade policymakers may promote the "public interest" by freeing economic exchange from governmental regulatory constraints.<sup>34</sup> For them, such technocratic officials are

---

<sup>33</sup> See *supra* note 3.

<sup>34</sup> See e.g. ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL TRADE LAW (1991), who advocates the constitutionalization of international trade law through the creation of private international "trading rights" recognized before international and domestic courts, in furtherance of neoliberal free trade goals. See, for example, Petersmann's call for recognition of "freedom of trade as a basic individual right." *Id.* at 463. See also McGinnis and Movsian, Reinforcing Democracy Through Trade, *supra* note 13.

more likely to make “better” policy, from the perspective of national and world economic welfare, than national officials subject to nationalist, mercantilist political biases. Yet to the extent that national trade officials represent protectionist producer interests, as well as export interests, they will not necessarily take a uniform neoliberal stance as advocated by libertarian commentators and as chastised by WTO critics. This article assesses the extent to which national trade bureaucrats, working with the WTO secretariat and business interests, shape the trade and environment debate within the WTO Committee on Trade and Environment and—through the Committee—outside of it.

### C. A Civil Society/Stakeholder Approach

Theorists taking a civil society, or stakeholder, approach depict non-governmental actors as playing a central and increasing role in international arena, independent of state representatives.<sup>35</sup> Some non-state theorists focus on how international market liberalization processes favor and reflect the power of transnational corporations who dominate policymaking nationally and internationally.<sup>36</sup> Many others, however, focus on the role of non-business actors in constructing knowledge, setting agendas, and transforming perceptions of alternative outcomes

---

<sup>35</sup> In international relations theory, the civil society model of politics is sometimes referred to as “transnational relations” (in contrast to intergovernmental relations), in that it focuses on the role of private non-governmental actors working across borders to directly determine transnational policy outcomes. See presentation of transnational relations theory in Pollack and Shaffer, *Transatlantic Governance in Historical and Theoretical Perspective*, *supra* note 18.

<sup>36</sup> See, e.g., SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996) (stating that “the impersonal forces of world markets, integrated over the postwar period more by private enterprise in finance, industry and trade than by the cooperative decisions of governments, are now more powerful than the states to whom ultimate political authority over society and economy is supposed to belong,” *id.* at 4, and noting how non-state actors exercise power through providing and withholding credit, defining the nature of knowledge and deciding the terms and conditions of production, *see id.* at 1); ROBERT W. COX, *APPROACHES TO WORLD ORDER* (1996) (noting the primary role played by capitalist interests in a hegemonic world order). See also DAVID C. KORTEN, *WHEN CORPORATIONS RULE THE WORLD* (1995); P. CHATTERJEE & MATTHIAS FINGER, *THE EARTH BROKERS: POWER, POLITICS AND WORLD DEVELOPMENT* (1994); RICHARD BARNETT & JOHN CAVANAGH, *GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER* 19 (1994) (“The most disturbing aspect of this system is that the formidable power and mobility of global corporations are undermining the effectiveness of national governments to carry out essential policies on behalf of their people.”). For a major work from the 1970s assessing the privileged role of business in national policy-making, see CHARLES LINDBLOM, *POLITICS AND MARKETS: THE WORLD’S POLITICAL-ECONOMIC SYSTEMS* (1977).

through their interactions with policymakers at the national and international levels.<sup>37</sup>

Under this latter analysis, the trade-environment debate within the World Trade Organization should reflect the impact of transnational networks of environmental activists striving to change the structure of the debate within the World Trade Organization as to the appropriateness of trade measures imposed on environmental grounds. These civil society theorists tend to focus on the power of persuasion as opposed to material coercion, in particular in respect of non-governmental organizations' dealings with powerful states.<sup>38</sup> These theorists examine the strategic role of non-state actors as norm entrepreneurs attempting to change perceptions of, and priorities concerning, the trade-environment nexus.<sup>39</sup> Some go so far as to

---

<sup>37</sup> See, e.g., MARGARET KECK & KATHERINE SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL RELATIONS* 3 (1998) (noting how transnational advocacy groups “contribute to changing perceptions that both state and societal actors may have of their identities, interest, and preferences, to transforming their discursive positions, and ultimately to changing procedures, policies, and behavior”); Thomas Risse-Kappen, *Introduction to BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES, AND INTERNATIONAL INSTITUTIONS*, 3-33 (Thomas Risse-Kappen ed., 1995); MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996); *CONTESTING GLOBAL GOVERNANCE: MULTILATERAL ECONOMIC INSTITUTIONS AND GLOBAL SOCIAL MOVEMENTS* (Robert O'Brien, Anne Marie Goetz, Jan Aart Schote and Marc Williams, eds., 2000); and *CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875* (John Boli & George M. Thomas eds., 1999).

The focus on how actors shape (or “construct”) norms that thereby affect policy outcomes is often referred to as *constructivism*. For an analytical account of “constructivism” and its variants in international relations theory, see John Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, *INTERNATIONAL ORGANIZATION* 855 (Autumn 1998) (noting constructivism’s grounding in the sociological approaches of Emile Durkheim and Max Weber). For constructivist analysis of the power of international organizations, see Michael Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 *International Organization* 699 (Autumn 1999) (assessing how international organizations exercise power, that is autonomous from states, through their abilities to classify the world, fix meanings and articulate and diffuse new norms,” at 710). For constructivist approaches to international environmental politics with neo-Marxist and Gramscian orientations, see e.g. the contributions in *THE ENVIRONMENT AND INTERNATIONAL RELATIONS* (eds. John Vogler and Mark Imber (1996), such as Julian Saurin, *International relations, social ecology and the globalisation of environmental change* 76, 81 (“The debate over environmental change is in large part a battle in the social construction of knowledge and meaning which is fought out in a global arena,” noting the benefits of Marxist inquiries) and Marc Williams, *International Political Economy and global environmental change* 41, 56 (“The linkages between globalisation and ecological degradation are more usefully addressed through an approach which explores the interactions between transnational ideologies, transnational social movements and states,” noting the benefits of neo-Gramscian analysis).

<sup>38</sup> See e.g. Martha Finnemore and Kathryn Sikkink, *International Norms Dynamics and Political Change*, 52 *International Organization* 887, 900 (Autumn 1998) (noting that international NGO networks “are rarely able to ‘coerce’ agreement to a norm—they must persuade”).

<sup>39</sup> See, e.g., KECK & SIKKINK, *ACTIVISTS BEYOND BORDERS*, *supra* note 37; Finnemore & Sikkink, *International Norms Dynamics*, *supra* note 38, at 888 (focusing on “processes we call ‘strategic social construction,’ in which actors strategize rationally to reconfigure preferences, identities, or social context.”).

declare that transnational environmental activists not only “constructively” shape outcomes, but also directly determine policy outcomes through transnational coordination within what they term “world civic politics,” or a “world polity.”<sup>40</sup> Arguably, as communication and transportation barriers diminish, the ability of an organization in one country to influence perceptions and policies in another expands.<sup>41</sup>

Although the civil society approach has a positive, descriptive aspect, in the context of debates over the World Trade Organization, it is most commonly used in a normative sense. Most northern environmental activists advocate the adoption of a stakeholder model precisely because the model is *not* operational within the World Trade Organization or its Committee on Trade and Environment. Criticizing the WTO as unrepresentative and dominated by commercial concerns,<sup>42</sup> they advocate an alternative pursuant to which “stakeholders” other than

---

<sup>40</sup> See, e.g., PAUL WAPNER, ENVIRONMENTAL ACTIVISM AND WORLD CIVIC POLITICS (1996) [hereinafter Wapner, World Civic Politics]; Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 WORLD POLITICS, 311-40 (1995); Paul Wapner, *Governance in Global Civil Society*, in Oran R. Young, ed., GLOBAL GOVERNANCE: DRAWING INSIGHTS FROM THE ENVIRONMENTAL EXPERIENCE, 65-84.(1997); BOLI & THOMAS, *supra* note 37; ROBERT O'BRIEN, ANNE MARIE GOETZ, JAN AART SCHOLTE, MARC WILLIMAMS, CONTESTING GLOBAL GOVERNANCE: MULTILATERAL ECONOMIC INSTITUTIONS AND GLOBAL SOCIAL MOVEMENTS (2000) (recognizes north-south tensions, but does not seriously assess them in using the term “global social movements”). See also Peter Wiletts, *Who cares about the environment?*, in THE ENVIRONMENT AND INTERNATIONAL RELATIONS, *supra* note 37, 120, 132 (“The Global Politics paradigm, with its emphasis on values and issues, gives a sound theoretical basis for the instinctive feeling, on the part of environmental researchers, that NGOs really are important in a more fundamental way.”).

<sup>41</sup> As Keohane and Nye write, “the ability to disseminate free information increases the potential for persuasion in world politics. NGOs and states can more readily influence the beliefs of people in other jurisdictions.” Robert Keohane and Joseph Nye, *Power and Interdependence in the Information Age*, 77 Foreign Affairs, 81, 94 (Sept./Oct. 1998). See also John King Gamble and Chalotte Ku, *International Law—New Actors and New Technologies: Center Stage for NGOs?* 31 Law and Policy in International Business 221 (winter 2000).

<sup>42</sup> Many of these critics typically contend that the World Trade Organization serves multinational corporate interests. See Knapp, *WTO Rejects U.S. Ban on Shrimp Nets*, *supra* note[3]. For other critiques of the dominance of corporate trading interests in environmental matters, see, for example, WALLACH & SFORZA, WHOSE TRADE ORGANIZATION?, *supra* note 3; Matthias Finger & James Kilcoyne, *Why Transnational Corporations are Organizing to “Save the Global Environment,”* 27 ECOLOGIST (July/Aug. 1997) (maintaining that multinational businesses, through the World Business Council on Sustainable Development “will be uniquely positioned to determine and control global environmental and other standards, as well as trade rules”); P. CHATTERJEE & MATTHIAS FINGER, THE EARTH BROKERS: POWER, POLITICS AND WORLD DEVELOPMENT (1994); DAVID C. KORTEN, WHEN CORPORATIONS RULE THE WORLD (1995). A more nuanced critique of the role of a neoliberal-oriented GATT (now WTO) secretariat is found in Robert Howse, *The Legitimacy of the World Trade Organization*, at 21-25, 1999) (manuscript on file) (referring to the epistemic power and illegitimacy of the “network of trade experts” in GATT and WTO policymaking, while maintaining that the WTO Appellate Body has somewhat curtailed their previous influence).

business interests play a greater role in international policy formation. They advocate, in particular, the incorporation of the views of multiple stakeholders from developed and developing countries into the WTO negotiating and dispute settlement processes and, in particular, of environmental interest groups.<sup>43</sup> The aim of these northern activists is to integrate into WTO decision-making an “environmental” perspective alongside the currently predominant “trade” one.<sup>44</sup>

These advocates, however, typically fail to differentiate which stakeholders would likely benefit were the alternative model actually implemented, especially in light of which stakeholders presently most closely monitor CTE developments and lobby state representatives in defining their positions within the WTO Committee. They rarely review the representativeness

---

<sup>43</sup> See, e.g., Daniel Esty, *Public Participation in the International Trading System: Why the World Trade Organization Needs Environmental NGOs* (International Centre for Trade and Sustainable Development, 1996) available in <<http://www.ictsd.org/html/arcpubpart.htm>>; Daniel Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition or Exclusion*, 1 J. OF INTERNATIONAL ECONOMIC LAW 123, 147 (1998); Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INTL’L ECON. L. 331 (1996), as well as other papers given at a *Symposium on Participation of Nongovernment Parties in the World Trade Organization* contained in 17 U. PA. J. INTL’L ECON. L. (1996); Hillary French, *The Role of Non-State Actors*, in Jacob Werksman (ed.) *Greening International Institutions 1996*. See, in particular, Shell, *Analysis of the World Trade Organization*, *supra* note 19 (advocating the stakeholder model “as a blueprint” for the future institutional reform of the WTO). Shell’s stakeholder model views “trade dispute resolution as part of a wide-ranging deliberative process by which an emerging global social system can set its priorities.” *Id.* at 911. Shell borrows from “civic republican” theory in U.S. legal scholarship applied to U.S. constitutional and administrative law issues. See generally Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). In turn, scholars writing in the civic republican tradition often borrow from the German philosopher Jurgen Habermas and his theory of communicative action. See, e.g. JURGEN HABERMAS, *THEORY OF COMMUNICATIVE ACTION* (1981), and *BETWEEN FACTS AND NORMS* (1996). Habermas advocates communicative action (action derived from deliberation leading to understanding and agreement as opposed to a common good) to instrumental action (action of particular interests to achieve given ends involving tradeoffs and compromises). See also Cass Sunstein, *Democracy Isn’t What You Think*, N.Y. TIMES at 7 (reviewing JURGEN HABERMAS, *BETWEEN FACTS AND NORMS* (1996)).

An example of an attempt to create a stakeholder community bringing together northern and southern environmental and developmental NGOs is the International Centre for Trade and Sustainable Development (ICTSD), based in Geneva, Switzerland. The ICTSD closely follows CTE developments, helps organize trade-environment symposia bringing together northern and southern NGOs, state delegates, international civil servants and academics, periodically meets with CTE secretariat members and state delegates to the CTE, and publishes a bi-monthly newsletter appropriately named BRIDGES. See their web site at <<http://www.ictsd.org/>>. Other examples are the symposia on trade-environment matters organized by the CTE secretariat that have brought together northern and southern developmental and environmental NGOs, business associations and academics. See *infra* notes 301-302 and accompanying text.

<sup>44</sup> For a discussion of this, see *infra* notes 268-273 and 341-342 and accompanying texts.

of such non-governmental organizations themselves.<sup>45</sup> Not surprisingly, representatives of northern-based non-governmental organizations, with greater resources and organizational capacities, are more likely to advocate adoption of a “stakeholder model.”<sup>46</sup> They hope that, under this alternative model, their northern environmental views would more likely prevail.

\*\*\*

These three perspectives, or “ideal types,” are used as alternative frameworks for analysis because they incorporate the terms and concepts most prevalently used and abused by commentators on the World Trade Organization. This article tests the explanatory power of these three theoretical approaches as applied to the World Trade Organization. By examining *What Is*, it provides us with the tools to better assess proposals for *What Ought*. The article empirically assesses (i) why the WTO Committee on Trade and Environment was formed; (ii) what accounts for its agenda; (iii) what explains the current status of CTE discussions; and (iv) what external developments has the CTE internal process spurred.

## II. Why Was the Committee on Trade and Environment Formed?

The Committee on Trade and Environment was formed pursuant to a Ministerial Declaration annexed to the Marrakesh Agreement establishing the WTO in April 1994. The process, however, was started over two years earlier, for the Committee developed out of a Working Group first convened in November 1991 under the name the “Working Group on Environmental Measures and International Trade” (EMIT Working Group).

There were of course no provisions in the original General Agreement on Tariffs and

---

<sup>45</sup> See e.g. Ryan Lizza, *Silent Partner*, *The New Republic*, 22 (Jan. 10, 2000) (noting “the suspicion that Roger Milliken—billionaire textile magnate from South Carolina, founding member of the conservative movement, and patron of right-wing causes for almost 50 years—has been quietly financing the anti-globalization efforts of Public Citizen and related organizations; John J. Audley, GREEN POLITICS AND GLOBAL TRADE: NAFTA AND THE FUTURE OF ENVIRONMENTAL POLITICS 135 (1997) (“repeated attempts by the author to obtain financial information regarding the source of Public Citizen’s financial support for the Trade Watch produced only marginal information”). Public Citizen’s Global Trade Watch is the Ralph Nader’s organization which played a central role in the protests at the 1999 WTO Ministerial Meeting in Seattle). See also Peter Spiro, *New Global Potentates: Nongovernmental Organizations and the ‘Unregulated’ Marketplace*, 18 *Cardozo L. Rev.* 957 (1996).

<sup>46</sup> See Part IVC, *infra* notes 280-283 and accompanying text.

Trade (GATT)<sup>47</sup> that clearly address environmental protection because, when the GATT was signed in 1947, the environment was on no domestic policy agenda either.<sup>48</sup> There was, at the time, no Environmental Protection Agency in the United States or Europe, and no Greenpeace, World Wildlife Fund or Friends of the Earth. When environmental concerns became domestic and international policy issues in the 1970s, they were not addressed within GATT, but through the United Nations system. In anticipation of the 1972 UN Conference on the Human Environment, GATT members agreed to form the EMIT Working Group to examine, “upon request any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment, especially with regard to the application of the provisions of the General Agreement . . . .”<sup>49</sup> However, no requests were made and the EMIT Working Group never met until twenty years later.<sup>50</sup> Even in 1991, convening the EMIT Working Group and

---

<sup>47</sup>The GATT refers to the de facto institution operating to oversee the General Agreement on Tariffs and Trade (or GATT). The GATT, as an informal institution, became the WTO in April 1994. At that date, the former GATT agreement, signed in 1947, became known as GATT 1947; GATT 1947, together with all subsequent protocols, understandings and decisions modifying it through January 1, 1995, became collectively known as GATT 1994. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994). See generally ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS, AND DISPUTE SETTLEMENT (1997) (providing an overview history of the GATT and the WTO and their dispute settlement systems).

<sup>48</sup> See Edith Brown Weiss, *Environment and Trade as Partners in Sustainable Development: A Commentary*, 86 Am. J. Int'l L. 728, 728 (1992). But see Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, J. World Trade 37 (Oct. 1991) (noting that states discussed wildlife agreements in the context of their negotiations over the creation of an International Trade Organization in the late 1940s). Although Article XX(b) and XX(g) of GATT 1994 respectively refer to “measures... necessary to protect human, animal or plant life or health; ... [and] relating to the conservation of exhaustible natural resources,” these provisions do not expressly cover environmental protection, and it is unclear what they were originally intended to encompass. The first GATT cases that clearly confronted environmental concerns did not appear until the 1990s. Finally, in the 1998 case *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, the WTO Appellate Body ruled that the original words in Article XX, “crafted more than 50 years ago,... [are] by definition, evolutionary... [and] must be read... in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.” See WTO Doc. WT/DS58/AB/R, paras. 129-131.

<sup>49</sup> GATT Council, Minutes of Meeting Held in the Palais des Nations, Geneva, on 9 November 1971, C/M/74 at 4 (Nov. 17, 1971) (containing the decision of the GATT contracting parties to establish a group on environmental measures and international trade).

<sup>50</sup> The trade-environment nexus was also not specified in the mandate for the Uruguay Round negotiations set forth in the 1986 Ministerial Declaration at Punto del Este, Uruguay. See *Subjects for Negotiations in Ministerial Declaration on the Uruguay Round*, Sept. 20, 1986, GATT B.I.S.D. (33rd Supp.) at 19, 23-26 (1987). Nor did the environment appear as an issue in the 1985 report of an independent group of seven “eminent persons,” designated

defining its agenda was no easy matter, involving over eleven months of internal debates within the GATT Council.<sup>51</sup>

There is a certain amount of misunderstanding about why the GATT's EMIT Working Group was finally convened and the WTO Committee on Trade and Environment formed in the 1990s. Many assume that they were primarily the result of pressure from U.S. environmental groups, who harnessed U.S. negotiating power to achieve their ends. The assumption is understandable given the largely contemporaneous signature of the 1993 environmental side agreement to the North American Free Trade Agreement (NAFTA),<sup>52</sup> the importance of environmental issues in U.S. domestic debates over NAFTA's ratification, and the formation within the Organization of Economic Cooperation and Development (OECD) of an analogous "Joint Session of the Trade and Environment Committees."<sup>53</sup> As Keohane has written, "If there is

---

by the GATT Director General, to make recommendations for multilateral negotiations. See *TRADE POLICIES FOR A BETTER FUTURE: THE LEUTWILER REPORT, THE GATT AND THE URUGUAY ROUND* (1987). The report is known as the "Leutwiler" report after its chairman. Then Senator Bill Bradley was one of the seven "eminent persons."

<sup>51</sup>The convening of the EMIT Working Group was first raised in a Uruguay Round negotiating meeting in December 1990, but the first EMIT Working Group meeting was not held until November 1991. See the proposal to convene the EMIT Working Group, submitted by member countries of the European Free Trade Association, in *Statement on Trade and the Environment*, MTN.TNC/W/47 (Dec. 3, 1990). See EMIT, *Report of the Meeting of the Group on Environmental Measures and International Trade*, TRE/1 (Dec. 17, 1991) (being the minutes of the first EMIT Working Group meeting). While Daniel Esty was at the United States Environmental Protection Agency (EPA), the EPA pushed the United States Trade Representative to support the convening of the EMIT Working Group. Correspondence with Daniel Esty, July 2000.

<sup>52</sup> See North American Agreement on Environmental Cooperation (Environmental Side Agreement, Sept. 13, 1993), 32 I.L.M. 1480. See discussion in Daniel Esty, *Economic Integration and the Environment*, in *The Global Environment: Institutions, Law, and Policy* (Norman Vig & Regina Axelrod, eds), 191-192 (1999).

<sup>53</sup> In 1991, the members of the Organization of Economic Cooperation and Development (OECD) also agreed to form an OECD Joint Session of the Trade and Environment Committees which, as the CTE, continues to periodically meet. For a fuller description of the work of the Joint Session and its impact, see Robert Youngman and Dale Andrew, *Trade and Environment in the OECD*, in *SUSTAINABLE DEVELOPMENT: OECD POLICY APPROACHES FOR THE 21ST CENTURY* 77 (1997). For a presentation of the issues by the Chairman of the OECD Trade Committee at the beginning of the joint OECD sessions, see Geza Feketekuty, *The Link Between Trade and Environmental Policy*, 2 *Minn. J. Global Trade* 171 (summer 1993). Many commentators believe that greater progress in exploring the substantive linkages between trade-environment policy was made in the OECD deliberations than in the WTO Committee on Trade and Environment. For an example of the Joint Session's work focusing on the impact of trade on the environment, see *The Environmental Effects of Trade* (OECD 1994). This is explained in part by the greater likelihood of common social values among OECD members (consisting of the developed countries), and the fact that there is no binding OECD dispute settlement system that could enforce the findings of the Joint Session. Nonetheless, Youngman and Andrew note that, as with the EMIT Working Group, a Nordic country, Sweden, proposed for the OECD to review trade and environment policy links, being particularly concerned with "the effects

one key variable accounting for [international environmental] policy change, it is the degree of domestic environmental pressure in major industrialized democracies, not the decision-making rules of the relevant international institutions.”<sup>54</sup>

Moreover, most developing countries opposed the EMIT Working Group’s convening and the CTE’s formation precisely because they feared the Working Group and Committee could serve to justify U.S. and European unilateral trade measures against developing country imports, resulting in “green protectionism.”<sup>55</sup> In the GATT Council meetings leading up to the EMIT Working Group’s convening, the Thai representative (on behalf of the ASEAN group) asserted that “for GATT to address environmental protection problems as a general trade policy issue was inappropriate;”<sup>56</sup> the Moroccan delegate questioned whether the GATT had the “competence to legislate on this subject;”<sup>57</sup> the Tanzanian delegate queried “whether the GATT had the capacity

---

of differing national environmental standards on trade.” *Id.*

<sup>54</sup> Robert Keohane, *Introduction* to INSTITUTIONS OF THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION 15 (Robert Keohane et al. eds., 1995).

<sup>55</sup> The Egyptian ambassador to the WTO, Mounir Zaharan recalls that “the environmental issue was imposed on the WTO during the last phase of the Uruguay Round with the argument that those who would oppose it would bear responsibility for the Round’s failure.” He confirms “that many developing countries feared the entry of ‘trade and environment’ in the WTO would lead to more protectionism.” Martin Khor, *South Concerned over New Issues at WTO*, (visited Oct. 2, 1998) <[www.iatp.org/iatp](http://www.iatp.org/iatp)> (reporting on remarks at a conference in Malaysia on July 9, 1996 entitled “The WTO: Perspectives from the South”). At the Conference, Dr Vandana Shiva of the Research Foundation for Science, Technology and Natural Resources Policy (India) maintained that developed countries sought to link trade and the environment in the WTO “to serve as a justification for unilateral trade measures.” *Id.* See also Cristina Hernandez, *Green Protectionism: Does the end justify the means?*, in *Striking a Green Deal: Europe’s role in environment & South-North trade relations* (Hernandez, who became Mexico’s delegate to the CTE, denounces unilateral measures with extraterritorial effect as “green protectionism.”).

Developing countries’ reluctance to have environmental matters addressed in international fora is nothing new. They have long feared that environmental obligations could be imposed that limit their autonomy and their economic growth. Developing countries were similarly wary of the holding of the 1972 UN Conference on the Human Environment and the creation of the United Nations Environment Program. See e.g. David Kay and Eugene Skolnikoff, *International Institutions and the Environmental Crisis: A Look Ahead*, 26 INT’L ORG. 469, 474 (spring 1972).

<sup>56</sup>GATT Council, *Minutes of Meeting: Held in the Centre William Rappard on 6 February 1991, C/M/247*, at 22. (Feb. 6, 1991) [hereinafter February 1991 Council Meeting]. ASEAN (Association of Southeast Asian Nations) typically designated one member to speak for the association within the EMIT working group and the CTE. The members of ASEAN within the WTO are Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand.

<sup>57</sup> *Id.* at 25.

to handle this matter;”<sup>58</sup> and the Egyptian delegate concurred that GATT “was not the forum to deal with this matter.”<sup>59</sup> They did not want to be pressured into signing an environmental side agreement analogous to NAFTA’s.<sup>60</sup>

However, the full explanation for the CTE’s formation is two-fold, involving both an effort to assuage northern environmental constituencies and an effort to subject environmental regulatory developments to greater GATT scrutiny and control. First, it is true that environmental groups within powerful states (the U.S. and EC) became increasingly active on international environmental issues during the 1980s and 1990s, in particular in connection with the 1992 United Nations Conference on Environment and Development, the largest international conference ever held.<sup>61</sup> They also pressured their home states to enact environmental measures which led to trade conflicts, with issues ranging from tropical logging<sup>62</sup> to ocean fishing practices. The most famous of these measures in GATT history was the United States’ ban on tuna imports from Mexico in response to fishing methods used by Mexican tuna boats that killed dolphins trapped in their nets.<sup>63</sup> Mexico reacted to the U.S. ban by filing a GATT complaint, giving rise to a GATT dispute settlement panel finding that the U.S. ban was contrary to GATT

---

<sup>58</sup> *Id.* at 23.

<sup>59</sup> GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 12 March 1991*, C/M/248, at 18 (April 3, 1991) [hereinafter March 1991 Council Meeting].

<sup>60</sup> See Richard Eglin, Overview of Trade and Environment Issues, Speech before the Korea Environmental Technology Research Institute at an International Symposium on Trade and Environment (24 July 1996) (draft, provided by Eglin to the author, on file). Eglin was the first Director of the Trade and Environment Division of the WTO Secretariat.

<sup>61</sup> The Conference is sometimes referred to the Rio Conference, as it was held in Rio de Janeiro, Brazil.

<sup>62</sup> Austria passed a law in 1990 that mandated a labeling scheme for all tropical timber and imposed a new 70% tariff on tropical timber imports. Austria eventually backed down in response to ASEAN’s call for a product boycott on all Austrian products and Austria’s realization that it would lose a GATT case. Austria subsequently submitted a GATT working paper criticizing the use of extraterritorial environmental measures. See discussion in Porter and Brown, *GLOBAL ENVIRONMENTAL POLITICS*, *supra* note 23, at 135-136 (citing Austria’s paper before the EMIT Working Group, *GATT and International Environmental Agreements*, TRE/W/19, Oct 1, 1993).

<sup>63</sup> Until the relevant U.S. legislation came into effect, U.S. tuna-fishing boats used the same method of encircling dolphins swimming in the eastern tropical Pacific Ocean since, by a quirk of nature, the desired tuna tended to swim beneath large schools of dolphins leaping from the ocean’s surface.

rules.<sup>64</sup> This trade conflict, known as the tuna-dolphin dispute, generated more commentary and publicity than any other dispute in GATT history.<sup>65</sup> Suddenly, the GATT became a symbol for groups that had no interest whatsoever in trade issues other than the impact of trade rules on non-trade initiatives. Because environmental groups believed that GATT rules constrained their ability to achieve environmental goals, they lambasted, and at times demonized, the GATT system for failing to accommodate their desired policies. For example, following the tuna-dolphin decision, Greenpeace erected a banner at GATT headquarters in Geneva projecting a lean dolphin being devoured by a great white shark named “GATT,” and other groups papered Washington with posters of “GATTzilla.”<sup>66</sup>

The United States and EC did not want environmentalist challenges to jeopardize the conclusion of the Uruguay Round of trade negotiations. They attempted to defuse these challenges to trade policy by supporting the formation within GATT of the EMIT Working Group, followed by the creation of a formal Committee within the new, and expanded, WTO

---

<sup>64</sup> The tuna-dolphin dispute followed a 1990 court injunction obtained by U.S. environmental groups which forced the U.S. to ban imports of Mexican tuna. In January 1991, Mexico requested the Contracting Parties to establish a dispute settlement panel concerning the U.S. ban, which the Contracting Parties agreed to on February 6, 1991. The GATT Panel found that the U.S. import ban violated Article XI of GATT that prohibits “quantitative restraints” and was not permitted under GATT’s exception clause, Article XX. Article XX is discussed further in *surpa* note 48. For an excellent analysis of the tuna-dolphin dispute, see Richard Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT’L ENVTL. L. REV. 1 (Fall 1999). For a briefer case review, see Joel Trachtmann, *Decision: GATT Dispute Settlement*, 86 AM. J. INT’L L. 142 (1992).

<sup>65</sup> As a member of the WTO Secretariat assigned to the CTE states, “The public paid little attention to GATT panel reports until the tuna-dolphin case. There was a sectoral interest maybe, but not a public interest. The tuna-dolphin case brought the first concerted commentary and critique of a panel report. Before no one paid much attention to panel reports or GATT reasoning except for a small and narrow group of trade specialists.” Interview with Scott Vaughan, in Geneva, Switzerland (June 1997).

<sup>66</sup> See Nancy Dunne, *Fears Over Gattzilla the Trade Monster*, FIN. TIMES, Jan. 30, 1992 at I3; William Roberts, *Ban on Tuna about to Be Deep-Sixed*, J. COMM., July 29, 1997, at A1. On seeing the sign, a surprised GATT Director General Arthur Dunkel reportedly commented “I never knew the GATT had teeth.” Dunkel was referring to the fact that the GATT could not force countries to change discriminatory practices, in particular because, under former GATT rules, a losing party could block the adoption of a GATT panel report that held against it. In fact, the two GATT panel reports finding against the United States’ tuna ban were never adopted, and Mexico eventually agreed to change its legislation to prohibit the fishing techniques in question. The poster of GATTzilla can be seen in DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE, *supra* note 5, at 34.

structure, the Committee on Trade and Environment.<sup>67</sup>

Second, however, trading interests in all states, including those same powerful states, were concerned with the proliferation of environmental measures, evidenced by new national labeling and packaging requirements,<sup>68</sup> the 1991 U.S. tuna-dolphin case, and the 1992 UN Conference on Environment and Development. The first nations to actually call for the convening of the EMIT Working Group were not the U.S. and EC, but members of the European Free Trade Association (EFTA), a grouping of those European countries that were not EC members, including Austria, Switzerland and all Nordic countries other than Denmark.<sup>69</sup> These northern European countries, despite their “green” reputations, demanded the EMIT Working Group’s convening to defend their trade interests, not primarily to promote environmental goals. As an EFTA representative stated before the GATT Council, GATT needed to confront “the rising tide of environmental measures and international environmental agreements..., not least because many ... used trade measures to realize their objectives.”<sup>70</sup> The EFTA countries fretted about foreign environment-related measures impeding their exports, not about GATT’s need to accommodate more of them. They “drew attention to the forthcoming [Rio Conference] at which further environmental instruments having trade implications would be adopted” and hoped that GATT would prepare a “contribution” to it.<sup>71</sup>

Trading interests throughout the world, including in the United States and Europe, shared EFTA’s concerns. In the second tuna-dolphin case, the EC challenged the United States’

---

<sup>67</sup> See U.S. and EC statements, in February 1991 Council Meeting [C/M/247], *supra* note 56 at 24-26, and March 1991 Council Meeting [C/M/248] *supra* note 59 at 17-22.

<sup>68</sup> See *supra* and *infra* notes 62 and 76-78.

<sup>69</sup> EFTA consisted of European countries that were not members of the EC, and at the time included Norway, Sweden, Finland, Iceland, Austria, Switzerland and Liechtenstein. Since 1991, Sweden, Finland and Austria have joined the EC, and Switzerland has left EFTA on account of a treaty signed between EFTA and the EC establishing a European Economic Area (or EEA).

<sup>70</sup> February 1991 Council Meeting [C/M/247], *supra* note 56, at 20.

<sup>71</sup> February 1991 Council Meeting [C/M/247], *supra* note 56, at 20. GATT secretariat members attended the Rio Conference and did submit contributions concerning GATT principles and rules. See *infra* note 236

secondary ban on tuna imports imposed on environmental grounds.<sup>72</sup> The United States likewise threatened to challenge an EC Directive that would have banned the import of U.S. fur products on account of inhumane U.S. trapping methods.<sup>73</sup> Even in the context of the contemporaneous tuna-dolphin dispute, the U.S. representative maintained, “Contracting parties should not let the important principles of GATT be trampled upon by governments trying to protect the environment.”<sup>74</sup> As regards international environmental negotiations, the EC representative sustained “The sooner the GATT was involved in the design stages of environmental policies, therefore, the easier it would be to bring in a moderating influence from the trade policy point of view.”<sup>75</sup>

The proposed development of national eco-labels designed to modify consumers’ buying habits also raised a threat to foreign traders. The U.S. and EC were concerned by each other’s respective labeling and environment-related standards that could disproportionately raise their own producers’ costs.<sup>76</sup> Developing countries claimed that their relatively small producers were even more disadvantaged by new U.S. and European labeling and packaging requirements.<sup>77</sup>

---

<sup>72</sup> That is, the United States also banned tuna imports from European countries that did not themselves ban imports of Mexican tuna on account of Mexican tuna-fishing methods. *See* Panel Report, United States–Restrictions on Imports of Tuna, June, 1994, 33 I.L.M. 839 (1994); *see also* U.S. *Embargo Against Mexican Tuna May Be Resolved in 1995*, *Official Says*, 12 Int’l Trade Rep. 10 (BNA) (Mar. 8, 1995).

<sup>73</sup> For an overview, see Andre Nollkaemper, *The Legality of Moral Crusades disguised in Trade Laws: An Analysis of the EC “Ban” on Furs from Animals taken by Leghold Traps*, 8 J. ENVMTL. L. 237 (1996).

<sup>74</sup> GATT Council, *Minutes of Meeting: Held in the Centre William Rappard on 29-30 May 1991*, C/M/250, at 14 (June 28, 1991) [hereinafter May 1991 Council Meeting].

<sup>75</sup> *Id.* at 19.

<sup>76</sup> These concerns continue today. *See, e.g.*, Rossella Brevetti, Glickman Warns Senate Panel about Mandatory Country-of-origin Meat Labeling, 22 Int’l Trade Rep. (BNA) 919 (June 2, 1999) (citing U.S. Agricultural Secretary Dan Glickman’s testimony before the Senate Committee on Agriculture, Nutrition and Forestry, that “mandating origin labeling could be used to the detriment of U.S. exports in some markets,” such as the European Union. *See generally* Atsuko Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, 11 GEO. INT’L ENVTL. L. REV. 599, 639 (1999) (describing the potential increase in costs of numerous regimes having different labeling requirements).

Note: This article uses the American spelling for *eco-labeling* (with a single “l”) except where the English version (with a double “l”) is used in a document or quotation.

<sup>77</sup> Cut flower producers in Kenya, Colombia and Ecuador, for example, denounced Germany’s packaging requirements for subjecting them to higher costs than their German competitors. ESTY, GREENING THE GATT, *supra* note 5, at 102. *See also* Mexico’s comments in CTE, *Report of the Meeting Held On 25 and 26 March 1996*,

Although U.S. and European environmental groups lambasted the GATT tuna-dolphin panel decision as anti-environmental, from Mexico's perspective, the decision was extremely threatening to its fishing industry because the decision found that the U.S. "dolphin safe" private labeling regime complied with GATT rules.<sup>78</sup>

In short, states convened the EMIT Working Group and formed the WTO Committee on Trade and Environment primarily (although not exclusively) because, in reaction to domestic producer complaints, they perceived that environmental measures increasingly threatened their trading interests. As traditional trade barriers such as tariffs and quotas steadily declined,<sup>79</sup> U.S. and European environmental regulations proliferated.<sup>80</sup> Environmental and other domestic

---

WT/CTE/M/8, at 13 (April 11, 1996) (noting "Importers were also subject to disproportionate costs. Packaging requirements favored the use of local materials."). For a developing country perspective of the impacts of northern eco-labeling requirements on developing countries, see, *ECO-LABELLING AND INTERNATIONAL TRADE* (Simonetta Zarrilli, Veena Jha & Rene Vossenaar eds., 1997). The three editors were members of UNCTAD (United Nations Conference on Trade and Development) at the time of the book's publication. Vossenaar is Chief of UNCTAD's trade and environment section and Jha, an Indian who has a Ph.D. in economics from Cambridge University, was the section's chief economist. Chapter 10 of the volume, for example, addresses how Dutch eco-labeling schemes, "derived from the specific environmental and economic circumstances in the Netherlands," can be "unfair towards developing country exporters." Harmen Verbruggen, Saskia Jongma and Frans van der Woerd, *Eco-labelling and the Developing Countries: The Dutch Horticultural Sector*, at 143, 155-156. Note: This article uses the American spelling for eco-labeling (with a single "l") except where the English version (with a double "l") is used in a document or quotation.

<sup>78</sup> See Parker, *What We Can Learn from the Tuna-Dolphin Conflict*, *supra* note 84, at 24, 83 (noting that "Mexico was dissatisfied because the GATT decision upheld the cannery boycott [based on a strict dolphin-safe labeling requirement], which was more economically threatening than the [U.S. legal] embargo." *Id.* At 46).

<sup>79</sup> The eight multilateral trade rounds under GATT have reduced the amount of average *ad valorem* tariffs to under five percent, down from an average of 40 percent *ad valorem* at the end of World War II. See RAJ BHALA & KEVIN KENNEDY, *WORLD TRADE LAW* 6 (1998). Within those rounds, "the first round of negotiations yielded 45,000 tariff concessions affecting one-fifth of world trade. In the sixth [multilateral trade negotiation round], the Kennedy Round, existing customs duties were reduced an average of 35 percent." *Id.* In the Uruguay Round, the eighth and last completed negotiating round, participating developing countries reduced rates by 28 percent, and developed countries reduced rates to an average of 3 percent for goods from other developed countries and an average of 4.8 percent for goods from developing countries. *Id.* at 84-85; see also Mark R. Sandstrom et al., *Market Access*, in *THE WORLD TRADE ORGANIZATION* 117 (Terence P. Stewart ed. 1996) (examining the decrease over time, particularly since the Uruguay Round, of traditional trade barriers imposed at borders).

<sup>80</sup> See, e.g., *Inhabitants in the Field of European Community Environmental Law*, 5 Colum. J. Eur. L. 39, (1998-99) (describing the increase in EC environmental legislation since the 1970s); Mark J. Connor, *Government Owned-contractor Operated Munitions Facilities: Are They Appropriate in The Age of Strict Environmental Compliance And Liability?*, 131 MIL. L. REV. 1, 2 n.6 (finding that "[b]etween 1970 and 1987, the number of pages in the Code of Federal Regulations devoted to implementing regulations for federal environmental statutes increased from approximately 500 to approximately 9700").

regulatory policies correspondingly became the object of battle between government authorities.<sup>81</sup> Both trade and environmental factors were important to the CTE's formation. Yet it was the forces of trade competition, in reaction to the perception of environmental groups' growing success in promoting environmental regulation in national and international fora, that first brought environmental issues to the GATT and WTO.

### **III. What Accounts for the Agenda of the WTO Committee on Trade and Environment?**

Since all environmental measures have economic effects and all trade measures impact on the environment, GATT and WTO members had to frame the Working Group's and Committee's mandates. Developing countries, in particular, persistently pointed out that the GATT was a "trade" organization, and not an environmental one. In response, the member governments defined the trade and environment linkage in a manner that focuses primarily on the trade impacts of environmental measures—not on the environmental impacts of trade rules.<sup>82</sup> Governments, and particularly the trade-oriented bureaucracies within governments, see the World Trade Organization as a "dollars and cents organization"<sup>83</sup> with rules and a dispute settlement system that affect their economic interests. States have largely relegated concerns over the environmental impacts of trade to other international institutions with fewer detailed rules and less judicialized enforcement regimes, such as the United Nations Environmental Programme (UNEP) and single issue international environmental organizations created under UNEP's and others' auspices.

---

<sup>81</sup> See, e.g., DAVID VOGEL, *BARRIERS OR BENEFITS, REGULATION IN INTERNATIONAL TRADE* (1997).

<sup>82</sup> On developing country concerns of "green protectionism," see *supra* note 55 and accompanying text. Although in the end, the EMIT Working Group's original trade-focused mandate was retained, the EC and U.S. argued that the mandate should not be limited. The EC was concerned that "the 1971 Group's original terms of reference risked being seen as an attempt to screen environmental protection measures having an impact on trade . . ." February 1991 Council Meeting [C/M/247], *supra* note 56, at 25-26. It objected "to any restrictive interpretation of the GATT's competence on this matter." March 1991 Council Meeting [C/M/248], *supra* note 59, at 18. The United States likewise observed that it "was not certain that the 1971 Group's mandate was sufficiently broad to address the full range of issues involved." February 1991 Council Meeting [C/M/247], *supra* note 56, at 25-26. Nonetheless, in order not to further delay the convening of the group, its initial mandate was retained.

<sup>83</sup> Interview with Andrew Griffith, formerly Canadian representative to the CTE, in Geneva, Switzerland (June 1997).

The EMIT Working Group's initial mandate was "to examine upon request any specific matters relevant to the *trade policy aspects* of measures to control pollution and protect human environment" (emphasis added).<sup>84</sup> This trade-focused mandate was then broken down by the Working Group into three issues: "(a) trade provisions contained in existing *multilateral environmental agreements*... vis-a-vis GATT principles and provisions; (b) multilateral *transparency of national environmental regulations* likely to have trade effects; and (c) trade effects of new *packaging and labelling requirements* aimed at protecting the environment" (emphasis added).<sup>85</sup> While each of these issues permitted countries to assert environmental interests, the primary focus was on the adverse trade impacts of certain environmental measures, and not the environmental impacts of trade policy. As the EMIT Working Group's Chair affirmed in 1994, "The Group has been careful to ensure that the scope of its discussions remained well within its mandate and GATT's competence, namely the *trade-related aspects* of environment policies which may result in significant trade effects for GATT contracting parties" (emphasis added).<sup>86</sup>

---

<sup>84</sup> The terms of reference, in their entirety, are "to examine upon request any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment especially with regard to the application of the provisions of the General Agreement taking into account the particular problems of developing countries." Group on Environmental Measures and International Trade, TRE/2 (Dec. 17, 1991).

The preamble to the decision establishing a Committee on Trade and Environment provides that the Committee's competence "is limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members." See Trade and Environment, Decision of April 14, 1994, MTN/TNC/45(MIN).

<sup>85</sup> See *Report of the Meeting of the Group on Environmental Measures and International Trade* [TRE/1], *supra* note 51, at 1. On the notion of "transparency," see *supra* note 14.

<sup>86</sup> Report by the Chairman of the Group on Environmental Measures and International Trade presented to the Contracting Parties at their Forty-ninth Session, GATT B.I.S.D. (40th Supp.) at 75, par. 9 (1995) (reporting to the January 25 and 26 1994 meeting of GATT members, the work of the EMIT Working Group in 1993, which is document L/7402).

By "competence," delegates (and in this case, the Chair of the Committee) typically refer to whether states have granted the World Trade Organization, as an international institution, the power and authority to address an issue. This notion of "competence" has a legal meaning. In the context of debates within the WTO Committee on Trade and Environment, states would often maintain that the WTO Committee did not have "competence" to address environmental issues, but only trade issues. Thus, in the above quotation, the Chair is maintaining that the CTE only has competence to address "trade-related aspects of environmental policies," not environment-related aspects of trade policies. Some commentators, however, also have used the term "competence" in a practical sense, maintaining that the WTO has developed an expertise on trade issues which it does not hold on environmental issues. Interview with Richard Eglin, former director of the Trade and Environment Division of the WTO, June 9, 1997, Geneva, Switzerland

Although the initial push for the formation of a WTO Committee on Trade and Environment came from developed countries, developing countries agreed to its formation provided the CTE's agenda reflected their development concerns as well.<sup>87</sup> This was part of their *quid pro quo* for agreeing to the CTE's formation as part of an overall package concluding the Uruguay Round and creating the World Trade Organization. The agenda of the Committee on Trade and Environment was expanded to incorporate a package of ten items balancing concerns of developed and developing countries. The entire agenda is set forth in *Table 1*, together with an indication of whether developed or developing countries were primarily interested in such item, and noting the number of interventions of the most active developed and developing countries. Though the ten items have been formally retained, they were subsequently re-categorized in 1997 into two central clusters also identified in *Table 1*: a cluster involving "market access" issues, and a cluster involving "linkages between the multilateral environment and trade agendas."<sup>88</sup>

Developed and developing countries were equally concerned by the numerous market access issues addressed within the WTO Committee. However, the CTE agenda also included issues involving a potential revision of WTO rules to accommodate environmental goals, some promoted primarily by developed countries, offset by others promoted primarily by developing countries. In each case, states defended their respective trading interests, blocking any recommendations for changes to WTO law.

### **A. Market Access Issues of Concern to All**

Countries' positions on the four items known as the "market access cluster"-- items 2, 3,

---

<sup>87</sup> The EMIT Working Group's terms of reference explicitly provided that the group shall be "taking into account the particular problems of developing countries." *See supra* note 84.

<sup>88</sup> *Table 1* is set forth at the end of this article. The clustering was done in order to provide greater substantive focus to discussions. *See* Trade and Environment Bulletin No. 17, *The WTO Committee on Trade and Environment Establishes its Work Programme and Schedule of Meetings for 1997*, PRESS/TE017 (Mar. 26, 1997), available in <<http://www.wto.org/wto/environ/te17.htm>>; Trade and Environment Bulletin No. 20, *WTO Committee on Trade and Environment Adopts 1997 Report*, PRESS/TE020 (Dec. 3, 1997), available in <<http://www.wto.org/wto/environ/te020.htm>>.

4 and 6<sup>89</sup>-- shatter the conventional notion of a clean north-south split on trade-environment matters.<sup>90</sup> Developing countries are increasingly outward-looking, demanding greater access to U.S. and European markets. They are correspondingly less focused on preserving domestic import substitution policies, which helps explain the decline of southern solidarity over trade policy.<sup>91</sup> This policy shift now facilitates the formation of north-south coalitions, and south-south conflicts, over specific trade matters.

The key market access issue before the CTE was item 6, which broadly covers “the effect of environmental measures on market access... and environmental benefits of removing trade restrictions and distortions.” The purported environmental benefits of eliminating politically-sensitive agricultural, fishery, energy and other subsidies generated extensive debate within the WTO Committee. Agricultural exporting nations, including the United States, Australia, New Zealand, Argentina, Chile, Brazil and even India, joined forces in the Committee on Trade and

---

<sup>89</sup> As for clustering the items, see *supra* note 88. Items 3 and 6, discussed in this paragraph, generated a significant amount of debate. Item 4, however, (concerning “the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects”) was less controversial, and was the only item where CTE members recommended a concrete initiative—the creation of a database by the WTO secretariat of all such measures and requirements, which the secretariat continues to compile and update. See CTE, *Report (1996) of the Committee on Trade and Environment*, WT/CTE/1, at par. 192 (Nov. 12, 1996) [hereinafter CTE 1996 Report]. Item 2 was a catch-all item that yielded little focused debate.

<sup>90</sup> On north-south divisions over environmental policy, see e.g. *The North, The South and the Environment: Ecological Constraints and the Global Economy* (eds. V. Bhaskar and Andrew Glyn) 4 (1995) (integrating concerns over “equity” in its analysis); *Environment: North and South* (eds. Charles Pearson and Anthony Pryor) (1977) (an early book addressing issues of economic growth and environmental protection).

<sup>91</sup> See e.g., Alejandro Jara, *Bargaining Strategies of Developing Countries in the Uruguay Round*, in *THE DEVELOPING COUNTRIES IN WORLD TRADE: POLICIES AND BARGAINING STRATEGIES* (eds. Diana Tussie & David Glover) 11, 27 (1993) (“Coalitions seem to better serve their purpose when built around well-defined interests of like-minded countries, whether developed or developing.”); Diana Tussie, *Bargaining at a Crossroads: Argentina*, in *DEVELOPING COUNTRIES IN WORLD TRADE*, 119, 135 (“Before the Uruguay Round, Argentina, like most developing countries, had concentrated its trade diplomacy on the defense of import substitution, applying its skills mainly to securing import protection... But gradually Argentine interests focused on issues of market access, both in the bilateral and the multilateral arena.”); Rajiv Kumar, *The Walk Away from Leadership*, in *DEVELOPING COUNTRIES IN WORLD TRADE*, at 155, 165, 168 (“India’s position in the multilateral trade negotiations will henceforth be more unambiguously inspired by clearly defined national interests” and not by “classical North-South positions”); Rajiv Kumar, *Developing Country Coalitions in International Trade Negotiations*, in *DEVELOPING COUNTRIES IN WORLD TRADE* 205, 213 (“The Uruguay Round has been unique in witnessing the evolution of hybrid coalitions of developing and developed countries that have continued to function”). One developing country WTO representative goes so far as to say, “The roles have completely reversed. Developing countries demand free trade and the United States and Europe try to block it.” Interview with an Asian representative to the WTO, Geneva, June 2000.

Environment to employ environmental rationale to challenge the EC, Japan and Korea for protecting their agricultural sectors.<sup>92</sup> India's support of the United States is particularly noteworthy, as India often led the defense of developing country interests vis-a-vis the United States.<sup>93</sup> The EC, Japan and Korea, in turn, however, also adopted arguments with which many developing countries were receptive, such as the need for agricultural protection to ensure "food security."<sup>94</sup> The issue of "packaging, labelling and recycling" requirements (item 3) also resulted in north-south coalitions and pitted northern governments against each other, witnessed by ongoing disputes involving Canada and the United States against EC labeling of wood products,<sup>95</sup> and EFTA's early challenge to EC packaging and labeling requirements.

States attempted to harness the effects of non-state actors to support their negotiating positions. In June 1997, the environmental group WWF-World Wide Fund For Nature sponsored

---

<sup>92</sup> See presentation of state positions in Trade and Environment Bulletin No. 21, *WTO Committee on Trade and Environment Welcomes Information Session With MEA Secretariats, Discusses Items Related to The Linkages Between The Multilateral Environment and Trade Agendas, Services And The Environment, Relations With NGOs and IGOs, and Adopts 1997 Report*, PRESS/TE021 (Dec. 19, 1997) <<http://www.wto.org/wto/envIRON/te021.htm>>.

<sup>93</sup> India stressed the need for "special and differential treatment for developing countries" and their "sovereignty over environmental resources." CTE 1996 Report, *supra* note 89, at par. 48 (citing India's non-paper of July 23, 1996 on item 2, setting forth India's view on the relation of trade and environmental principles). See also India's views on items 1 and 8, *supra* note 110.

<sup>94</sup> For Korea's food security argument, see *Report on the Meeting Held on 25 and 26 March 1996*, *supra* note 77, at par. 12. On the resonance of the "food security" argument, see, for example, *India Willing to Abandon Traditional Allies in WTO Talks, If Necessary, Officials Say*, 16 Int'l Trade Rep. (BNA) 1526, 1527 (reporting that Indian Commerce Secretary P.P. Prabju said that "India definitely wants discussed . . . agricultural subsidies in developed countries, specifically the European Union" in the new round of trade negotiations, yet also quoting his special secretary who admitted, "we have our own food security and rural employment issues in agriculture."). See also remarks of Vandana Shiva, Director of the Indian NGO Research Foundation for Science Technology and Natural Resource Policy, *Ecology in International Trade—A Small-Scale Perspective*, WTO as a Conceptual Framework for Globalization 114, 118 (referring to the need to secure "food security"); *Uruguay's Envoy Says Tariffication's Effects must Be Overcome in next WTO Farm Round*, 16 Int'l Trade Rep. (BNA) 786 (May 5, 1999) (noting that "many net food-importing nations perceive that liberalized agriculture trade will impede access to inexpensive food and diminish their food security . . .").

<sup>95</sup> See e.g., *Labeling: Canada, ASEAN, Other Nations Criticize Dutch Proposal to Label Wood Products*, Int'l Trade Rptr. (BNA) (Dec. 2, 1998); *North-South Rift on Eco-labeling Exposed in Meeting before WTO Ministerial*, 13 Int'l Trade Rptr. (BNA) (Oct. 30, 1996) (noting "The American Forest and Paper Association, among others, has protested the proposed EU rules [for labeling paper products] and said if necessary it will ask Washington to protest them at the WTO."). Conversely, the EU has "criticized both Egypt and Brazil for what it claimed were excessive labeling requirements for raw textiles." Daniel Pruzin, *Labeling: United States Reiterates Complaint to WTO on EU Labeling of Genetically Modified Foods*, 15 Int'l Trade Rptr. (BNA) 1572, 1573 (Sept. 23, 1998).

a symposium held at the United Nations in Geneva on the detriments of subsidies to the fishing industry. This, in turn, spurred the WTO secretariat assigned to the Committee on Trade and Environment to prepare its most ambitious analytical paper, a 78 page working paper prepared in two parts assessing the detrimental environmental effects of agricultural, fishing, energy and other subsidies.<sup>96</sup> The focus on market access in item 6 permitted states to harness both trade liberal and environmental NGO support to advance their interests.<sup>97</sup> For a neoliberal-oriented trade community, Article 6 helped frame the trade-environment linkage in terms of trade-environment synergies, as opposed to conflicts. Yet though the framing may have temporarily aligned certain non-state actors from the trade and environment communities, states continued to clash—in particular the United States, Japan, Europe and the Cairns group<sup>98</sup> of agricultural

---

<sup>96</sup> In its November 1997 paper, the Secretariat notes how “trade liberalization has the potential to have a twofold positive effect on the environment,” since it leads to a more efficient allocation of resources meaning fewer resources will be required for a given output, and it generates more wealth meaning more income will be available to protect the environment. CTE, *Environmental Benefits of Removing Trade Restrictions and Distortions: Note by the Secretariat*, WT/CTE/W/67 (Nov. 7, 1997), at para. 5. This latter paper is considerably more detailed, the initial paper and its addendum totaling 78 pages. The paper cites numerous economic studies of the relationship between growth in per capita income and the intensity of polluting effluents. It notes that some environmental problems (such as scarcity of potable water and sanitation) decline, some (such as particulate emissions and habitat loss) initially worsen and then decline, and some (such as carbon dioxide emissions) worsen.

<sup>97</sup> For example, the Argentine representative to the CTE, Hector Torres, was viewed by environmentalists as a potential environmental ally. Argentina’s primary interest was in item 6. It aimed to use the CTE to pressure the EC, in particular, to reduce its agricultural subsidies and other barriers to market access for Argentina’s agricultural products. In exchange, Argentina appeared more willing than other developing countries to accommodate NGO demands on items 1 and 10. Among other matters, Torres was the chair of a session at WWF--World Wide Fund For Nature’s fisheries conference co-sponsored with UNEP, *see infra* note 263, the rapporteur of WWF--World Wide Fund For Nature’s Expert Panel on Trade and Sustainable Development, *see infra* note 264, had a paper published by the Canadian NGO IISD, *see infra* note 271, and published the following article in a mainstream trade law journal: Hector Torres, *The Trade and Environment Interaction in the WTO: How Can a ‘New Round’ Contribute?*, 33 J. OF WORLD TRADE LAW 153 (1999). He was also invited to a conference organized by Global Environment and Trade Study (“GETS”) on trade and environment, where he provided participating NGOs with an update of the CTE discussions and exchanged views. *See WTO Committee on Trade, Environment Gears up for Second Round of Talks*, Int’l Trade Rep. (BNA) (Jan 31, 1996), at 172. GETS is an environmental think tank active on the issue of WTO transparency, created by James Cameron, Steve Charnovitz, Daniel Esty and Mark Ritchie, all champions of greater NGO access to WTO activities and of greater accommodation of environmental measures.

<sup>98</sup> The “Cairns group” consists of a group of fourteen predominately agricultural exporting countries, formed in Cairns Australia early in the Uruguay Round of trade negotiations, that includes developed and developing countries. The original members were Argentina, Australia, Brazil, Canada, Chile, Fiji, Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand and Uruguay. *See* Diana Tussie: *The Cairns Group in the Uruguay Round*, in DEVELOPING COUNTRIES IN WORLD TRADE, *supra* note 91, 181-203 (“The coalition had been Australia’s intellectual child, but gradually other countries were pulled to the center of the stage.” *Id.* at 195); JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND 30-31 (1995).

exporting countries over agricultural trading interests.

### **B. Environmental Issues of Primary Concern to the United States and EC**

The purportedly “environmental” items of primary interest to the United States and Europe were not surprisingly of primary interest to U.S. and European non-governmental organizations.<sup>99</sup> These items respectively examined the existing environmental exceptions in GATT (item 1), in GATS (item 9), and their adjudication before WTO panels (item 5), as well as relations between the WTO and non-governmental organizations (item 10).<sup>100</sup> Of these items, only item 1, concerning “the relationship between [WTO rules] and trade measures for environmental purposes,” generated considerable debate, as it implicated current GATT rules around which the controversial tuna-dolphin dispute turned.<sup>101</sup> However, since these items would disproportionately affect the trading interests of smaller states and, in particular, of developing countries, developing countries (supported by developing country interest groups) viewed them less as “environmental” issues and more as market access/anti-protectionist issues.<sup>102</sup> Working

---

<sup>99</sup> Developing countries were of course interested in the outcome of discussions over these items from a *defensive* perspective, but they would have preferred that the items be kept off the CTE/WTO agenda.

<sup>100</sup> Item 5 concerning “the relationship between the dispute settlement system in the multilateral trading system and those found in multilateral environmental agreements” was “discussed in conjunction with” and largely folded into item 1. *See* CTE 1996 Report, *supra* note 89, at par. 32. Item 9, which concerned issues under the General Agreement on Services (GATS) similar to those under GATT Article XX, generated little debate, with discussions being deemed merely “exploratory.” *Id.* at par. 154. Discussions over item 10, concerning the input of intergovernmental non-governmental organizations, were largely transferred to General Council meetings, resulting in a General Council Decision on “Guidelines for arrangements with non-governmental organization” of July 18, 1996. CTE 1996 Report, *supra* note 89, at par. 165. On an informal basis, the CTE secretariat nonetheless worked relatively closely with non-governmental organizations, organizing a number of NGO symposia, as well as with representatives of international intergovernmental organizations, who were invited to give presentations to the CTE. *See* discussion *infra* notes 301-302 and accompanying text.

<sup>101</sup> In particular, the GATT exception clause, Article XX, permits, subject to a number of conditions, trade restrictions “to protect human, animal or plant life or health” and for “the conservation of exhaustible natural resources.” Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 art. XX(b), (g) (1994).

For example, Canada and Australia were also skeptical over the potential use by the United States and EC of an expansive interpretation of the exception clauses in Article XX of GATT 1947.

<sup>102</sup> For an overview of developing country positions on a modification of Article XX, *see e.g.* Magda Shahin, *Trade and Environment: How Real is the Debate?*, in TRADE, ENVIRONMENT AND THE MILLENNIUM (Gary Sampson and W. Bradnee Chambers, eds.), 35, 43-49 (1999).

together with smaller developed countries, they successfully opposed U.S. and European proposals that could amend or interpret WTO rules to better accommodate certain trade-restrictive environmental measures.<sup>103</sup>

### C. Environmental Issues of Primary Concern to Developing Countries

The two “environmental” items of primary interest to only developing countries<sup>104</sup> similarly enabled them to adopt environmental arguments to restrict trade—item 7 concerning “the export of domestically prohibited goods” (or “DPGs”) (that is, goods not permitted to be sold in developed countries),<sup>105</sup> and item 8 concerning “the relevant provisions of the Agreement

---

<sup>103</sup> For an overview of the nine member submissions on item 1 before the CTE, see Chiedu Osakwe, *Finding New Packages of Acceptable Combinations of Trade and Positive Measures to Improve the Effectiveness of MEAs: A General Framework*, in *Trade and the Environment: Bridging the Gap* (eds. Agata Fijalkowski & James Cameron) 38, 41-45 (1998) and Magda Shahin, *Trade and Environment in the WTO: A Review of its Initial Work and Future Prospects*, 5 Third World Network Trade & Development Series (1997) (on file with author). Shahin and Osakwe were respectively the Egyptian and Nigerian delegate before the CTE. Osakwe is now a member of the WTO secretariat. See also CTE 1996 Report, *supra* note 89, at 3 n.12, 5 n.18, 7 n.26 (referring respectively to a non-paper of Switzerland; May 20, 1996; a non-paper of the European Community, Feb. 19, 1996; a non-paper of the United States, Sept. 11, 1996; as well as submissions of a number of other countries). In WTO/GATT parlance, the curious term “non-paper” refers to a submission by a state whereby the state expressly reserves its position. A state may, for example, submit a “non-paper” when its position has not been fully cleared through an inter-agency process, or it wishes to reserve taking a formal position because of domestic political concerns.

Nonetheless, the U.S. and EC positions on the need for Article XX to better accommodate trade restrictions on environmental grounds were largely accepted by the WTO Appellate Body through the Appellate Body’s subsequent interpretation of Article XX. This occurred in the fall of 1998 in its judgement in a dispute involving a U.S. ban of shrimp imports from Thailand, Malaysia, India and Pakistan on account of the shrimp methods used that resulted in the death of endangered sea turtles. For an overview and analysis of this dispute, see Gregory Shaffer, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 93 AM. J. INT’L L. 507 (April 1999) [hereinafter Shaffer, *Shrimp-Turtle Dispute*].

<sup>104</sup> Again, these issues were of interest to developed countries only from a *defensive* perspective, and they would have preferred to keep them off the CTE/WTO agenda.

<sup>105</sup> This and related issues have been negotiated in parallel in other fora. For example, in March 1998, the parties to the Basel Convention on the Control of Transboundary Movements of Wastes and their Disposal agreed to amend it so as to immediately ban the export of hazardous wastes from developed to developing countries. See *Basel Meeting on Hazardous Wastes Ends on Note of Optimism*, (Feb. 27, 1998) <<http://www.unep.ch/basel/press/press6.html>>; *Successful Outcome for Basel Convention Conference in Kuching, Malaysia* (Feb. 27, 1999) <<http://www.uk-us-trade.org/bistext/fordom/environ/02Mar98.stm>>. Also in September 1998, countries signed a new treaty requiring prior informed consent of a developing country before certain banned and severely restricted chemicals and hazardous pesticides are exported to them. This latter treaty was negotiated under UN auspices, co-sponsored by UNEP and the Food and Agricultural Organization (FAO). See *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, Sept. 11, 1998, 38 I.L.M. (1999) (reporting U.N. Doc. UNEP/FAO/PIC/CONF/2).

on Trade-Related Aspects of Intellectual Property Rights” (TRIPs) in relation to sustainable development objectives. Not surprisingly, these two items were opposed by northern business groups and northern governments and advocated most fervently by southern (not northern) environmental and developmental non-governmental organizations.<sup>106</sup>

Although the Committee on Trade and Environment focused primarily on the impact of environmental measures on trade, states freely adopted “environmental” arguments where their trading interests could benefit.<sup>107</sup> While most developing countries initially opposed the EMIT Working Group’s convening because environmental issues fell outside the WTO’s “competence,”<sup>108</sup> they did not hesitate to wield environmental arguments to limit other countries’ exports after the WTO Committee was formed. African states, led by Nigeria, asserted that WTO rules should restrict the export of waste materials and domestically prohibited goods to protect the African environment and African health.<sup>109</sup> India pressed for changes in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) to limit patent rights, create “farmer rights” and recognize “indigenous knowledge” in order to promote sustainable development. India knew that these changes would economically benefit its farmers vis-a-vis U.S. and European agribusiness and pharmaceutical concerns. India maintained that forcing

---

<sup>106</sup> See discussion *infra* notes 111-113 and accompanying text.

<sup>107</sup> Environmental arguments have long had an elastic nature. They have, for example, long been employed in U.S. domestic commerce and EC internal market cases. In the United States, *see e.g.* *Minnesota v Clover Leaf Creamery C.*, 449 U.S. 456 (1981) (concerning a Minnesota statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but not cardboard nonreturnable, nonrefillable containers). For the EC, *see e.g.* *Commission v Denmark (Beverage Containers)*, Case 302/86, 1 CMLR 619 (1989) (concerning a Danish law requiring the use of only certain re-usable containers for the sale of beer and soft drinks).

<sup>108</sup> See *supra* notes 56-59 and accompanying text.

<sup>109</sup> Egypt, for example argued that “commercial interests should not prevail over the protection of human, animal or plant life or health.” CTE, *Report of the Meeting Held on 16 February 1995*, WT/CTE/M/1, at par. 5 (March 6, 1995). The Tanzanian delegate maintained that export restrictions on trade in waste materials and domestically prohibited goods were required so that developing countries would not become “convenient dumping grounds” for the developed world and its multinational enterprises. See May 1991 Council Meeting [C/M/250], *supra* note 74, at 6. The United States countered that these issues were more appropriately addressed in other international environmental fora. See CTE, *Report of the Meeting Held on 14 December 1995*, WT/CTE/M/6, at par. 32 (Jan. 17, 1996) (where the U.S. maintains that other organizations “had the competence and expertise” to address these items, unlike the CTE). This constituted a reversal of the parties’ respective positions on item 1 where developing countries maintained that, because environmental issues were to be addressed in other international fora, unilateral trade restrictions on environmental grounds were not in compliance with WTO rules.

developing countries to recognize and enforce intellectual property rights over life forms, as in the case of genetically-modified plant varieties, could result in monopolization of seeds available on the market, the growth of mono-crops, the loss of traditional farmer and indigenous knowledge and seed use, and ultimately a decrease in biological diversity because fewer plant varieties would be available. India, supported by other developing countries, argued that, in this way, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights would conflict with the 1992 Convention on Biological Diversity.<sup>110</sup>

When it came to calls for amending intellectual property rules, however, the United States and Europe switched stances on the issue of WTO competence. In defense of U.S. biotechnology, agribusiness and pharmaceutical interests, the U.S. responded, “the WTO was not an environmental organization and it lacked the competence to insert MEA [multilateral environmental agreement] goals in WTO Agreements.”<sup>111</sup> Likewise Switzerland, another advocate of accommodating environmental exceptions into GATT Article XX (item 1), yet with its huge pharmaceutical companies now threatened by environmental arguments, “recalled the

---

<sup>110</sup> See e.g. CTE, *Report of the Meeting Held on 11-13 September 1996*, WT/CTE/M/12 (Oct. 21, 1996). India has also proposed that countries prohibit the granting of patents to inventions made with foreign genetic material obtained in contravention of the principles of “sovereign rights” over genetic resources and “fair and equitable” sharing of benefits set forth in Article 15 of the United Nations Convention on Biological Diversity. See remarks of India in WT/GC/W/147 and WT/GC/W/225. **PRINT AND ADD TITLES AND DATES**. Similarly, India has proposed that environmental technology be transferred to developing countries on favorable terms, particularly technologies mandated by multilateral environmental agreements. See remarks of India in WT/GC/W/294. **PRINT AND ADD TITLE AND DATE**. For the position of Kenya on behalf of the “African Group,” Bolivia, Colombia, Cuba, Dominican Republic, Ecuador, Honduras, Nicaragua, Peru, and Venezuela, see V. Jha, R. Vossenaar and U. Hoffmann, *Trade and Environment: Issues Raised in Proposals Submitted to the WTO Council during the Seattle Process and their Possible Implications for Developing Countries*, in *TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: VIEWS FROM SUB-SAHARAN AFRICA AND LATIN AMERICA: A READER* (Pieder Konz, ed.) 375, 390-393, 399-402 (United Nations University, 2000) (citing remarks contained in the following WTO documents WT/GC/W/302, Aug. 6, 1999; WT/GC/W/282, Aug. 6, 1999; WT/GC/M/39, p.4) (includes protection of indigenous and farmers’ rights and knowledge; implementation of developing country rights under the Convention on Biological Diversity, limits to patentability of life forms; compulsory licensing).

<sup>111</sup> CTE, *Report of the Meeting Held on 11-13 September 1996*, WT/CTE/M/12, par. 39 (Oct. 21, 1996). As for limits on patentability of discoveries by the United State’s bio-engineering industries, the U.S. likewise asserted that “it is not within the competence of the WTO to seek to remedy ethical, moral and religious practices.” CTE 1996 Report, *supra* note 89, at par. 140. The United States went on to argue that sustainable development is best promoted through intellectual property protection, that indigenous knowledge does not constitute intellectual property because it falls within the public domain, that in general, any problem for the transfer of environmentally-sound technology lies not in the TRIPs Agreement, but rather in developing countries’ foreign investment restrictions. See CTE 1996 Report, *supra* note 89, at par. 138-143.

Committee's mandate, bearing in mind that the WTO did not have a role in environmental standard-setting and that any interpretation of the Biodiversity Convention would be determined by its Conference of the Parties."<sup>112</sup> In line with its commercial interests, the EC also took a clear bottom line: "The TRIPs Agreement should not be weakened by anything which might transpire in the CTE."<sup>113</sup>

\*\*\*

What mattered in debates within the Committee on Trade and Environment was not the consistency of states' arguments concerning the legal and practical competence of the World Trade Organization to address environmental issues, but rather the specific state objectives at stake. Agricultural-exporting countries such as Argentina pointed out the EC's "inherent contradiction in claiming that free trade and environmental protection were mutually supportive, while at the same time, denying that [agricultural] trade distortions did not have negative environmental effects."<sup>114</sup> But it was to no avail. Similarly, the sub-Saharan African countries' position on trade in domestically prohibited goods and waste products contradicted a host of developing country arguments, including concerning the WTO-illegality of extraterritorial regulation, the inappropriateness of holding developing countries to developed country standards, and GATT's limited competence on environmental policy matters.<sup>115</sup> India likewise capitalized on environmental arguments to promote its economic interests in respect of the WTO Agreement

---

<sup>112</sup> CTE, *Report of the Meeting Held on 21-22 June 1995*, WT/CTE/M/3, at par. 52 (July 18, 1995).

<sup>113</sup> EC comments quoted in Trade and Environment Bulletin No. 13, *WTO Trade and Environment Committee Continues Discussing Proposals on Recommendations for the Singapore Ministerial Meeting and the Post-Singapore Work Programme*, PRESS/TE 013, at 7 (Sept. 1996) available in <<http://www.wto.org/wto/enviro/te013.htm>>. The EC's position reflected the views of UNICE, the EC's peak business lobbying association, which maintained that "the letter and spirit" of TRIPs must prevail and that the EC must "use the WTO dispute settlement system to redress any violations." UNICE Position Paper on TRIPs and the Environment, 1 (Sept. 16, 1997) (on file). UNICE is the acronym for the Union des Confederations de l'Industrie et des Employeurs d'Europe.

<sup>114</sup> CTE, *Report of the Meeting Held on 11-13 September 1996*, WT/CTE/M/12, at 7 (Oct. 21, 1997) (intervention of Argentina).

<sup>115</sup> ASEAN nations, with business constituents potentially engaging in such trade, perceived how these arguments could be used against their interests on other agenda items, in particular item 1 concerning the use of trade measures for environmental purposes, and thus did not support their African counterparts on this issue.

on Trade-Related Aspects of Intellectual Property Rights, but held that the WTO had limited competence to assess environmental perspectives under item 1 concerning the WTO-legality of trade restrictions imposed on environmental grounds.<sup>116</sup> States only argued about the limited competence of the World Trade Organization when they believed that environmental arguments prejudiced their economic interests. States made dollars and cents of the trade-environment linkage before this “dollars and cents” organization. They formed alliances with neoliberals and transnational environmental and business groups when it served their interests.<sup>117</sup>

#### **IV. Alternative Explanations of the Current Status of the CTE Process: Contending States, Neoliberal Networks, Conflicted Stakeholders**

##### **A. Why Negotiation of the 1996 CTE Report Mattered**

Understanding WTO negotiations over trade-environment matters provides a better understanding of how the political bodies within the WTO operate, and in particular, why they provide such little guidance to WTO dispute settlement panels as to how to apply WTO rules to trade-environment disputes. The CTE presented a 47 page report to the first WTO Ministerial Meeting in November 1996 after a grueling negotiating process, culminating in a 36-hour marathon session where the concluding portion of the report was negotiated line-by-line.<sup>118</sup>

---

<sup>116</sup> See CTE 1996 Report, *supra* note 89, at par. 133, 137 & 139. Interview with member of CTE Secretariat, Geneva, Switzerland, June 1998.

<sup>117</sup> As for common interests between northern environmental groups and developing countries over item 8 (TRIPs), see Magda Shahin, *Trade and Environment: How Real is the Debate?*, *supra* note 102, at 52-53 (“It is worth stressing at this juncture that developmental and environmental NGOs from the North as well as from the South latched on to the issue [of TRIPs and sustainable development] that developing countries should have been tackling in depth much earlier.... The recent failure of the lengthy negotiations on the Multilateral Agreement on Investment in the Organization for Economic Cooperation and Development... clearly denotes the strength and skills of environmental NGOs and, if they feel sidelined, TRIPs could be next in turn.”). Similarly, Shahin notes common interests of northern business groups and developing countries on market access issues, such as trade restrictions based on production and process methods. *Id.*, at 55.

<sup>118</sup> For two succinct presentations by participants in the negotiation of the CTE Report, see Magda Shahin, *Trade and Environment in the WTO: A Review of its Initial Work and Future Prospects*, 5 Third World Network Trade & Development Series (1997) (on file with author); and ANDREW GRIFFITH, CANADIAN DEP’T OF FOREIGN AFFAIRS AND INT’L TRADE, REFERENCE DOC. NO. 3, A NEGOTIATOR’S POINT OF VIEW, at 17 (Oct. 1997) (on file with author). Shahin and Griffith were respectively Egypt’s and Canada’s representatives in the negotiation.

Despite the intensity of the negotiation, none of the conclusions proposed any substantive legal changes to WTO rules, but rather called for “further work” on all ten agenda items.<sup>119</sup>

It was not as if state representatives had not fully explored the issues. By December 1996 when the Committee on Trade and Environment delivered its Report, the WTO trade and environment body (in its various mutations), had met thirty-two times over multiple days, in addition to informal consultations among members.<sup>120</sup> The minutes of the formal meetings alone, in their summarized form, total around 800 pages.<sup>121</sup> States submitted over fifty written proposals and observations.<sup>122</sup> In addition, at the member states’ request, the WTO secretariat assigned to the Committee (the CTE secretariat) prepared over thirty working papers providing background information and analysis on the ten agenda items, which in turn cited numerous other studies

---

<sup>119</sup> The 1996 WTO Ministerial Conference was held in Singapore from December 9-13, 1996. At the conclusion of the Conference, the Ministers issued a “Singapore Ministerial Declaration,” paragraph 16 of which briefly summarized the work of the Committee on Trade and Environment, noting that “further work needs to be undertaken on all items of its agenda.” WTO Ministerial Conference, *Singapore Ministerial Declaration*, WT/MIN(96)/DEC (Dec. 11, 1996) available in <<http://www.wto.org/wto/archives/wtodec.htm>> and 36 I.L.M. 218 (1997). Between Ministerial sessions, the WTO is run by the General Council, which oversees and is reported to by the WTO’s numerous committees and subcommittees, including the CTE. The General Council and each committee consists of a representative of each WTO member state.

<sup>120</sup> In total, the EMIT Working Group met thirteen times, once in November 1991, six times in 1992, five times in 1993 and once in 1994. Pending formal ratification of the WTO agreements and formation of the WTO at the WTO’s first General Council meeting on January 1, 1995, the new trade and environment body met four additional times in 1994 as a “Sub-Committee on Trade and Environment of the WTO Preparatory Committee.” Subsequent to the WTO’s formation, the body met as the “Committee on Trade and Environment” six times in 1995 and seven times in 1996. Many informal consultations were of course also held among key member states, as well as the CTE’s chair and the director of the secretariat’s trade and environment division.

<sup>121</sup> The total count is 801 pages of minutes of formal meetings. In internal WTO terminology, there are “formal” and “informal” meetings. The most difficult negotiations, however, take place in “informal” ones, for which there are no minutes. When the delegates negotiated the language of the final CTE 1996 Report, they went into “closed” sessions (a.k.a. held “informal” meetings). Insiders confirm that, if busy, delegates may only attend the “informal” meetings since those are the ones which “count.” Interview with U.S. and Canadian delegates in Geneva, Switzerland (June 1997). An interesting development in WTO-speak is the formation of an “Invisible Committee,” consisting of a small group of WTO members discussing the issues for a new round of negotiations. See *WTO Members Consider Packaging Future Negotiations as New Round*, INSIDE U.S. TRADE 13 (Nov. 14, 1997) (referring to “a meeting of the so-called Invisible Committee, a small group of WTO members . . . . The Invisible Committee was chaired by Canada and included the U.S., European Union, Japan, Argentina, Australia, Brazil, India, Korea, Luxembourg, Morocco, New Zealand, Norway, Poland, Singapore and Switzerland.”).

<sup>122</sup> The precise number is difficult to calculate because many non-papers are not available from WTO archives. This calculation is based on all documents in the archives plus references to non-papers in the CTE 1996 Report and the secretariat’s Trade and Environment Bulletins.

from the World Bank, the Organization of Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and other intergovernmental organizations.

Exhausted by a process which led to such a meager outcome,<sup>123</sup> WTO members significantly reduced the CTE's working schedule since 1996, meeting only three times per year from 1997-2000, tailoring the meetings more toward an analytic study of the trade-environment issues on the Committee's agenda. Although, at the beckoning of the United States and EC, a "WTO high level meeting on trade and the environment" brought together heads of state from around the world in March 1999 to spur negotiation over trade-environment matters, it too resulted in no substantive developments.<sup>124</sup> At the third WTO Ministerial Meeting in December 1999,<sup>125</sup> the United States and EC again paid lip service to environmental issues,<sup>126</sup> but there is no evidence that WTO rule changes desired by U.S. and European environmental non-governmental organizations will soon result.

The intensity of the negotiations over the 1996 CTE Report may seem ironic given that it

---

<sup>123</sup>See Michael Reiterer, *Trade and Environment: Reflections on the Impact of the OECD Joint Session*, INT'L ENVTL. AFF., 69, 70 (1997). The frustrating, exhausting nature of the negotiations over the Report's language was universally confirmed in all interviews conducted by the author with participating state delegates and secretariat members assigned to the Committee on Trade and Environment.

<sup>124</sup> The EC call for a "high level trade and environment meeting... to break the log jam" is cited in European Commission, *The Rt Hon. Sir Leon Brittan QC Vice-President of the European Commission Solving the Trade and Environment Conundrum The Bellerive GLOBE International Conference Geneva, 23 March 1998*, RAPID, March 23, 1998. The agenda and presentations to the high level meeting, held in March 1999, including from U.S. President Clinton and EC Commissioner Sir Leon Brittan, can be obtained from the WTO web site at <<http://www.wto.org/wto/ibs/websym.htm>>. In line with an intergovernmental perspective, Brittan only identified issues of interest to the EC, in particular items 1 and 3. Excluded from Brittan's list were the CTE issues of greatest interest to developing countries, including reduced agricultural and fishery subsidies and a revision of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. See critique from a southern non-governmental organization in *infra* note 337. Moreover, there were internal divisions within the EC itself as to whether such a high level meeting should take place. See Peter Lund, *The Politics of Trade and Environment in the World Trade Organization*, August 1999, at 91 (masters thesis at Copenhagen Business School available in the WTO library) (from his interviews with Danish and other European officials, Lund notes opposition of southern European states such as France, Italy, Greece and Spain.).

<sup>125</sup> See WTO, *The World Trade Organization's Third Ministerial Conference* <<http://www.wto.org/minist/seatmin.htm>> (describing the meeting in Seattle).

<sup>126</sup> See e.g. *EU Unveils Broad Agenda for New Round, Including Standards on Environment, Labor*, 16 INT'L. TRADE REP. (BNA) 1160 (July 14, 1999), and Clinton Stresses Labor, Environment as Elements of WTO Agenda, *Inside U.S. Trade* 6 (Oct. 15, 1999).

gave rise to no procedural or substantive changes in WTO rules or practices. Yet the negotiation of the Report's language, line by line, mattered to states because, as one state delegate noted, it was negotiated in an institution where "words have consequences."<sup>127</sup> As confirmed by another state delegate, "the WTO is an organization about reality."<sup>128</sup> That is, state representatives contrast the tenor of discussions in the World Trade Organization with discussions in UN bodies where states do not confront the same "consequences" when negotiating generalized principles concerning environmental norms.<sup>129</sup> Upon issuance of the CTE Report, member states were thus careful to affirm that it "was not a legal document,"<sup>130</sup> "did not modify the rights and obligations of any WTO member,"<sup>131</sup> and "could not be used in part or its entirety in any dispute settlement process or any other legal instruments that might be developed subsequently."<sup>132</sup>

State delegates perceive that words are more likely to have "consequences" in the World Trade Organization because of the economic impact of decisions rendered by its binding dispute

---

<sup>127</sup> Interview with Chiedu Osakwe, former Nigerian delegate to the CTE, in Geneva, Switzerland (June 1997). Osakwe was contrasting discussions among states within the WTO compared to those same discussions within UN bodies. Osakwe left the Nigerian delegation to work in the WTO Secretariat's Division on Trade and Development. In September 1999, he was appointed project co-ordinator of the WTO's work with least developed countries and a special advisor to the Director-General. See WTO, Moore Announces Key Appointments for Development Issues (Sept. 13, 1999) <<http://www.wto.org/wto/new/press136.htm>>.

<sup>128</sup> Interview with Andrew Griffith, former Canadian delegate to the CTE, in Geneva, Switzerland (June 1997).

<sup>129</sup> For a cogent presentation of the way international environmental institutions address environmental concerns, see, INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL PROTECTION (Peter Haas et al. eds. 1993) (a state-centric analysis characterizing "intergovernmental organizations and rules" as "extremely weak," but nonetheless potentially promoting effective coordination through fostering agenda setting, facilitating the negotiation of new international environmental policy initiatives, and enhancing national capabilities for implementing them, *id.* at 424).

<sup>130</sup> Statement of Singapore in CTE, *Report of the Meetings Held on 30 October and 6-8 November 1996*, WT/CTE/M/13, at par. 11 (Nov. 22, 1996).

<sup>131</sup> Statement of CTE Chair, Ambassador Juan Carlos Sanchez Arnau of Argentina, in *Report of the Meetings Held on 30 October and 6-8 November 1996*, *supra* note 130, at par. 3. Similarly, the EMIT Working Group's Chair earlier stressed that the group was not "a negotiating forum." Report of the Chairman of the Group on EMIT, Ambassador Hideotoshi Ukawa of Japan, in GATT B.I.S.D. (40th Supp.), at par. 8, page 75.

<sup>132</sup> Statement of India in *Report of the Meetings Held on 30 October and 6-8 November 1996*, *supra* note 130, at par. 19).

settlement process.<sup>133</sup> Potential disputes with real economic impacts tend to polarize the discussion of complex trade-environment issues.<sup>134</sup> As a representative from an African nation to the Committee on Trade and Environment confirmed, “Delegates are wary of the WTO. GATT is a binding contract. People are not as open and free wheeling as in other international fora. In the WTO, everything you say matters and can be used against you.”<sup>135</sup>

National representatives were vigilant over the wording of the CTE Report because they feared that the CTE Report could, in fact, be used against them in subsequent disputes implicating domestic economic and political interests. In the WTO’s first major trade-environment dispute following the CTE Report—the shrimp-turtle dispute—the claimants (Thailand, Malaysia, India and Pakistan), the respondent (the U.S.) and three third party participants (Australia, Nigeria and Singapore) each referred to different paragraphs from the CTE Report in support of their positions.<sup>136</sup> The dispute settlement panel likewise cited the Report both in its findings and in its “Concluding Remarks,”<sup>137</sup> as did the Appellate Body in

---

<sup>133</sup> The WTO has the most active dispute settlement system of all international organizations. States are thus much more careful with the text of WTO agreements and agreed interpretations of WTO provisions because they will be interpreted within a binding dispute settlement process. The interpretation of WTO legal provisions can have extremely high stakes. For example, when the Appellate Body held against the United States’ “foreign sales corporation” tax exemptions as contrary to WTO rules on export subsidies, it was estimated that the U.S. may have to pay the EC over US\$4-5 billion dollars annually if the United States does not comply with the WTO decision or otherwise settle the matter. See Joseph Kahn, *U.S. Loses Dispute on Export Sales*, N.Y. TIMES A1 (Feb. 24, 2000). During the first five years of the World Trade Organization’s existence, WTO members filed 185 claims (as determined by number of formal consultations requested—the first step of the process) before its dispute settlement body, and WTO panels rendered substantive decisions in 30 separate matters that were formally adopted by the WTO Dispute Settlement Body. Most of the filed claims, as well as claims never formally filed, were settled within the shadow of the WTO’s dispute settlement system. See *Overview of the State-of-play of WTO Disputes* (Jan. 13, 2000) <<http://www.wto.org/wto/dispute/bulletin.htm>>.

<sup>134</sup> Ironically, the pressure of ongoing disputes can turn the GATT, despite its reputation as a relatively well-functioning international institution, into a General Agreement to Talk and Talk. The Uruguay Round itself took ten years of negotiation until sufficient issue linkage gave rise to tradeoffs resulting in the new WTO rules.

<sup>135</sup> Interview with Chiedu Osakwe, Nigerian representative on the CTE, in Geneva, Switzerland (June 4, 1997). Similarly, in the words of a representative from the United Nations Environmental Program (UNEP), unlike UNEP, the WTO is a “contract-based organization,” one where breaches have consequences.

<sup>136</sup> See Report of the Panel, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998), at par. 4.16, 4.53 & 4.71 (summarizing third party participants’ observations) [hereinafter Shrimp-Turtle Panel Report].

<sup>137</sup> See Shrimp-Turtle Panel Report, at par. 7.50 (in findings) and 9.1 (in concluding remarks).

reversing certain panel findings.<sup>138</sup> Although the CTE Report was not decisive in any party's position, each tried to spin it to support its reasoning. Ultimately, while the Appellate Body still concluded that the United States' import ban was "not justified" under GATT Article XX (the GATT exception clause),<sup>139</sup> it nonetheless applied Article XX in a manner more accommodating to U.S. trade restrictions than earlier GATT reports, finding that the words of Article XX must be read... in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."<sup>140</sup> In being more accommodating to trade restrictions for environmental ends, the Appellate Body decision could significantly affect developing countries' trading interests. In fact, the Thai shrimping industry had annually exported almost a billion dollars of shrimp and shrimp products to the United States in the years immediately preceding the ban, constituting over 50% of Thailand's total exports of these products.<sup>141</sup> States' belief that the "words" of the CTE Report had "consequences" was justified.<sup>142</sup>

---

<sup>138</sup> See Report of the Appellate Body, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), at par. 154-55 (referring to the importance of the environmental objectives and the absence of CTE "specific recommendations" in the context of its finding that the GATT Article XX(g) exception concerning the "conservation of exhaustible natural resources" is applicable), and par. 168 (noting the CTE's affirmation of the importance of "multilateral solutions" in the context of its critique of the United States failure to engage in "serious, across-the-board negotiations," at par. 167) [hereinafter *Shrimp-Turtle Appellate Report*].

<sup>139</sup> See *Id.*

<sup>140</sup> See *Id.*

<sup>141</sup> The Thai shrimp industry is particularly dependent on the U.S. market, selling just over 50% of its shrimp exports to the U.S. In 1994 and 1995, the Thai shrimp industry exported shrimp and shrimp products to the United States valued at 981 million dollars. In 1996, the value of Thai imports of shrimp products into the United States dropped to \$888 million, even though Thailand quickly revised its regulations in order to comply with U.S. shrimping requirements. See Fisheries of the United States, 1997 (Shrimp Imports by Country of Origin), U.S. Department of Commerce, National Oceanic and Atmospheric Administration (on file). The 50% figure is cited in *Executive Summary*, 1 BRIDGES (April 1997) (published by the NGO consortium International Centre for Trade and Sustainable Development, based in Geneva, Switzerland). Moreover, the uncertainty of access to the US market resulted in a glut of shrimp on the Thai market and plummeting prices. Many Thai shrimp farmers were forced to sell at a loss. Some lost their entire investments and a number reputedly committed suicide as a result. Interview with officials from the Thai Department of Fisheries, January 2000, Bangkok, Thailand.

<sup>142</sup> Following the Appellate Body's ruling, the United States continues to impose its legislation mandating sea turtle protection measures and has simply modified procedures pursuant to its implementing regulations in an attempt to comply with the Appellate Body's more accommodating requirements. See Shaffer, *Shrimp-Turtle Dispute*, *supra* note 103.

The CTE Report was also negotiated in the context of on-going U.S. and EC parallel demands that the World Trade Organization address labor standards and possibly authorize trade restrictions were a country not to comply with minimum labor standards.<sup>143</sup> Trade restrictions based on labor standards are analogous to those based on environmental standards because both are based on the manner in which a product is produced (in WTO jargon, on “process and production methods,” or “PPMs”), and not on any danger inherent in the product itself.<sup>144</sup> Thus, developing countries feared that were the CTE Report to suggest that trade restrictions imposed to protect a foreign country’s environment could be authorized under WTO rules, this could imply that trade restrictions would similarly be permissible in order to protect a foreign country’s workers. Since WTO-authorized trade restrictions based on labor standards would even more severely prejudice developing country trading interests, the words of the CTE Report mattered.

---

<sup>143</sup> See Gary G. Yerkey “*Discussion of Trade-labor Link Will Be Sufficient, Lang Says*, 13 Int’l Trade Rep. (BNA) 1629 (Oct. 23, 1996) (reporting the efforts of the U.S. and almost all EU member states to have labor standards included on the agenda of the WTO’s first ministerial meeting). This concern over the inclusion of labor standards in the WTO agenda was a central conflict in the 1999 WTO Ministerial in Seattle Washington, in particular after President Clinton appeared to call for trade restrictions against countries not meeting minimum standards. See Roger Cohen, *Clinton Remark on Child Labor Irks Brazil*, N.Y. TIMES, Dec. 7, 1999, at A14; David E. Sanger, *After Clinton’s Push, Questions about Motive*, N.Y. TIMES, Dec. 3, 1999, at A12 (“India, Brazil, South Africa and other developing nations abhor the idea” of “making labor rights a central part of the World Trade Organization’s mission.”).

<sup>144</sup> The PPM issue cuts at the core of the predictability of the WTO-GATT system, for if countries can restrict trade on the basis of how a product is purchased, then hard fought negotiations to reciprocally reduce tariffs can be rendered meaningless. The can also be made inequitable, since developed countries are more likely to impose restrictions on environmental grounds than developing countries. The controversial tuna-dolphin and shrimp-turtle cases both revolved around the issue of trade restrictions based on production and process methods. The United States import bans were made on the basis of how the tuna and shrimp were respectively caught (i.e. the production method), which had nothing to do with the tuna or shrimp themselves (i.e. the U.S. restrictions were, in WTO parlance, “non-product related”). Developing countries fear that an acceptance of non-product related production and process methods could undermine one of GATT’s core provisions, that concerning the non-discriminatory treatment of foreign “like products” (Article III of GATT 1947). If WTO members were permitted to ban the sale of products that did not meet with required national production methods— be they environmentally harmful emissions or minimum wage requirements—then developed countries might restrict their imports on the grounds that they are not “like products” because they differ in the manner in which they are produced.

Developing country are thus extremely wary of opening the door in any way to trade restrictions based on production and process methods. For example, the Egyptian ambassador to the WTO, Mounir Zahran noted developing countries’ concern “that the ecolabelling issue could be a prelude to introducing PPMs [process and production methods] into the WTO.” See Martin Khor, *South Concerned over New Issues at WTO*, *supra* note 35. The PPM-issue was also raised in respect of item 3(a) concerning taxes for environmental purposes. The CTE 1996 Report notes that “Different views have been expressed on the likely treatment under the Agreement of a rebate for exported products of indirect environmental taxes on a non-product related PPM in excess of the tax rebated on like products when sold for domestic consumption.” CTE 1996 Report, *supra* note 89, par. 56.

As a Brazilian WTO representative confirms, “We [developing countries] cannot be in favor of a change in Article XX [the clause providing for exceptions to GATT obligations]. We think that this would create an imbalance in terms of a whole set of disciplines and commitments and would set a precedent for other issues”—namely trade restrictions based on “unfair” labor standards.<sup>145</sup>

In the context of an institution with an effective dispute settlement system which implicates significant economic interests, states have been justifiably concerned about the repercussions of the more abstract discussions in the Committee on Trade and Environment on their specific trading interests. They were thus extremely guarded about the substance and language of the CTE Report, and remain guarded about the possibility of any substantive recommendation coming out of this or any other WTO Committee.

Any honest challenge to WTO trade-environment policy must be based on a clear understanding of how the WTO political process works and, in particular, the roles and positions of different players in respect of existing WTO trade-environment rules. The remainder of this section assesses the relative roles and positions of states (representing national positions), national trade bureaucracies, the WTO secretariat, and northern and southern business and other civil groups. Such an analysis provides us with a better understanding of who lies behind the WTO rules that dispute settlement panels ultimately must interpret in trade-environment disputes.

---

<sup>145</sup>Interview with Brazilian delegate, in Geneva, Switzerland (June 19, 1998). For further comments concerning labor standards from major figures from developing countries, see e.g. remarks of Julius Nyerere (former president of Tanzania), *Social Issues in International Trade Discussions*, Bridges 11 (Nov. 1999) (maintaining that the demands for social standards cloak protectionist designs and that, in any case, they should be accompanied by serious international anti-poverty measures); and the Secretary General of the United Nations, Kofi Annan, in *Let UN Agencies Tackle Labour and Environment, Says Annan*, at <http://www.twinside.org.sg/souths/twn/title/annan-cn.htm> (visited Dec. 12, 1999) (maintaining “that labour and environment issues should not be used as pretexts for ‘trade restrictions’ and they were better dealt with by the specialized United Nations agencies promoting their causes”).

While the WTO now incorporates intellectual property protection, a PPM, into the trading system by means of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), developing countries feel that this was forced on them by the United States and EC to their disadvantage, and is not an argument for incorporating yet another PPM requirement into the GATT system. For an overview of the political economy of the TRIPs Agreement, see Susan K. Sell, *Multinational Corporations as Agents of Change: The Globalization of Intellectual Property Rights*, in A. Claire Cutler, Virginia Haufler, and Tony Porter, eds., *PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS* 169 (1999).

### A. The Predominant Role of States

The WTO is a state-dominated institution and not surprisingly states played the dominant role in shaping the CTE agenda. Only states are formal members of the World Trade Organization, permitted to vote on WTO matters and file claims under WTO rules. Moreover, only states may attend, speak and submit papers to meetings of WTO committees, including the Committee on Trade and Environment.<sup>146</sup> As the former director of the Trade and Environment division of the WTO secretariat confirms, “The [CTE] process was driven by proposals from individual WTO members.”<sup>147</sup> Already by December 1996 (the month of the CTE Report), states had submitted over fifty documents to the Committee and its predecessor working group, setting forth their national experiences, observations and positions in respect of the CTE’s ten agenda items.<sup>148</sup> These written submissions supplemented state’s numerous interventions at committee meetings, which also were typically based on policy papers developed in home capitals.<sup>149</sup>

1. Intra-State Conflicts. The reason that the Committee on Trade and Environment has been stalemated over its ten-point agenda is not solely because of a lack of consensus *among* states, but also because of a lack of consensus *within* states. In the United States, for example, the Clinton administration has been hampered in forming a clear position on the permissibility of trade restrictions on environmental grounds on account of conflicts between powerful business constituents, on the one hand, and environmental constituents, on the other.<sup>150</sup> One WTO

---

<sup>146</sup> The only exception to this rule is where states, by consensus, invite representatives of other international organizations to observe and sometimes present overviews of such organization’s work programs. Technically speaking, to be a WTO member, an entity only need have a separate customs policy, and need not be recognized as a separate political entity, or state. However, of the WTO’s 136 members, only Hong Kong is not a full-fledged state.

<sup>147</sup> Eglin interview, *supra* note 86.

<sup>148</sup> See *supra* note \_\_\_. [CUT THIS NOTE]

<sup>149</sup> State delegates confirmed that the positions they present at CTE meetings are typically based on policy papers prepared with representatives in home capitals. In many cases, states simply read the policy papers at the CTE meeting. Confirmed in interviews with state delegates to the CTE in Geneva, Switzerland in June 1997 and June 1998.

<sup>150</sup> See, e.g., *Administration Unclear on Policy for WTO Environment Committee*, INSIDE U.S. TRADE, Jan. 26, 1996, at 19 (citing Gregory Mertz, of the U.S. Environmental Protection Agency concerning the slow pace of interagency discussions on account of “conflicting concerns”). On the controversial item 1, the United States only

secretariat representative criticizes the United States for bringing to the World Trade Organization what it is “incapable of solving at the national level,” calling this “madness.”<sup>151</sup> Yet it was not madness for U.S. government representatives. They could appease domestic constituents by appearing to address issues in the WTO and letting other countries block changes to WTO rules that could affect U.S. business interests. They could use the Committee on Trade and Environment as a foil to avoid taking clear positions that would disaffect politically powerful constituencies.<sup>152</sup> In any case, it was certainly not worth the administration’s risk of exposing itself domestically were its position ultimately rejected by other CTE members.

CTE secretariat members were similarly never clear about the EC’s position on the WTO-

---

submitted to the CTE, during the final negotiations of the CTE 1996 Report, a “non-paper” setting forth certain general principles that the U.S. wished the Committee to endorse. These general principles merely stated that “WTO rules should not hamper the ability of MEAs [multilateral environmental agreements] to achieve their environmental objectives” and that WTO panels “should seek input from relevant MEA bodies in any dispute involving questions relating to an MEA.” CTE 1996 Report, *supra* note 89, par. 23.

U.S. business groups tended to argue in favor of clearer rules needed to prevent protectionist barriers on environmental grounds, and U.S. environmental groups tended to argue in favor of greater discretion for the use of trade policy as a coercive measure to promote environmental protection abroad. For example, while U.S. environmental groups would like the GATT exception clause to clearly provide that trade sanctions authorized under multilateral agreements should be automatically deemed permissible under the GATT exception clause (Article XX), business groups are quick to point out that “a WTO case involving a MEA [multilateral environmental agreement] to which the United States is not a party could come sooner or later.” Rosella Brevetti, WTO Rules Allow Parties to Join Pacts on Global Environment with Trade Provisions, 17 Int’l Trade Rep. (BNA) 446-447 (March 16, 2000) (noting comments of Timothy Deal, Senior Vice President of the U.S. Council for International Business). A case in point may be the Cartagena Protocol on Biosafety which permits countries to restrict the import of genetically modified seeds on the basis of the “precautionary principle” (that is, without clear scientific evidence that the seeds could harm the environment). For a discussion of the Biosafety Protocol and its relation to the WTO Sanitary and Phytosanitary Agreement, see Mark Pollack and Gregory Shaffer, *Genetically Modified Organisms: the Next Transatlantic Trade War?*, The Washington Quarterly (Oct. 2000). While business groups have close relations with the Office of the United States Trade Representative, environmental groups also exercise power in the United States because they can block granting “fast-track” negotiating authority to the Clinton administration, or otherwise block the negotiation of trade liberalization agreements. See, e.g., *Environmentalists Seek Stronger U.S. Position in New WTO Talks*, 17 INSIDE U.S. TRADE 22 (Oct. 1, 1999) (citing Sierra Club’s Executive Director’s warning that “failure to achieve changes [in the U.S. position for “millennium round” negotiations] could result in environmental groups lobbying against fast-track for any new WTO agreements that arise out of the negotiations.”).

<sup>151</sup> Interview with a high level official of the WTO secretariat, in Geneva, Switzerland (June 1997).

<sup>152</sup> For example, the WTO critic from India, Vandana Shiva, director of the Research Foundation for Science, Technology and Natural Resources Policy (India), states, “There were two functions sought to be served by linking trade and environment in the WTO: to serve as a justification for unilateral trade measures; and to pacify the demands of environmentalists as well as deflect their interests and actions away from the national level by blaming poorer countries for causing global environmental problems.” See Martin Khor, *South Concerned over New Issues at WTO*, *supra* note 35.

legitimacy of private eco-labeling regimes (discussed under item 3)—that is, eco-label regimes developed by the private sector, often in conjunction with environmental groups, without government involvement.<sup>153</sup> All eco-label regimes are controversial because they are typically based on production methods that do not affect the product consumed in the importing country, but only the environment of the foreign country. Moreover, domestic producer interests generally influence the details of national eco-labels regimes, and, by definition, private regimes, and can thus tailor them to discriminate against foreign competitors. Divisions among EC business and environmental/consumer interests impeded the EC's ability to clarify its position.<sup>154</sup> These internal EC stakeholder divisions were reflected, to a certain extent, in divisions between the EC directorates respectively responsible for trade and for environmental policy.<sup>155</sup> While the EC trade directorate appeared more accommodating, the environmental directorate argued that the EC should refrain from agreeing that private eco-labeling regimes are subject to WTO rules because they could then more easily be challenged before WTO panels.<sup>156</sup> EC member states' competing interests also clash, whether over packaging regulations or the reform of the EC's

---

<sup>153</sup> Interview with a member of the CTE secretariat, in Geneva, Switzerland (June 1998). Eco-labels involve the labeling of a product as being relatively unhazardous to the environment compared to substitutable products. Some eco-labels take account of a product's entire "life cycle," from production to disposal. Eco-labels can be controversial because they can be created in a manner to favor local producer interests over foreign producers, thus constituting a discriminatory barrier to trade.

<sup>154</sup> EC businesses, for example, under UNICE (Union des Confederations de l'Industrie et des Employeurs d'Europe), argued that all eco-labels, including "voluntary" labels (i.e. those developed voluntarily by private groups), should be governed by the WTO Agreement on Technical Barriers to Trade. See UNICE Position on Eco-Labeling for the WTO Discussion on Trade and Environment, July 22, 1996 (obtained by author from UNICE). EC environmental groups, fearing the constraints of TBT rules, argued otherwise. See, e.g., WWF, *Eco-Labeling in The WTO Committee on Trade and Environment is it Serious?* (visited Nov. 14, 1999) <<http://www.panda.org/resources/publications/sustainability/wto/eco.htm>> ("[T]he WTO should not attempt to limit the consumers right to know, nor interfere with the development of this potentially important new environmental policy tool.") For another example of conflicting pressures on EC negotiators from business and environmental groups, see Vinod Rege, *GATT Law and Environment-Related Issues Affecting the Trade of Developing Countries*, 128 J of World Trade 95, 141 (June 1994) (noting "conflicting pressures from EU industry and environmental groups on the position to take concerning Indonesia's export restrictions on unprocessed rattan").

<sup>155</sup> The European Commission is currently divided into 24 directorates general, one being the Directorate General for External Trade and another being the Directorate General for the Environment.

<sup>156</sup> Confirmed in interview with EC representative in Geneva, June 1998. As a CTE secretariat representative stated, "The Canadian Pulp and Paper Association has a file ready against EC eco-labeling schemes." Interview in Geneva, Switzerland (June 1998).

agricultural regime, which more recently pitted France against Germany, again hampering the formation of a clear EC position.<sup>157</sup> The EC is, in consequence, less likely to expend political capital within the WTO on eco-labeling and other environmental issues, in particular where it could thereby be pressed to trade off EC—and, in particular, French and southern European—agricultural interests as part of an issue-linked package deal.

2. State Power. States are not equal players within the Committee on Trade and Environment. In the hundreds of pages of minutes of CTE and EMIT Working Group meetings, only twenty-two states (out of the WTO's 134 members) spoke more than six times on the different items in the CTE's agenda.<sup>158</sup> The most active states were the United States, EC and Canada, in that order, even though the United States has been faulted by some WTO insiders for not taking a more entrepreneurial role.<sup>159</sup> India and Mexico were particularly active among developing countries, reflecting India's large population, relatively large gross national product, and its leading role among developing countries, and Mexico's relative size and relevant experience with trade and environment negotiations under the North American Free Trade Agreement. Smaller developing countries remain at a distinct disadvantage, for their bureaucracies are less experienced with the details of international trade rules, and often, given scarce resources, they have only one (or in many cases, no) representative in Geneva to follow all

---

<sup>157</sup> See generally HUGO PAEMAN & ALEXANDRA BENSCH, FROM THE GATT TO THE WTO: THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND (1995) (noting how it was difficult for the EC to take the initiative in the Uruguay Round trade negotiations on account of EC member state differences); Robert Graham, *Barnyard Noises*, FIN. TIMES (Mar. 3, 1999) at 19 (reporting how Common Agricultural Policy negotiations have pitted France against Germany and other EU members); Michael Smith, *Defeat for Champions of Market Liberalisation: Common Agricultural Policy Proposed Reforms Weakened*, FIN. TIMES (Mar. 27, 1999) (describing the ultimate failure of negotiations to provide substantive reform in EC intergovernmental meetings in March 1999).

<sup>158</sup> The OECD members (i.e. those countries considered to be developed countries) so participating were Australia, Canada, the EC (collectively representing all member states), Japan, Mexico, New Zealand, Norway, South Korea, Sweden, Switzerland and the United States. The only non-OECD members on this list were Argentina, ASEAN (as a group), Brazil, Chile, Egypt, Hong Kong, India, Morocco, Nigeria, Sierra Leone and Venezuela. This is based on an approximate count of interventions found in the minutes of CTE meetings.

<sup>159</sup> Interviews with a number of WTO secretariat members in Geneva, Switzerland (June 1997 and June 1998). See explanations for U.S. reticence in *infra* notes 150-152 and accompanying text.

WTO matters.<sup>160</sup> More powerful states such as the United States and EC, thus drive WTO agendas. For example, the U.S. and EC were able to demand a “high level meeting on trade and environment matters” held in March 1999, but developing countries wield no such clout. As a senior Brazilian delegate confirms, “It’s a question of power. We don’t have the power to call for a high level meeting on matters important to us, such as tariff escalation or agricultural protection in the EC. We would simply be ignored. Only the U.S. and EC have the power to pressure other countries into holding high level meetings of ministers on specific matters of interest.”<sup>161</sup>

3. Divisions Between Powerful States. Divisions within and between powerful states have helped block proposals that could adversely affect developing countries’ trading interests. Divisions *within* the United States and EC over controversial CTE items, such as item 1 (concerning trade measures for environmental purposes) and item 3 (concerning eco-labeling and related national regulations), hamper their taking a more aggressive role. Divisions *between* the United States and EC over these matters, impede them from presenting a united, coherent negotiating package.<sup>162</sup> The United States wished to leave item 1 for resolution by WTO dispute settlement panels while the EC sought a politically-negotiated clarification of GATT Article XX.

---

<sup>160</sup> As of November 1999, twenty-eight WTO members did not even maintain permanent offices in Geneva because of a lack of resources. See *WTO organizes ‘Geneva Week’ for non-resident delegations*, 43 *WTO Focus* 16 (Nov. 1999). Where a developing country only has a single national representative, that representative must divide his or her time between more than seventy different WTO councils, committees, working parties and other groupings. See Gary Sampson, *Trade, Environment and the WTO: The Post-Seattle Agenda* 24 (2000). As Sampson, the former Director of the WTO’s Trade and Environment Division, notes, “The Egyptian delegation to the WTO has estimated that there were 2,847 meetings in the WTO in 1997, or an average of 10 meetings per working day.” (citing Communication from Egypt, High Level Symposium on Trade and Development, mimeo WTO 17 March 1997). *Id.*, at 30. In consequence, many countries’ representatives simply do not attend or keep up with developments in most WTO committees. In any case, they are much less likely to instigate new policy initiatives.

<sup>161</sup> Interview with Carlos A. da Rocha Paranhos, Brazil’s Deputy Permanent Representative to the WTO, (June 1998). The Indian NGO activist Vandana Shiva agrees, stating, “Industrialized countries can demand a forest convention which imposes obligations on the Third World to plant trees. The Third World cannot demand of the industrialized countries a reduction in the use of fossil fuels and energy. In the way the ‘global’ has been structured, the North (as the globalized local) has all the rights and no responsibilities, while the South has no rights and all responsibilities.” Shiva, *The Greening of Global Reach*, 22 *THE ECOLOGIST* 258 (Nov.-Dec. 1992). Neither northern governments nor northern environmental NGOs have called for unilateral trade bans imposed on the United States because of its profligate energy consumption, nor that this matter be addressed on the CTE’s agenda or at a WTO high level meeting. Hurrell and Kingsbury similarly note that “the states and peoples of the South have had less success in securing prominence for environmental problems closely associated with development. Hurrell and Kingsbury, *International Politics of the Environment*, supra note 20, at 37.

<sup>162</sup> See generally supra notes 72-76, 92 and 95 and accompanying texts.

The United States challenged EC eco-labeling schemes, most recently those covering genetically modified seeds and food,<sup>163</sup> and also supported the CAIRNS Group' challenge of EC agricultural subsidies as detrimental to the environment. Because of these intra and inter-transatlantic divisions, the U.S. and EC could not offer developing countries sufficient side payments to agree to changes in WTO rules advocated by U.S. and EC environmental groups. From a realist perspective, these divisions over trade-environment policy within and between the WTO's two most powerful members explain why WTO rules have not changed.

4. Divisions Between Developing Countries. Developing countries' positions within the WTO/GATT have shifted from protecting their domestic import-substitution policies to expanding their exports to the developed world. The result is increased competition and trade conflicts among developing countries and a reduction in developing country "solidarity."<sup>164</sup> Although there were north-south divisions over intellectual property issues in the Committee on Trade and Environment, most issues addressed in the CTE could pit states before WTO dispute settlement panels irrespective of their levels of development. While the United States and EC remain the WTO's most common opponents, developing countries increasingly file trade claims against each other.<sup>165</sup>

5. Attempts to Change Southern Norms. Developed countries have attempted to change the appreciation of trade-environment matters *within* developing countries by working through,

---

<sup>163</sup> See Pollack and Shaffer, *GMOs*, *supra* note 150; and *supra* note 76.

<sup>164</sup> The former Egyptian representative to the CTE, Magda Shanin, for instance, comments on the "lack of solidarity today" of developing countries, "in stark contrast with their solidarity during the 1960s, 1970s and 1980s." See Magda Shahin, *Multilateral Investment and Competition Rules in the World Trade Organization: An Assessment*, 6 *TRANSNATIONAL CORPORATIONS* 127 (August 1997). See also, Mark Drajem, *India Willing to Abandon Traditional Allies in WTO Talks, If Necessary, Officials Say*, 16 *INT'L TRADE REP.* (BNA) 1526 (Sept. 22, 1999). A trend toward less developing country unity in international trade talks is, in part, a reflection of structural changes in the global economy, with developing countries being more export-oriented, as well as an ideological shift in favor of a more market-oriented trading system. For a reflection of the shift of developing countries' focus from southern solidarity to coalitions based on sectoral interests, see e.g. Alejandro Jara, *Bargaining Strategies of Developing Countries in the Uruguay Round*, in *The Developing Countries in World Trade: Policies and Bargaining Strategies* (eds. Diana Tussie & David Glover 11, 27 (1993) ("Coalitions seem to better serve their purpose when built around well-defined interests of like-minded countries, whether developed or developing.") and *supra* note 91.

<sup>165</sup> See e.g. Robert Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 *MINN. J. GLOBAL TRADE*, 1 (1999).

and in conjunction with the WTO's secretariat and transnational non-governmental groups. The Dutch, for example, have financed a pilot series of regional symposia that would bring together state representatives from trade, industry, environment and other ministries with business, environmental and developmental non-government organizations. Their hope is that these NGO-government symposia will spur greater policy coordination on trade-environment matters in developing countries which, in turn, could help overcome the gridlock in the Committee on Trade and Environment and "place the issue of trade and environment on the agenda of the next Millennium round negotiations."<sup>166</sup> Following the Dutch initiative, the WTO, the Dutch embassy and the Geneva-based NGO consortium International Centre for Trade and Sustainable Development became partners in the program. Seven regional trade-environment intergovernmental symposia were organized by the WTO secretariat and respectively held in Malaysia, Trinidad and Tobago, Chile, Czech Republic, Ivory Coast, Egypt and Zimbabwe. Parallel symposia involving regional non-governmental organizations were arranged for the meetings in Chile and Zimbabwe.<sup>167</sup> However, there is no sign that the regional meetings have yet to change developing country national positions.

Similarly, northern non-governmental groups have formed networks with developing country groups to likewise empower environmental constituencies within the developing world.<sup>168</sup> Yet as examined below, developing country NGOs continue to support developing

---

<sup>166</sup> Correspondence from the Dutch Ambassador to the EC Ambassador to the WTO (June 1998) (on file with author).

<sup>167</sup> For a book containing the presentations at the meetings in Chile and Zimbabwe, see *VIEWS FROM SUB-SAHARAN AFRICA AND LATIN AMERICA: A READER*, *supra* note 110. The organization of regional trade and environment symposia by the WTO was initially to involve only government representatives. The organization of parallel NGO symposia involving government officials and non-governmental organizations was promoted and financed by the Netherlands. *See also* ICTSD Proposal for Civil society Participation in WTO Trade and Environment Regional Seminars for Developing Countries, April 3, 1998 (Annex 3 to the Dutch Ambassador's letter (on file). The first two pilot NGO regional symposia were held in Santiago, Chile and Harare, Zimbabwe, respectively in September and December 1998, followed by symposia in Malaysia, Trinidad and Tobago, Czech Republic, Ivory Coast and Egypt. *See Statement by the Director-General on Transparency and Interaction with Civil Society to the WTO General Counsel, 15 July 1998* (July 15, 1998) <<http://www.wto.org/wto/archives/dgspnote.htm>> (stating that the WTO "is now organizing seven regional symposia on trade and the environment with the participation of developing countries"); WTO Regional Seminars on Trade and Environment for Developing Countries in 1998, WTO Trade and Environment Bulletin 24 (PRESS/TE024).

<sup>168</sup> *See supra* note 40 and *infra* note 251.

country representatives on the issues addressed before the WTO Committee on Trade and Environment, in particular concerning the WTO legality of unilateral trade sanctions imposed on environmental grounds.<sup>169</sup> Constituencies in developing countries continue to hold different social priorities, reflective of their different interests. Their state representatives continue to represent these interests and priorities before the World Trade Organization.

### **B. Role of Neoliberal Interests and Ideas**

As an observer of the CTE process from the United Nations Environment Programme complains, “At the end of the day, the forum, the structure of the debate, the structure of the agenda, the whole thing defines itself as a trade discussion on environmentally relevant issues and not vice versa.... It’s a question of the framing of the whole debate. It’s what they talk about, why they talk about it and how they talk about it.... The way the debate is set up, determined, defined, leads itself to one kind of discussion,” that is, a trade discussion.<sup>170</sup>

Yet while trade interests predominated in CTE discussions, they were not necessarily neoliberal ones. That is, national trading interests promoted trade protectionism at home as well as trade liberalization abroad. They wielded environmental arguments, whether in one direction or the other, for trade ends.

Many critics of the World Trade Organization as a neoliberal institution imply that it is the WTO secretariat that defines the WTO’s outlook. Yet since only states are entitled to speak and vote within the World Trade Organization, a more subtle analysis of neoliberal influences must focus on the role of state delegates, influenced by national commercial interests, assisted by the secretariat working within the WTO institutional context. In assessing neoliberal ideas and interests<sup>171</sup> advanced within the Committee on Trade and Environment, one must start with

---

<sup>169</sup> See Part IVD, *infra* notes 278-289.

<sup>170</sup> Interview with Deborah Voorhees of the trade and environment division of the United Nations Environment Programme (UNEP) (June 1997). The UNEP observer was not referring to the powers of the CTE secretariat, but rather to the predominance of state trading interests represented by state trade delegates in shaping the debate. For an academic critique of the GATT for its trade bias, see e.g. Dunoff, *Institutional Misfits*, *supra* note 5, 1047-1071.

<sup>171</sup> For an overview of the neoliberal perspective, *see supra* note 17.

states' representatives themselves, who largely came from state trade and foreign ministries.

---

1. Role of State Trade Bureaucracies. As the World Trade Organization is a trade body, the most active representatives before the Committee on Trade and Environment predominantly came from trade ministries or from economic divisions within foreign ministries. While the United States, EC and other developed countries also sent representatives from agricultural and environmental agencies, trade delegates typically, although not always, presented the national position. Developing countries, on the other hand, were almost always represented by foreign or commercial ministries.<sup>172</sup>

While it is true that states primarily (although not exclusively) framed the CTE debate in terms of a debate over trade, the actual role of neoliberals in such framing was limited. The demands for economic protection in agricultural, energy and other sectors, the domestic political salience of trade-environment issues addressed within the Committee on Trade and Environment, the trade and environmental slants actually adopted by state delegates, and the outcome of the debates, all undermine the simplistic critique that the World Trade Organization and its Committee on Trade and Environment have not accommodated environmental measures because they are neoliberal-dominated institutions. Especially in the United States and Europe, environmental non-governmental organizations actively lobbied their government representatives on these issues, pressing Congress not to grant the Clinton administration "fast-track" negotiating authority and opposing trade liberalization initiatives by the EC's trade directorate.<sup>173</sup> While some trade delegates played a predominant role in CTE debates, they received their instructions from home capitals, which, in countries with more developed bureaucratic systems, involved

---

<sup>172</sup> For an overview of the trade policy process in a number of developing countries, see Tussie and Glover, *The Developing Countries in World Trade*, *supra* note 91 (including chapters on Argentina, Brazil, Costa Rica, India, Mexico and Asian newly industrialized countries). Whereas the United States and EC have a specialized trade bureaucracy, developing countries typically do not. Developing country diplomats often must rotate from Geneva to what they consider to be less desirable foreign posts. One diplomat noted that after Geneva he would be sent to Bulgaria. Interview with developing country diplomat, Geneva, June 2000.

<sup>173</sup> See Neil Buckley *France Blocks Bid for Eu-US "Marketplace"*, FIN. TIMES (April 28, 1998); Guy de Jonquieres, *No Meeting of Minds*, FIN. TIMES (July 23, 1999) (noting broad NGO opposition to liberalization of trade).

intra-agency debates.<sup>174</sup> Trade representatives did not even play the dominant role in determining and representing national positions on some agenda items. For example, representatives from the agricultural ministries of the U.S., EC, Japan, Korea, Canada, Australia and New Zealand all attended CTE meetings and typically delivered their country's position on item 6 (concerning the "environmental benefits of removing trade restrictions"), insisting or denying that a removal of agricultural subsidies would benefit the environment.<sup>175</sup> Although EC and Japanese trade negotiators may have been more willing to compromise on liberalizing agricultural sectors,<sup>176</sup> national agricultural associations made sure that EC and Japanese agricultural ministries intervened.<sup>177</sup> The outcome in CTE debates on this issue was, in consequence, not a neoliberal one.

National delegates advanced issues that were politically salient in their home countries, as

---

<sup>174</sup> For the United States, see e.g. Trade and Environment: Conflicts and Opportunities, U.S. Congress, Office of Technology Assessment, OTA-BP-ITE-94, at 10 (1992) (noting that an interagency group coordinated by USTR started meeting on trade-environment policy in 1991). U.S. environmental groups worked closest with the Environmental Protection Agency, whose officials often attended and sometimes submitted official U.S. positions at meetings of the CTE. Conversation with former EPA member who participated in CTE meetings, Washington, April 2000. See e.g. The Greening of World Trade, A Report to EPA from the Trade and Environment Committee of the National Advisory Council for Environmental Policy and Technology (1993)(containing supporting papers submitted by Durkwood Zaelke of the Center for International Environmental Law, Robert Repetto of World Resources Institute, Konrad von Moltke of Dartmouth College, and Michael McCloskey of Sierra Club).

<sup>175</sup> Agricultural ministries were closely involved with item 6 of the CTE's agenda concerning the "environmental benefits of removing trade restrictions," since some states used it to promote liberalization of the agricultural sector, including through the reduction and elimination of tariffs, quotas and subsidies, to promote environmental goals.

<sup>176</sup> For example, a representative from a northern EC member state in Geneva confirmed that the EC could agree to remove some of the EC agricultural trade barriers in exchange for developing country compromise on item 1, but that this was opposed by southern EC member states and their agricultural constituents. Interview in Geneva, (June 1998). France, in particular, closely monitored the European Commission's position on agricultural trade liberalization, having little confidence in the EC's ability to negotiate on France's behalf in agricultural trade negotiations. See Lionel Barber et al., *US Stands Ground on Farm Pact: Statement as France Renews Threats to Veto GATT Deal*, FIN. TIMES, Sept. 23, 1993, at 26; *Except Us*, ECONOMIST, Oct. 16, 1999 (quoting French foreign minister Alain Juppé's 1993 statement that, "We do not trust you, Monsieur Brittan, and we will never trust you," addressed to Sir Leon Brittan, the EC trade commissioner and chief trade negotiator). See also discussion of disputes between EC trade officials and France over the EC's negotiating position during the Uruguay Round trade negotiations in PAEMAN & BENSCH, *THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND*, supra note 157.

<sup>177</sup> On the power of Japanese agricultural pressure groups, see, for example, Aurelia George, *The Organization of Agricultural Cooperatives as a Pressure Group in Japan*, in COOPERATION IN WORLD AGRICULTURE 97 (1985). See also *Ex uno, plures*, Economist, 44 (Aug. 21, 1999) (concerning the power of the Zenchu [Central Union of Agricultural Co-operatives] in Japan.)

a two-level intergovernmentalist perspective would predict. Canada focused on challenging EC eco-label regimes concerning wood and paper products because the wood products sector accounted for over 12% of Canada's exports and over 6% of Canadian employment.<sup>178</sup> Argentina, Australia, Brazil and New Zealand focused on attacking agricultural subsidies because this item was of great interest to their most vocal constituents on CTE matters, their agricultural export sector.<sup>179</sup> Conversely, Japanese, Korean and EC negotiators, recalling the mass demonstrations in Japan, Korea and Europe in protest against the WTO Agricultural Agreement at the end of the Uruguay Round,<sup>180</sup> were not about to permit the CTE to recommend further liberalization in agricultural trade. Similarly, farmers in India engaged in mass demonstrations against the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)<sup>181</sup> and Indian negotiators correspondingly raised environmental arguments in support of an amendment of the TRIPs Agreement, even though they had earlier maintained that the WTO was not competent to discuss environmental impacts. Developing countries attempted to deploy environmental rationales to weaken the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights because they realized that the TRIPs Agreement was much more likely to benefit developed country constituencies to the detriment of their own consumers and

---

<sup>178</sup> Canada correspondingly presented three of the nine state submissions on item 3 concerning the trade impact of eco-labeling, packaging and related schemes. The export revenue of the Canadian wood products sector was 39.7 billion Canadian dollars in 1998. See CANADIAN FOREST SERVICE, STATE OF CANADA'S FORESTS 1998-1999 (1999). This constitutes over 12 percent of all Canadian exports and accounts for approximately one out of every sixteen jobs in Canada (around 877,000 in total). See Department of Foreign Affairs, Press Release No. 34, *Canada's 1998 Exports at Record Levels*, (Feb. 19, 1999) <[http://www.dfait-maeci.gc.ca./](http://www.dfait-maeci.gc.ca/)> (citing \$323.4 billion in Canadian exports).

<sup>179</sup> See Daniel Pruzin & Mark Felsenthal *Cairns, U.S. Agree on Agriculture; Some Developing Nations Also on Board*, 16 Int'l Trade Rep. (BNA) 1969 (Dec. 1, 1999); Peter Menyasz, *Cairns Group Leader Praises U.S. Focus on Liberalization of Agricultural Trade*, 15 Int'l Trade Rep. (BNA) 595 (April 8, 1998).

<sup>180</sup> See *Trade Pact Stirs up India, S. Korea: Many Fear Invasion of American Rice*, Cincinnati Enquirer, Dec. 16, 1993, at B9; Colin Narbrough, *The Free-trade Bandwagon Is Finally Morocco-bound*, TIMES, April 12, 1994.

<sup>181</sup> See John Tanner, *Biodiversity-India: U.S. Giant, Peasants Battle for "Blessed Tree,"* Inter Press Service, October 12, 1993 (reporting half a million protesting farmers in the central Indian city of Bangalore protesting "against the patenting of agricultural products.").

producers.<sup>182</sup>

Differences between national agencies on CTE matters reflect divisions within WTO members. Agricultural ministries are more likely to defend agricultural interests; and environmental ministries are more likely to prioritize environmental goals.<sup>183</sup> Involvement of multiple ministries representing distinct national constituencies, however, also leads to stalemates within national administrations, so that no clear position is taken.<sup>184</sup> Concerning eco-labels (item 3), for example, the Canadian delegate observed that the U.S. “appeared to be backing off [from taking a position] given their own inter-agency differences on labels based upon non-product related PPMs [production and process methods].”<sup>185</sup>

Neither does a neoliberal ideology promoted by technocratic networks of mid-level trade officials explain the positions of developing countries. On the one hand, developing countries with a less developed governmental infrastructure were less likely to develop inter-agency processes to determine national positions, so that trade and foreign ministries were more likely to predominate.<sup>186</sup> Some Geneva-based delegates from developing countries were also more likely to have greater discretion than their counterparts from developed countries.<sup>187</sup> However,

---

<sup>182</sup> The argument that the TRIPS Agreement will favor developed country constituencies to the detriment of developing countries is maintained by well-known trade economists such as Alan Deardorff, *Should Patent Protection Be Extended to all Developing Countries?* in \_\_\_\_\_ 497 (“patent protection is almost certain to redistribute welfare away from developing countries” Id. At 507)- **NEED FORMAL CITE from BOOK**

<sup>183</sup> The Geneva-based delegate from Japan from the foreign affairs ministry, for example, involved the environmental ministry in the formation of Japan’s position on item 1, to counterbalance the trade ministry’s trade focus. Interview with Japan’s delegate, in Geneva, Switzerland (June 1998).

<sup>184</sup> See *infra* note 150-157 and accompanying text.

<sup>185</sup> See GRIFFITH, CANADIAN DEP’T OF FOREIGN AFFAIRS AND INT’L TRADE, REFERENCE DOC. NO. 3, A NEGOTIATOR’S POINT OF VIEW, at 17 (Oct. 1997) (on file with author). See also internal EC divisions, *supra* note 153-157 and accompanying text. On the notion of PPMs, see *supra* note 144.

<sup>186</sup> In relatively developed countries such as Korea, while environmental ministries were consulted, they were less prepared for the legalistic and trade oriented issues than were the trade, agricultural and foreign ministries. See interview with representative from Korean Foreign Ministry, who confirmed that “since environmental benefits are difficult to quantify, it is difficult for environmental ministry to have much impact.”

<sup>187</sup> They were more likely to represent their countries in meetings and sometimes played a central role in the development of national positions. For instance, the delegate from Nigeria, Chiedu Osakwe, was very active in the CTE process until he joined the WTO in May 1998, especially on the issue of trade restrictions on domestically-prohibited goods. Many developing country participants claimed that he was taking too “northern” of a perspective

especially where developing countries had more structured, experienced civil services, such as in Brazil, India and Mexico, clear guidelines were typically established in national capitals.<sup>188</sup> The United States, for example, suspecting that Mexico's intransigence on U.S. demands in the Committee on Trade and Environment and the General Council for greater WTO "transparency" did not reflect Mexico's national position, complained to high officials in Mexico's central administration who quickly confirmed that these were indeed Mexico's positions.<sup>189</sup> Lower level trade officials were not autonomously determining Mexican policy outside of the control of Mexican heads of state.

Although northern governments and environmental NGOs complain that developing countries do not integrate the views of environmental ministries in the formation of their national positions, it should be recalled that the United States did not even create its Environmental Protection Agency until 1970. This was a time when the United States had a per capita gross domestic product that far surpassed, and poverty and malnutrition rates far inferior to, those of developing countries today. It is thus logical that environmental preservation is seen in a different context by developing country representatives and their constituencies.

Moreover, even though developing country delegates with a trade orientation predominated in the formation of their national positions, their positions were typically not

---

on trade and environment issues. He, on the contrary, argued that there was no "southern" perspective, and he was present to fight for what he considered to be Nigeria's interests. When he left the Nigerian mission, however, Nigeria became significantly less engaged with the process in the CTE. Interestingly, in Osakwe's dissertation on U.S.-Nigerian relations, one of the three factors he uses to analyze changes in US-Nigerian relations over time is "the policy managers involved in the relationship." Chiedu Igwebuike Osakwe, *Conflict and Cooperation in Nigeria-United States Bilateral Relations, 1960-1994*, at viii-ix (1996) (unpublished Ph.D. dissertation, New York University) (available from UMI Dissertation Services). The other two factors are "the relative rates of economic change in the two countries" and "the risk assessments each country makes of the other." *Id.* He concludes that "The caliber and type of diplomatists appointed as representatives for a country matter . . . [P]olicy managers should be appointed or recruited who are professional in training, moderate in temperament, consensus in orientation . . ." *Id.* at 433.

<sup>188</sup> Confirmed in interviews with representatives from Brazil in Geneva (June 1998).

<sup>189</sup> Interview with Ricardo Barba, Deputy Permanent Representative to the WTO from Mexico, in Geneva, (June 1997).

neoliberal, much less of a unitary perspective.<sup>190</sup> When India's delegates raised environmental arguments in an attempt to amend the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights Agreement, they did not do so because of diplomatic ideological preferences in India's trade bureaucracy for or against environmental protection; but because India's agricultural interests feared that permitting the patenting of seeds and life forms would favor northern interests to their economic detriment.<sup>191</sup> Similarly, in opposing northern environmental demands for amending GATT Article XX (the exceptions clause) to permit greater use of unilateral trade restrictions for environmental ends, India was not reflecting a commitment to neoliberal trade ideology. In fact, India is known for having one of the most protected economies among WTO members.<sup>192</sup>

In short, state delegates were careful to advance (if on the offensive) and not compromise (if on the defensive) their national positions within the CTE for future WTO negotiations over agriculture, intellectual property rights, technical standards and all other matters. If anything, state representatives were not predominantly neoliberal (whereby they would have promoted free trade regardless of their domestic producer interests), but rather mercantilist (attempting to

---

<sup>190</sup> For a critique of a presentation of the "unitary" view of WTO members on trade-environment matters, see comments of Cheidu Osakwe in *POLICING THE GLOBAL ECONOMY: WHY, HOW AND FOR WHOM?* (ed. Sadruddin Aga Khan), 251-252. For a description of trade policy-making in Nigeria, see Enoch Okpara, *Development of Trade Policy in Sub-Saharan Africa: the Role of Civil Society*, in *TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: VIEWS FROM SUB-SAHARAN AFRICA AND LATIN AMERICA: A READER*, supra note 110, at 189, 192-195 (United Nations University, 2000) (noting that "the ministry primarily responsible for external trade was the Ministry of Commerce and Industry," which still dominates policy formation but increasingly receives input from a private sector that seeks import protection "to protect locally manufactured goods from unbridled foreign competition" and "liberalized import policy... [for] industrial raw materials and other inputs").

<sup>191</sup> See *infra* note 181 and accompanying text (concerning demonstrations in India over the TRIPs Agreement).

<sup>192</sup> See, e.g., OECD, *Trade, Employment and Labor Standards*, 139-40 (1996) (classifying India as having a restrictive trade regime). Steve Charnovitz, implicitly criticizes India, with its highly protected market for taking a hypocritical position on the use of trade measures to promote environmental goals, stating "Even governments that routinely employ trade measures to protect favored domestic industries evinced no embarrassment in casting doubt on the propriety of trade measures in MEAs . . ." Yet India, as other developing countries, was consistent in defending its conception of its most vocal constituents' economic interests. See Charnovitz, *A Critical Guide to the WTO's Report on Trade and Environment*, supra note 5, at 356.

expand their countries' exports and limit competition from imports).<sup>193</sup> As assessed subsequently, the positions advanced by state trade delegates on specific trade-environment issues reflected those advocated by their own most vocal stakeholder constituencies, including those of non-business advocacy groups. State trade delegates did not support neoliberal foreign exporting interests as they would have had they truly been committed to free trade economic theory.<sup>194</sup>

2. Role of Business Interests. Large transnational businesses in the United States and Europe certainly organized to help shape the debate of trade and environment issues within the Committee on Trade and Environment and other fora.<sup>195</sup> They operated through long-standing associations, such as the International Chamber of Commerce,<sup>196</sup> the United States Council on International Business, the EU's *Union des Confederations de l'Industrie et des Employeurs d'Europe*, and relatively new ones, such as the World Business Council for Sustainable

---

<sup>193</sup> As one developing country delegate states, "We are all a bunch of haggling merchants here." As merchants, when delegates use environmental arguments, they use them to advance their trading interests.

<sup>194</sup> See Part IVD, *infra* notes 278-298 and accompanying text.

<sup>195</sup> See, e.g., Gary G. Yerkey, *U.S., EU Business Leaders to Urge Further Easing of Impediments to Trade*, 14 Int'l Trade Rep. (BNA), 1909, 1910 (noting how "companies with a particular interest in intellectual property rights protection- such [as] Pfizer Inc., Time Warner Inc., and Microsoft Corp.- will also be pressing the United States and the EU at the TABD meetings... to ensure that governments live up to the commitments made in the WTO [TRIPs Agreement].") The EC Trade Commissioner, Sir Leon Brittan, the US Commerce Secretary and the Deputy US Trade Representative, among other senior officials, attended the meeting sponsored by the Transatlantic Business Dialogue).

<sup>196</sup> The members of the International Chamber of Commerce (ICC) consist of sixty three national committees, as well as individual companies from countries where a national committee has yet to be formed. The U.S. Council for International Business is the U.S. national member of the ICC. See ICC web site at <[www.iccwbo.org/iccw](http://www.iccwbo.org/iccw)>.

Development<sup>197</sup> and the Transatlantic Business Dialogue.<sup>198</sup> These associations generally have greater access to state trade representatives than other non-state actors because of their importance to domestic economies, as well as to domestic elections.<sup>199</sup> They thus can work more discretely than other non-state actors.<sup>200</sup> Businesses obtain information on what transpires in the

---

<sup>197</sup> The Geneva-based World Business Council for Sustainable Development (WBCSD) consists of approximately 120 member corporations from around the world, including such multinationals as Shell (Netherlands), Nestle (Switzerland), Total SA (France), Volkswagen (Germany), Dow Chemical, Mobile, Texaco and Weyerhaeuser (US), and Hitachi, Mitsubishi and Sony (Japan). The WBCSD results from a 1995 merger of two international business associations which were formed in the early 1990s to coordinate business's positions during the UNCED "Earth Summit" negotiations. The WBCSD reports that it "is expanding its network of national BCSDs to have a presence in every developing region of the world." See WBCSD, *Signals of Change: Business Progress Towards Sustainable Development* 47 (1996).

<sup>198</sup> A U. S. Department of Commerce official maintains that "'virtually every' market-opening initiative undertaken by the United States and the EU in the past couple of years has been suggested by the TABD." Gary G. Yerkey, *U.S., EU Business Leaders Urge Further Easing of Impediments to Trade*, *supra* note \_\_, at 1909. As an example of the work of the Transatlantic Business Dialogue (TABD), it formed an "issue group" consisting of representatives of U.S. and European forest and paper industries to explore "areas of common concern" and the potential for "concerted action". The group found that the "most immediate issue" it faced was the EC's proposed eco-labeling scheme for paper products. It formally opposed it before the EC "on the grounds that it is discriminatory and a breach of fair competition and trade." See remarks of W. Henson Moore, President and CEO of American Forest and Paper Association to Hearing before the Subcommittee on Trade of the Committee on Ways and Means of the House of Representatives, 104<sup>th</sup> Congress, 2<sup>nd</sup> Session, Sept. 11, 1996, Serial 104-92, at 91 (in preparation for the finalization of the CTE 1996 Report and the first WTO Ministerial Meeting in Singapore) [hereafter *Subcommittee on Trade, 104<sup>th</sup> Congress, 2<sup>nd</sup> Session*]. Moore's remarks were subsequently supported by Elizabeth Seiler, Director of Environmental Affairs, Grocery Manufacturers of America (which groups "trade associations representing aluminum, forest and paper, chemical, plastic, electronic and food and consumer product companies") (attacking European eco-labeling schemes and promoting work of the CTE to resolve trade problems inherent in some labeling schemes). *Id.* at 152-54.

<sup>199</sup> Private parties in the developed world have resources which dwarf those of developing countries. Of the 100 largest holders of wealth, 51 are companies and 49 are States. See Robert Kaplan, *Was Democracy Just a Moment?*, ATLANTIC MONTHLY, Dec, 1997, at 71 (citing this figure). That is, over fifty multinational corporations hold more wealth than over sixty percent of the members of the WTO. Commercial interests can afford lawyers and consultants to represent them, including former "insiders", such as former national trade delegates and WTO secretariat members. Businesses pool their resources for greater impact. They form broader organizations, such as the International Chamber of Commerce and the Business Council for Sustainable Development, to represent them on non-sector specific issues. They form sectoral associations, such as the International Council on Mining and the Environment (ICME), to follow specific issues pertinent to their industries. Not surprisingly, when northern commercial interests present their views before CTE symposia, their well-informed remarks are more pertinent to issues currently before the CTE. Stated in interviews with developed country delegates to the CTE, June 1997 and June 1998, Geneva.

<sup>200</sup> Businesses may not wish to provide ammunition to WTO critics by being too visibly connected with WTO policy developments. Moreover, unlike environmental non-governmental organizations, businesses do not need to issue constant press releases to be in the public spotlight, and thereby help raise funding for lobbying endeavors.

World Trade Organization through consultants and trade association representatives, many of whom are based in Geneva,<sup>201</sup> and many of whom were formerly in leading positions in international and national trade organizations. For example, Arthur Dunkel, the former Director-General of GATT, became the Chair of the International Chamber of Commerce's Commission on International Trade and Investment Policy, which follows the Committee on Trade and Environment and other WTO committees.<sup>202</sup> Paula Stern, former chair of the U.S. International Trade Commission, became the Transatlantic Business Dialogues's trade consultant and was designated a member of President Clinton's Advisory Committee on Trade Policy and Negotiations.<sup>203</sup> The former Canadian national representative to the Committee on Trade and Environment confirms that he was in close contact with Canada's Pulp and Paper Association on CTE matters, forthrightly stating, "Canada's approach on eco-labels reflected the business needs of its forest products industry."<sup>204</sup> Personal relations with key figures in government and

---

<sup>201</sup> The International Chamber of Commerce and World Business Council for Sustainable Development have offices in Geneva. The International Council on Mining and the Environment has hired as a consultant the husband of the director of the WTO Appellate Body Secretariat. In general, in terms of resources, multinational companies have more assets than many WTO members, and they effectively target their expenditures on matters affecting them.

<sup>202</sup> The ICC's Commission also "formulates recommendations on post-Uruguay Round trade policy issues for the 1990s including: trade and the environment, trade and competition, trade and investment, trade and labour standards". See ICC Policy Statement, "Trade Measures for Environmental Purposes", Document no. 103/187 Rev. and Document no. 210/535 Rev. (Oct. 24, 1996), at 1. Dunkel is also a member of the board of directors of Nestle SA and Credit Suisse group. Nestle is, in turn, a member of the World Business Council for Sustainable Development.

<sup>203</sup> Stern engages in what she terms "entrepreneurial diplomacy," whereby corporations take a leading entrepreneurial role in defining the agenda and the terms of trade negotiations. See, for example, TABD's role in the negotiation of mutual recognition agreements and harmonized international standards. See Jeff Gerth, *Where Business Rules: Forging Global Regulations That Put Industry First*, N.Y. TIMES, Jan. 9, 1998, at D2. Stern is President of the Stern Group, an international trade advisory group in Washington. She was an ITC commissioner for nine years and chaired the ITC from 1984-86. Other examples of the revolving door in Washington D.C. between the public and private sectors are former USTR Mickey Kantor, who is now a partner at Mayer, Brown & Platt; former U.S. ambassador to the WTO Jeffrey Lang, now a partner at Wilmer Cutler & Pickering; and former members of the Office of the USTR's legal division Alan Holmer and Judith Bello, now respectively President and Vice-President of PhRMA (Pharmaceutical Research and Manufacturers of America), the U.S. Pharmaceutical industry's main lobbying association. All provide advice to private commercial interests on trade-related matters.

<sup>204</sup> Interview in Geneva, June 1998. The same holds true for developing countries. Regarding the Brazilian government's response to its pulp and paper industries on the eco-label issue, see, for example, *EC Eco-label Program Raises Concerns for Brazilian Business, Government Officials*, Intl'l Env't Daily (BNA) (Feb. 3, 1993).

intergovernmental organizations provides businesses with access unavailable to others.<sup>205</sup>

Business influence, however, is primarily exercised through access to state representatives, not the WTO secretariat, as businesses recognize that state representatives are the primary decision-makers within the World Trade Organization.<sup>206</sup>

Yet commercial interests are not always neoliberal, resulting in conflicts between export-oriented and purely domestic businesses. The U.S. steel industry, for example, is constantly demanding relief from imports and the need to preserve U.S. antidumping laws to keep out low-priced import competition. Similarly, agricultural interests in the EC, Japan and Korea certainly oppose the elimination of agricultural trade subsidies and tariff barriers on environmental or any

---

<sup>205</sup> In the United States, for example, the Federal Advisory Committee Act requires the creation of sectoral and functional committees consisting of representatives of civil society “fairly balanced” in their viewpoints to provide input on trade policy formation. Business interest groups, however, are predominantly represented in these committees. Environmental groups have had to litigate to even have a single seat on sectoral committees involving lumber and wood products and paper and paper products. *See e.g. Panels Must Include Environmentalists*, THE NATIONAL LAW JOURNAL, B5 (NOV. 22, 1999) (noting that a federal court ordered the USTR to “name at least one environmentalist to each of two panels that advise her on trade agreements for wood and paper products” in order to comply with the Federal Advisory Committee Act); Gary Yerkey, *Administration to Work Closely with NGOs, but Has Appealed Ruling on Advisory Groups*, 17 INT’L TRADE REP. (BNA) 78 (Jan. 20, 2000); and Rossella Brevetti, *Environmental Groups Warn About Possible Lawsuit on Advisory Committee Composition*, Int’l Trade Reporter (BNA) 1946 (Dec. 1, 1999) (noting environmental NGO demands for appointment on “a committee advising the government on trade in chemicals”). On U.S. trade advisory committees, *see e.g.* Kenneth Abbott, *‘Economic’ Issues and Political Participation: The Evolving Boundaries of International Federalism*, 18 CARDOZO LAW REV. 971, 991-993 (1996) (noting “In 1994, the Clinton Administration created a new ‘trade and environment’ advisory committee, with representation from environmental and business groups alike. Some environmental advocates feared that this committee could become a way of segregating environmental concerns from the work of the major advisory committees. The more serious problem appears to be, however, that the new committee has not been given a significant policy role.”); Audley, *Green Politics and Global Trade*, supra note 45, at 124-126 (noting increased representation of environmental groups in U.S. trade advisory committees as an offshoot of the ratification debates over NAFTA); Jan McAlpine and Pat LeDonne, *The United States Government, Public Participation, and Trade and Environment*, in Durkwood Zaelke et al., *Trade and the Environment: Law, Economics and Policy* 203, (1993) (noting EPA’s “tradition of public participation,” and the differences of the advisory process used by USTR where environmentalists are at a disadvantage because “the environmental community, as compared to the trade community,... does not represent a product or service, but rather a wide range of resource, product, and process change objectives” which are difficult to cover in over thirty technical, sectoral and functional advisory committees).

<sup>206</sup> **TRY TO GET EXACT QUOTE** As Christopher Boyd, Senior Vice President of Environment and Government Affairs of Lafarge SA, a global manufacturer of construction products, such as cement, confirms in an interview, “re importance of national capitals for companies..... See Christopher G. Caine, *Powers of Persuasion: Behind the Scenes with the World’s Top Lobbyists*, 10 CORP. LEGAL TIMES 20 (2000) (citing Christopher Boyd, Senior Vice President of Environment and Government Affairs of Lafarge SA, a global manufacturer of construction products, on the importance of national capitals for industry lobbyists, as opposed to the WTO itself. This was part of a series of interviews of lobbyists for multinational corporations on their lobbying strategies and goals for the WTO).

other grounds. Similarly, developing country non-exporting interests are typically less supportive of WTO trade liberalization initiatives than developing country exporting interests.<sup>207</sup>

Moreover, U.S. and EC businesses favoring greater WTO constraints on environmentally-based trade restrictions do not always prevail in domestic policy debates. In fact, they have often criticized their national delegates' positions within the Committee on Trade and Environment and other fora for being too accommodating to environmental exceptions to trade rules. For example, US biotechnology companies and agribusinesses were unable to block the signature of the Cartagena Protocol on Biosafety in January 2000, although they believed that it could undermine WTO rules in accommodating import bans of genetically modified seeds and foods on allegedly environmental grounds, but without any clear scientific basis.<sup>208</sup>

3. Role of the WTO Secretariat. Opponents of neoliberalism, both on the left and the right, typically critique the World Trade Organization for encroaching upon national sovereignty, as if the WTO were an undemocratic autonomous actor with a single voice, independent of its member states. The WTO has become reified by its critics into an insidious agent of globalization of commerce and culture which infiltrates national borders and wreaks local havoc. At the GATT's fiftieth anniversary in 1998, protestors spray-painted Geneva walls with "WTO-

---

<sup>207</sup> Interview with Ricardo Melendez, currently Director of the International Centre for Trade and Sustainable Development (ICTSD), based in Geneva, and formerly delegate for Colombia to the CTE, Geneva (June 1998). Melendez noted also that many businesses in the export sector in developing countries are more willing to compromise on trade and environment matters than non-exporting businesses because they already have had to adapt to changes in international markets.

<sup>208</sup> Businesses noted that the new Protocol "could potentially cause trade disruptions primarily because it creates new momentum for countries banning imports on uncertain science" on allegedly environmental grounds. *See AG Groups Fear Biosafety Precaution Principle, Producers Downplay*, INSIDE U.S. TRADE 7 (Feb. 18, 2000). *See also* Pollack and Shaffer, *GMOs*, *supra* note 150.

As for frustrations of EC businesses, *see e.g.* UNICE Position on the Relationship between the Provisions of the Multilateral Trading System and Trade Measures For Environmental Purposes, including those pursuant to Multilateral Environmental Agreements (MEAs), July 22, 1996 (critiquing the European Commission for going too far in its proposal and advocating retention of a more constraining "necessity test"). Confirmed in telephone interview with Dr. Reinhold Quick, the representative from UNICE (the European employers' confederation) who drafted the position paper, May 1998. For an overview of the EC position, see Julio Garcia Burgues and Mikel Insaust Muguruza, "Trade and Environment in the WTO" *The European Community's Participation in the Committee on Trade and Environment*, RECIEL, vol 6, issue 2 (1997). Burgues is the Deputy Head of International Affairs, Trade and Environment at the Environment Directorate-General.

World Terrorist Organization.”<sup>209</sup> This turned out to be a relatively mild precursor to the huge protests in Seattle, Washington at the third WTO Ministerial Meeting in December 1999.

The WTO’s impact becomes transparent to environmental activists when WTO dispute settlement panels hold that national laws (with at least in part an environmental purpose) violate WTO rules. Yet before critiquing these judicial decisions as illegitimate, one needs a clear understanding of the political process that determines WTO rules in the first place, and how the players involved in that process view them. One of the primary purposes of the Committee on Trade and Environment was to respond to criticism of past panel decisions and determine whether GATT and WTO rules should be modified or further guidance be given as to how they should be interpreted. This was, after all, the first item in the CTE’s agenda. In the end, although the 1996 CTE Report did cite a number of international law principles, including that unilateral sanctions should be avoided, by far a majority of WTO members determined that no rule modifications were needed. Yet before smugly responding that the political process is democratically superior to the judicial one, one must assess whether the rule-makers themselves were biased in favor of certain interests, such as neoliberal multinational corporate interests, over others. This section assesses the role of the WTO secretariat in that underlying political process.<sup>210</sup>

There are approximately five hundred professional civil servants within the World Trade Organization, whose role is to provide assistance to the WTO’s member states upon request. This secretariat consists primarily of trade economists and trade lawyers. Of the six secretariat members assigned to the WTO’s Trade and Environment Division in 1998,<sup>211</sup> four were neo-classical economists and two were international trade lawyers, one formerly a member of a

---

<sup>209</sup> They overturned and burned vehicles and ransacked such globalization symbols as a Burger King and a Macdonalds outlet. It was reported to be the most violence Geneva had experienced in decades.

<sup>210</sup> An analysis of the role of the secretariat and the identity of panelists in the WTO judicial process (i.e. in the interpretation and application of WTO rules by WTO dispute settlement panels) is part of a parallel on-going project of the author.

<sup>211</sup> For ease of reference, members of the WTO secretariat assigned to the Trade and Environment Division of the WTO are sometimes referred to as the CTE secretariat. It is these secretariat members who provided services to the Committee on Trade and Environment, as examined in this section.

national trade ministry.<sup>212</sup> WTO secretariat members thus could be viewed as an epistemic community having “shared normative beliefs” (in free trade theory), “shared causal beliefs” (in how trade liberalization creates wealth), “shared notions of validity” (in applying neo-classical economic methodology)<sup>213</sup> and “a common policy enterprise” (to facilitate government negotiations toward trade liberalization).<sup>214</sup> This is evidenced in remarks of the former Director of the WTO’s Trade and Environment Division, Richard Eglin, an economist, who stated before a meeting of Korean trade and business representatives that the role of the Committee on Trade and Environment is to ensure that “steps taken to resolve environmental problems must uphold and safeguard the principles of the multilateral trading system,”<sup>215</sup> and to “remain vigilant to the threat of the use of environmental measures for trade protectionist purposes.”<sup>216</sup> On the basis of their expertise, impartial reputation,<sup>217</sup> inside information and close contacts with trade diplomats, secretariat members can, at least at the margins, help shape knowledge, frame issues, identify interests, facilitate coalition-building and thereby affect outcomes.

The capacity of a technocratic, supranational secretariat’s proclivities to affect outcomes, however, depends on what the secretariat actually does and the political saliency of the issue at stake.<sup>218</sup> The members of the CTE secretariat perform primarily five functions: the organization

---

<sup>212</sup> Interview with a member of the secretariat assigned to the CTE, Geneva, June 1998.

<sup>213</sup> As a former CTE secretariat member stated “This is a first best organization.” Interview with Scott Vaughan, assigned to the CTE, Geneva, Switzerland (June 1997). “First best” is an economic term signifying, in the CTE context, that trade and environment policies should be the most economically efficient possible.

<sup>214</sup> These attributes of epistemic communities are set forth in Peter Haas’ work, which notes that epistemic communities “have (1) a shared set of normative and principled beliefs . . .; (2) shared causal beliefs . . .; (3) shared notions of validity . . .; and (4) a common policy enterprise . . .” See Haas, *supra* note 32, at 3.

<sup>215</sup> Eglin, *supra* note 60, at 5. Eglin also confirmed that the CTE “must remain strictly within the competence of the WTO,” which is “limited to trade and those trade-related aspects of environmental policies which may result in significant trade effects for its Members.” *Id.* at 5

<sup>216</sup> Eglin, *supra* note 60, at 24.

<sup>217</sup> By “impartial,” I mean that the secretariat does no favor any particular WTO member. As noted above, the secretariat is not impartial from an ideological perspective.

<sup>218</sup> For an excellent analysis of the power of the European Commission within the EC, see Mark Pollack, *The Engines of Integration? Supranational Autonomy and Influence in the European Union*, in Wayne Sandholtz and Alec Stone Sweet, eds., *EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE*, 217-249 (1998).

of meetings and recording of minutes; research on trade and environment issues; liaison with international organizations addressing these issues; public relations, especially vis-a-vis non-governmental organizations; and mediation between states. The primary means through which the secretariat can potentially influence outcomes are through its research, its liaison with other international organizations, and its mediation services.<sup>219</sup>

States expect secretariat members to keep abreast of studies of trade and environment issues, particularly those conducted by other international organizations. In distributing information to all state delegates, the secretariat helps create a common base of understanding to defend the World Trade Organization from challenge by transnational environmental non-governmental organizations. Upon request of states, the secretariat researches and prepares papers on specific issues. Through September 30, 1999, the CTE secretariat provided delegates with 54 papers, totaling almost 1,000 pages.<sup>220</sup> Secretariat submissions addressed the environmental benefits of trade liberalization<sup>221</sup> as well as the “economic and trade implications”<sup>222</sup> of specific environmental instruments, such as packaging requirements,<sup>223</sup> eco-

---

<sup>219</sup> Another example of where the secretariat can play a key role is in the dispute settlement process. The WTO secretariat has a legal division which attends all hearings and prepares the drafts of the decisions for approval of the panelists. Insiders note how, while the panelists are designated for only a single panel, the secretariat of the legal division remains. This legal secretariat thus represents a reservoir of knowledge as to past practice and cases. Although, with the creation of an Appellate Body of judges, the role of the secretariat may be more constrained, it nonetheless retains an inside role in the dispute settlement process.

<sup>220</sup> A count of 983 pages includes some annexes of new environmental agreements or proposed drafts of agreements. **NEED SPECIFY THE DATE AS OF.** A list of all papers provided by the CTE secretariat on the agenda items through the November 1996 Singapore Ministerial meeting is listed in Annex IV to the CTE 1996 Report. Prior to the completion of the CTE 1996 Report, the secretariat prepared 46 papers on such items. Since the Singapore Ministerial meeting, the secretariat has prepared 28 more papers for the CTE. These can be obtained through the document search option of the WTO web site. The most important CTE matters in terms of secretariat output was item 1 (20 papers), item 3 (9 papers) and item 6 (5 papers). Most of the secretariat’s papers relevant to item 1 concerned developments in different international environmental fora. *See* discussion in *infra* note 310 and accompanying text.

<sup>221</sup> *See, e.g., and supra* note 96 and *infra* notes 225 and 229 .

<sup>222</sup> CTE, *Taxes and Charges for Environmental Purposes–Border Tax Adjustment: Note by the Secretariat*, WT/CTE/W/47 (May 2, 1997), at 1.

<sup>223</sup> *See* EMIT, *Agenda Item 2: Multilateral transparency of National Environmental Regulations Likely to Have Trade Effects: Note by the Secretariat*, TRE/W/10 (March 17, 1993). One secretariat paper points to problems of transparency, short deadlines for adaptation and the proliferation of differing national standards which adversely affect foreign traders, noting how market entry barriers “can be increased when input from local industries is a

labeling schemes,<sup>224</sup> and eco-taxes and charges<sup>225</sup> among other matters. The CTE secretariat coordinates its research with other international organizations, such as the Organization of Economic Cooperation and Development, the United Nations Conference on Trade and Development, and the World Bank, which it cites in the papers that it prepares for the Committee.<sup>226</sup> Many of these studies were, in turn, cited in the controversial CTE 1996 Report.<sup>227</sup>

---

dominant part of the process.” EMIT, *The Trade Effects of Environmental Measures: Note by the Secretariat*, TRE/W/13 (June 29, 1993), at 5. The paper recalls that content requirements for packaging “are likely to be tailored to domestic resource availability, technology, or preferences.” *Id.* at 9.

<sup>224</sup> EMIT, *Agenda Item 3: Packaging and Labelling Requirements: Note by the Secretariat*, TRE/W/12 (June 14, 1993).

<sup>225</sup> See *Taxes and Charges for Environmental Border Purposes—Border Tax Adjustments: Note by the Secretariat*, [WT/CTE/W/47], *supra* note 221.

<sup>226</sup> The most widely cited organizations in CTE papers were the Organization of Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), the World Bank, the United Nations Food and Agricultural Organization (FAO), and the United Nations Environment Programme (UNEP). For example, in a detailed 1997 report by the Secretariat on the “Environmental Benefits of Removing Trade Restrictions and Distortions,” the secretariat cites work from over fifteen international organizations, the predominant being the OECD (32 cites), UNCTAD (32 cites), the FAO (31 cites) and the World Bank (29 cites). See *Environmental Benefits of Removing Trade Restrictions and Distortions: Note by the Secretariat*, [WT/CTE/W/67], *supra* note 67, and its addendum WT/CTE/W/67/Add.1 (March 13, 1998) (the count comprises the report and its addendum).

The secretariat’s first report to the CTE on the environmental benefits of removing trade restrictions and distortions cites contributions from a World Bank discussion paper series seven times. See CTE, *Environmental Benefits of Removing Trade Restrictions and Distortions: Note by the Secretariat*, WT/CTE/W/1 (Feb. 16, 1995). The World Bank series was organized by Patrick Low, now director of the WTO’s Research Division. The secretariat submission also cited six papers by Kym Anderson, a former member of GATT’s research division. Two of these papers were included in the 1992 GATT economic study, *The Greening of World Trade Issues*, which Anderson co-edited with Richard Blackhurst, the GATT Research Division director at the time.

<sup>227</sup> In the CTE’s 1996 Report, “the CTE welcomes efforts of other inter-governmental organizations, in particular the UNCTAD and ITC [the WTO’s joint research center with UNCTAD], to collect and disseminate additional information on the use of trade-related environmental measures, and recommends the WTO Secretariat cooperate with those organizations to ensure duplication is avoided.” CTE 1996 Report *supra* note 89, at 43.

The most influential document for purposes of the CTE 1996 Report was probably the OECD’s 1995 Report on Trade and Environment to the OECD Council at Ministerial Level. This report was cited by the CTE secretariat in its papers, by member states in their arguments, as well as in the final CTE 1996 Report. See, e.g., CTE 1996 Report, *supra* note 89, par. 103-04 (citing the OECD Report’s findings of “positive effects” of high levels of environmental protection on competitiveness and the principle that trade measures should not be used to force harmonization of environmental standards). During the negotiation of the CTE 1996 Report, many delegates were seen comparing the language in the OECD Report with that being negotiated in the CTE. See Michael Reiterer, *Trade Impact of the OECD Joint Session*, 9 INT’L ENVTL. AFF. (1997), 69, 78 (“I can also confirm from my personal experience that many delegates—and not just those of the OECD countries—were carrying the green-banded OECD Ministerial Report during the final negotiations.”). Also confirmed to author in interview with the Canadian delegate to the CTE. Reiterer concludes that this shows that the Joint Session “has fulfilled the think-tank function that is

Although the secretariat largely controls the content of its CTE submissions,<sup>228</sup> it is usually cautious not to appear partisan. Secretariat submissions were thus largely informative and not argumentative in tone. Nonetheless, this is not always the case, as some secretariat members have clear preferences. For example, members of the CTE secretariat were clearly interested in exploring the issue of how trade liberalization results in environmental benefits.<sup>229</sup> As the former director of the CTE secretariat confirmed with pride, “the Secretariat did not pull any punches in saying that agricultural protection is by and large a disaster for the environment.”<sup>230</sup>

In public relations, which has become particularly important for the WTO, the secretariat is protective of its employer and a defender of trade policies with a neoliberal bent. For example, the WTO secretariat periodically publishes reports on its own initiative with a view toward defending the WTO’s trade policy before the larger public. In the midst of the outcry in the United States over the tuna-dolphin decision, the WTO secretariat included an extensive analysis of trade and environment matters in its annual report *International Trade 90-91*.<sup>231</sup> The secretariat authors argued “that unilateral restrictions on trade would never be the most efficient instrument for dealing with an environmental problem.”<sup>232</sup> They warned, “There is a serious risk

---

generally ascribed to the OECD,” and that “positive spill-over effects from the OECD and the WTO process will be needed and welcome.” *Id.*

<sup>228</sup> Eglin Interview, *supra* note 86. However, the secretariat is aware of the parameters and political sensitivities of the debates within the CTE and is constrained by those parameters and sensitivities.

<sup>229</sup> In interviews in Geneva in June 1997 and June 1998, secretariat members assigned to the CTE expressed how the CTE was particularly interested in exploring “win-win” type situations, where the WTO could use environmental rationale for further liberalizing trade. See also *Environmental Benefits of Removing Trade Restrictions and Distortions: Note by the Secretariat* [WT/CTE/W/67], *supra* note 96, at 2 (a secretariat paper to the CTE citing numerous economic studies of the relationship between growth in per capita income and the intensity of polluting effluents. It notes that some environmental problems (such as scarcity of potable water and sanitation) decline, some (such as particulate emissions and habitat loss) initially worsen and then decline, and some (such as carbon dioxide emissions) worsen. As to the benefits of trade liberalization, the secretariat explains how generally, “trade liberalization has the potential to have a twofold positive effect on the environment,” since it stimulates efficient resource allocation so that fewer resources are used per unit of output, and it generates wealth which can be invested in environmental protection.

<sup>230</sup> Eglin interview, *supra* note 86.

<sup>231</sup> GATT, *International Trade 90-91* (Geneva 1992).

<sup>232</sup> *Id.* at 21.

that the trading system could get badly bruised by a rush to deal with environmental issues,”<sup>233</sup> and conclude by pointing out “that current restrictions on international trade can be bad for the environment,” focusing on the situation in agriculture.<sup>234</sup> The secretariat helped highlight these issues for state delegates. Two years later, the issue of potential “win-win” benefits from agricultural trade liberalization was incorporated in item 6 of the CTE’s agenda. Moreover, the CTE certainly has not been in “a rush to deal with environmental issues” by amending WTO rules.<sup>235</sup>

The CTE secretariat also acts as a liaison with international environmental organizations to help states’ delegates to the World Trade Organization monitor international developments. At the instruction of state delegates, members of the CTE secretariat observe meetings of, periodically address, submit papers to, and correspond with these environmental organizations,<sup>236</sup> and then report back to the Committee on Trade and Environment on developments within

---

<sup>233</sup>*Id.* at 31

<sup>234</sup>*Id.* at 38. The report also cites empirical studies which “suggest caution in asserting that cost difference due to differences in environmental regulations are substantial, or that the trade and investment effects within particular industries are large.” and pointedly states “that GATT rules block the unilateral use of trade measures to dictate changes in the environmental policies of other nations.” *Id.* at 22, 31. *Cf.* Shrimp-Turtle Appellate Report, and assessments of this report, *supra* note 132.

<sup>235</sup> Nonetheless, with the WTO still on the defensive on trade and environment matters, the WTO secretariat helped prepare, in coordination with UNEP, a more thorough, nuanced analysis of trade and environment matters in preparation of the third WTO Ministerial Meeting held in Seattle, Washington. *See* Håkan Nordström & Scott Vaughan, World Trade Organization, Special Studies No. 4, Trade and Environment Report (Oct. 14, 1999) <<http://www.wto.org/wto/new/press140.htm>>. The Report argues that “that international economic integration and growth reinforce the need for sound environmental policies at the national and international level.” *Id.* Nordstrom is an economist in the WTO’s Research Division, and Vaughan, who was formerly a member of the CTE secretariat, contributed to the 1999 Trade and Environment Report when he had moved to UNEP.

<sup>236</sup>For example, Richard Eglin, Director of the secretariat’s Trade and Environment Division, wrote Lawrence Eicher, Secretary-General of International Organization for Standardization (ISO) on July 3, 1996, stating “The WTO Secretariat followed closely the proceedings of the ISO Technical Committee 207 and its sub-committees at their meetings in Rio de Janeiro from 16-23 June, with particular attention to the drafting of the trade principles” in ISO draft principles concerning eco-labelling schemes. Eglin said he found draft language “confusing” and suggested that ISO should change the word “should” to “shall” in the following passage from a draft of ISO 14020 setting forth ISO’s “General Principles for all Environmental Labels and Declarations”: “the provisions and interpretations of the WTO should be taken into account”. Eglin made the same suggestion concerning a draft of ISO 14024- “Environmental Labels and Declarations- Environmental Labelling Type 1- Guiding Principles and Procedures.”

them.<sup>237</sup> The secretariat thereby helps states quell potential conflicts between environmental measures proposed in these fora and WTO rules and principles. The secretariat's oversight also helps state delegates intervene by instructing their domestic colleagues of WTO constraints and thereby protect state trading rights.

Finally, the secretariat provides drafting and mediation services when states negotiate over trade and environment issues. The secretariat's mediation services were central to the CTE 1996 Report. The secretariat prepared successive drafts and circulated them with bracketed passages containing alternative language. The Director of the secretariat's Trade and Environment Division, Richard Eglin, met with key states over controversial individual items, such as the relation of WTO rules to multilateral environmental agreements, and proposed alternative draft language which states might accept. While the secretariat cannot dictate what states accept, it can push states to the limits of what they can accept to reach consensus.<sup>238</sup> As confirmed by the former Canadian delegate to the WTO Committee on Trade and Environment, "The role of the Secretariat in the informal drafting process of October 31-November 1 reflects

---

<sup>237</sup> Secretariat members assigned to the EMIT Working Group and then to the CTE, attended meetings and made contributions to the Rio Conference and its various follow-ups before the Commission on Sustainable Development. *See, e.g.*, Committee on Trade and the Environment, *Communication from the Secretariat*, WT/CTE/W/3 (March 10, 1995). Similarly, secretariat members attended meetings of the Basel Convention, the Montreal Protocol, the United Nations Food and Agricultural Organization and the United Nations Environment Programme. The secretariat then reported back to the CTE delegates on developments in these different fora in a series of papers which, together with updates, totaled \_\_\_ in number. **NEED ADD COUNT** *See, e.g.*, CTE, *UNCED Follow Up: Results of the Third Session of the Commission on Sustainable Development: Note by the Secretariat*, WT/CTE/W/7 (May 18, 1995); CTE, *Environment and TRIPS*, WT/CTE/W/8 (June 8, 1995); CTE, *Results of the Fourth Session of the Commission on Sustainable Development: Note by the Secretariat*, WT/CTE/W/30 (May 22, 1996) [and up-dates re UNCED follow-ups before the CSD]; CTE, *FAO Code of Conduct for Responsible Fisheries: Note by the Secretariat*, WT/CTE/W/15 (Dec. 1, 1995) [and up-date re the FAO's activities on fisheries]; CTE, *Seventh Meeting of the Parties of the Montreal Protocol: Note by the Secretariat*, WT/CTE/W/19 (Jan. 23, 1996)[re up-dates on the Montreal Protocol]. In addition, the secretariat members corresponded independently with other secretariats, providing them with information concerning WTO norms and rules.

<sup>238</sup> Robert Hudec, international trade law professor at University of Minnesota, notes that the role of the WTO secretariat in the drafting process considerably expanded in the more complex Uruguay Round of trade negotiations, compared to the eight previous GATT negotiating rounds. E-mail exchange with Robert Hudec concerning an earlier draft, Nov. 27, 1999 (on file). This greater *de facto* delegation of states to a centralized international secretariat is explained by the increased number, scope of coverage and complexity of the Uruguay Round agreements that states negotiated as part of a single package, ultimately requiring approval by consensus.

the professionalism and skill of the Secretariat in developing the basis for a consensus text.”<sup>239</sup>

The WTO secretariat does not fulfill a passive secretarial role. While secretariat representatives take the position that their role is solely to serve national delegates, and though they do not speak at meetings, they can shape states’ understanding of feasible alternatives and their desirability. Through their presence at meetings, they are aware of national positions. In private, they can indirectly work with members, including through the CTE’s Chair,<sup>240</sup> to facilitate negotiations and the forging of coalitions and consensus.

Yet while it is true that the secretariat, when it speaks, speaks from a trade vantage, and while it is true that there is no one in the WTO secretariat who, like the Lorax, “speaks for the trees,”<sup>241</sup> the influence of the WTO secretariat, compared to that of powerful states and powerful constituencies within states, is at best marginal. While a neoliberal-leaning WTO secretariat may have some influence, it is misleading to characterize the secretariat as an independent voice that shapes states’ trading policies to a significant extent. Within the World Trade Organization, secretariat members operate under the instructions of states and are under the watchful eyes of state delegates.<sup>242</sup> As a former member of the CTE secretariat confirms, “unlike the World Bank secretariat which makes executive decisions on project finance, the WTO secretariat has

---

<sup>239</sup> He further notes how “the drafting sessions of October 31 and November 1 indicated how effective such informal processes can be, as did the TRIPs discussions held late in the marathon session.” Andrew Griffith, *A Negotiator’s Point of View*, *supra* note 185, at 22-23.

<sup>240</sup> The Chair to the CTE is always an ambassador to the WTO from one of its member states.

<sup>241</sup> “He snapped, ‘I’m the Lorax who speaks for the trees  
which you seem to be chopping as fast as you please  
But I’m also in charge of the Brown Bar-ba-loots  
who played in the shade in their Bar-ba-loot suits  
and happily lived, eating Truffula Fruits.”

DR SEUSS, *THE LORAX* 35 (1971). I am thankful to Richard Parker for recalling this.

<sup>242</sup> As Richard Eglin, the head of the WTO secretariat’s Trade and Environment Division at the time of the CTE 1996 Report, states, “[WTO] members views clashed so much that the secretariat could not play much of a role.... Although the secretariat should act as a broker, it can’t when member views are diametrically opposed.” Interview, Geneva, Switzerland, June 15, 2000. Another WTO secretariat member confirmed, “Parties closely oversee the secretariat when they feel affected by it. Interview, Geneva, Switzerland, June 1997. For example, a member of the secretariat assigned to the Appellate Body noted how he/she was once reproached by a delegate from a powerful state for having lunch with a member of the secretariat assigned to the legal division. The message to the secretariat members was clear—states did not wish any *ex parte* discussion on a legal matter between these two divisions, so that it was preferable that the secretariat members not even meet socially.

significantly less power,” but rather “works as an intermediary” to facilitate state-to-state discussions, negotiations and monitoring.<sup>243</sup> States were not used by the World Trade Organization as agents to enforce WTO trade liberalization norms. Rather, the WTO secretariat assigned to the CTE was used as agents by states to monitor international environmental negotiations in order to protect state trading interests.<sup>244</sup>

Because of the consequential nature of WTO decision-making, states keep the WTO secretariat on a “tighter leash.”<sup>245</sup> Trade and environment issues addressed within the WTO Committee on Trade and Environment are highly politicized (witness the Seattle demonstrations) and can significantly impact states’ economies. State delegates, as well as business and environmental and developmental organizations, thus heed developments within the WTO Committee on Trade and Environment. Ultimately, discussions and negotiations within the WTO Committee on Trade and Environment were dominated by states with conflicting interests.<sup>246</sup> CTE secretariat members were just as frustrated with and exhausted by the endless CTE debates leading to no concrete results as were national delegates.<sup>247</sup>

### **C. Role of Other Stakeholders: Environmental and Developmental Non-governmental Organizations**

Different interests have attempted to advance their goals through the institutionalization of trade and environment issues within the World Trade Organization, as suggested by neoliberal and stakeholder perspectives. Northern environmental groups, in particular, are frustrated by the failure of the WTO Committee on Trade and Environment to recommend any changes in WTO rules. They are especially frustrated regarding the issue most important to them, item 1

---

<sup>243</sup> Interview with Scott Vaughan, June 2, 1997. In short, unlike the secretariat in the World Bank, the WTO secretariat has no independent executive decision-making authority.

<sup>244</sup> *See infra* notes 308-320 and accompanying text. [CUT THIS NOTE?]

<sup>245</sup> *Id.*

<sup>246</sup> *See infra* notes 277-298 and corresponding text. [CUT THIS NOTE?]

<sup>247</sup> Confirmed in interviews with secretariat members assigned to the CTE, in Geneva, Switzerland, June 1997 and June 1998.

concerning the use of trade measures to enforce international environmental agreements and advance environmental goals through unilateral state action. Because of the stalemate within the WTO Committee on Trade and Environment, they advocate a stakeholder model under which they would play a greater role in CTE deliberations. They have already used the CTE process to pressure the World Trade Organization to make its decision-making more transparent so that non-governmental organizations may better coordinate pressure on governments, in particular through the media, domestically and internationally.<sup>248</sup>

Yet the adoption of a stakeholder model of WTO governance has not been advocated by all non-governmental organizations (NGOs).<sup>249</sup> The model has been primarily advocated by environmental groups in the United States and Europe, not the south, because southern NGOs,

---

<sup>248</sup> The World Bank has, in the last years, worked much more closely with non-governmental organizations, integrating their views into its decision-making process, in response to intensive NGO pressure in the United States. See *Citizens' Groups: The Non-governmental Order*, THE ECONOMIST, 20, 21 (Dec. 11, 1999) (noting that environmental NGO campaigns against the World Bank in the mid-1990s led the Bank to develop working relations with NGOs so that now "more than 70 NGO specialists work in the Bank's field offices" and "more than half of World Bank projects last year involved NGOs.").

<sup>249</sup> While a large number of grassroots northern and southern non-governmental organizations signed a joint "Statement... Opposing a Millennium Round" which they presented to the WTO-organized Symposium on International Trade the day before the Ministerial Meeting began in Seattle, the Statement was abstract, blurring the serious differences among non-governmental organizations on specific issues. See *Statement from Members of International Civil Society Opposing a Millennium Round or a New Round of Comprehensive Trade Negotiations*, (available at <http://www.citizen.org/pctrade/gattwto> (visited March 30, 2000)). These differences were highlighted in NGO remarks at the Symposium itself. At the symposium, no southern non-governmental organization supported increased NGO involvement in WTO negotiations and dispute settlement. Northern non-governmental organizations such as Greenpeace and As You So, on the other hand, respectively called for "greater participation by NGOs in the proceedings of the WTO, including the dispute settlement process" and "a more substantive role for NGOs." See International Institute for Sustainable Development, *Summary Report of the Seattle Symposium on International Trade Issues in the First Decades of the Next Century*, 34 SUSTAINABLE DEVELOPMENTS 5 (Dec. 1, 1999) "As You So" is a San Francisco-based environmental foundation. For a description of the differences among non-governmental organizations signing the statement, see Debi Baker and Jerry Mander, *Invisible Government* (available at <http://www.twinside.org.sg/title/deb11-cn.htm> (visited March 30, 2000)). For the perspective of a southern non-governmental opponent of the WTO, see e.g. Walden Bello, *Why Reform of the WTO is the Wrong Agenda*, 43 FOCUS ON TRADE 1 (January 2000) (an electronic bulletin published by Focus on the Global South, a "research and action" program based in Bangkok, Thailand) (arguing that northern-biased "inequalities [are] built into the structure, dynamics, and objectives of the WTO" and that developing countries should aim "to radically reduce [the WTO's] power and to make it simply another international institution"). See also *infra* note \_\_. This is an opposite perspective from that of northern NGOs who maintain that environmental and labor standards should be integrated into the World Trade Organization and that NGO stakeholders should have the right to directly participate in WTO dispute settlement hearings and committee meetings.

although sometimes large in number,<sup>250</sup> are short on resources and typically localist in orientation. They thus recognize northern NGOs' advantage in international fora. Just as all states are not equal, all NGOs are not equal. Northern non-governmental organizations have more funding, are located closer to WTO offices in Geneva,<sup>251</sup> are more likely to finance international networks,<sup>252</sup> and have greater indirect access to information from their state representatives.<sup>253</sup> Non-governmental organizations from the south have less access in part because southern governments themselves have difficulty monitoring all developments in the World Trade Organization—including in its Committee on Trade and Environment.<sup>254</sup> In fact, one London-

---

<sup>250</sup> See *Citizens' Groups: The Non-governmental Order*, THE ECONOMIST, 20, 21 (Dec. 11, 1999) (citing an article in *World Watch* that estimates that India alone has about one million grass-roots NGOs, compared to a figure of around two million in the United States). Another source cites that, as of 1994, India had a more modest but still substantial number of "some 10,000 NGOs involved in development and environmental issues." See Benjamin Richardson, *Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum*, 11 *Colo. J. Int'l Envtl. L. and Pol'y* 1 (2000), citing World Resources Institute, *World Resources 1994-95* 84 (1994). **GCS NEED UPDATE THIS AND GET CURRENT REPORTS AND CITES.**

<sup>251</sup> Geographically, U.S. and European non-governmental organizations are located closer to Geneva, reducing their transportation costs and inconvenience. WWF International's headquarters is in Gland, Switzerland, within twenty-five miles of Geneva, and connected by train. The U.S. NGO Center for International and Environmental Law (CIEL) leases office space in Geneva, while other NGOs use the office space provided by the ICTSD consortium.

<sup>252</sup> The WWF family, for example, has affiliates or offices in at least twenty-seven countries. See WAPNER, *WORLD CIVIC POLITICS*, supra note 40, at 77. Friends of the Earth "has offices and multiple local chapters in over fifty countries. *Id.*, at 121.

<sup>253</sup> Environmental non-governmental organizations are represented, for example, on the U.S. administration's Trade Advisory Committees. U.S. and EC trade representatives also periodically meet with non-governmental organizations on trade-environment issues before WTO meetings or in respect of trade-environment disputes. The author, for example, was invited to USTR briefings of NGOs on the controversial WTO shrimp-turtle case. In the WTO shrimp-turtle dispute, the only place in the world with a public file containing the submissions of Thailand, Malaysia, Pakistan and India which could be photocopied was at the Office of the USTR in Washington. Washington-based non-governmental organizations and trade associations were thus able to obtain copies of these submissions conveniently and at minimal cost. However, U.S. trade advisory committees are dominated by business interests, and environmental non-governmental organizations have had to sue the Office of the United States Trade Representative to obtain access to sectoral trade advisory committees. See supra note 205.

<sup>254</sup> The primary concern in respect of the "transparency" of WTO decision-making for developing countries is that WTO rules have been traditionally negotiated by small groups of large developed countries without developing countries present. See e.g. Bhagirath Lal Das, *Why the WTO Decision-Making system of 'Consensus' Works against the South*, Third World Network Website, at <http://twinside.org.sg/souths/twn/title/bg13-cn.htm> (visited Dec 13, 1999) (noting that developing countries are always on the defensive"). Bhagirath Lal Das was India's Ambassador and Permanent Representative to the GATT. See also Chakravarthi Raghavan, *The Return of the 'Green Room'*, Third World Network Website, at <http://www.twinside.org.sg/souths/twn/title/green2-cn.htm> (visited

based environmental non-governmental organization, the Foundation for International Environmental Law and Development (FIELD), even negotiated a deal with a developing country, Sierra Leone, to represent it before the Committee on Trade and Environment in order for FIELD to support the cost of attending and reporting in meetings in exchange for FIELD's direct access to CTE meetings.<sup>255</sup> Sierra Leone, beset by violent civil conflict, did not have the resources or the priority to itself represent its "stakeholder" interests and represent them before the Committee on Trade and Environment. A northern NGO, though with serious conflicts of interest, offered to do so in its stead.

In short, northern non-governmental organizations are much better positioned than southern non-governmental organizations and southern trading interests to have their views heard at the international level.<sup>256</sup> Given scarce resources, southern states even question the appropriateness of the WTO sending NGO delegates to Geneva for symposia when those resources could be spent on water purification, nutrition, education and disease control projects

---

Dec. 13, 1999) (the green room refers to the conference room in GATT headquarters where former GATT Director General Arthur Dunkel held informal meetings with key GATT members to drive forward the Uruguay Round negotiations). *See also* infra note 283.

<sup>255</sup> In other words, the London-based NGO would obtain direct access to CTE debates and in return Sierra Leone would receive, free-of-charge, information on what transpired within the CTE, albeit filtered through the London-based NGO. Sierra Leone had no permanent representative in Geneva on account of its lack of resources. Developing countries in the CTE, however, recognized the FIELD representative (James Cameron) and at first demanded that he be excluded from the room. Another FIELD representative from London, Beatriz Chaytor held a Sierra Leone passport and was subsequently permitted to attend CTE meetings as Sierra Leone's representative after the CTE secretariat received confirmation from the Sierra Leone government of its approval. Even this authorization, however, was cryptic, for Ms. Chaytor's name was hand-written on a government letter above a scotched-out name. Within the CTE, Ms. Chaytor allegedly read a long "NGO-type" statement about how the WTO was "anti-environment." Interview with a member of the CTE secretariat, June 2000, Geneva. For Ms Chaytor's version of this experience, see Beatriz Chaytor, *Cooperation between Governments and NGOs: the Case of Sierra Leone in the CTE*, in *TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: VIEWS FROM SUB-SAHARAN AFRICA AND LATIN AMERICA: A READER* (Pieder Konz, ed.), supra note 110, at 89.

<sup>256</sup> An article published by the southern NGO Third World Network, for example, maintains that agenda-setting of large "international NGOs" is "led from their offices in London, Paris or Brussels. There is great reluctance to give their offices based in developing countries a greater say in running international campaigns... The involvement of southern counterparts is often restricted to generating research data to be used by northern advocates...." Binu S. Thomas, *WTO Steals a March on International NGOs*, Third World Network Website, at <http://www.twinside.org.sg/souths/twn/title/march-cn.htm> (visited Dec. 14, 1999). Thomas is noted as an employee of an international NGO who is based in Bangalore, India.

in developing countries.<sup>257</sup> While some northern commentators may condescendingly counter that the alternative use of funds will not go to social services, but to line the pockets of southern elites to pay “for a fourth mistress,”<sup>258</sup> the fact remains that international NGO conferences remain more of a prerogative of northern governments and northern constituencies.

Information comes at a price. Northern environmental non-governmental organizations such as Greenpeace and WWF-World Wide Fund For Nature, have multi-million dollar budgets that they target to address environmental matters. Their budgets exceed that of the World Trade Organization itself and are several times the size of the United Nations Environmental Programme.<sup>259</sup> They can thereby channel more resources toward CTE negotiations than the vast majority of WTO members. Northern non-governmental organizations publish glossy magazines,

---

<sup>257</sup> Interview with a developing country delegate to the CTE, June 1998, Geneva (noting that flights to the conference alone cost one to two thousand US dollars per participant, and that during the conference, many NGO representatives stayed at four and five star Geneva hotels. The delegate also questioned the representativeness of some “developing country NGOs,” some of whom were created and/or financed by environmental NGOs from the United States and thus “played no policy role in the developing country.” The CTE secretariat financed the expenses of certain developing country NGOs for the 1996 meeting “on an exceptional basis out of the Secretariat’s own budget.” See Trade and Environment Bulletin No. 16, *Report of the WTO Informal Session With Non-governmental Organizations (NGOs) on Trade and Environment*, PRESS/TE016, at 3 (Nov. 28, 1996), available at <[www.wto.org/wto/environ/te016.htm](http://www.wto.org/wto/environ/te016.htm)> [hereinafter 1996 NGO Symposium]. The Netherlands, Canada and Australia used development funds to finance the costs of developing country NGOs participating in the third NGO symposium. See Trade and Environment Bulletin No. 19, *WTO Symposium on Trade, Environment and Sustainable Development*, PRESS/TE019 (July 1997) <[www.wto.org/wto/environ/te019.htm](http://www.wto.org/wto/environ/te019.htm)>.

<sup>258</sup> Comments of a former delegate from a developed country who attended CTE meetings (April 2000). Ironically, the former delegate was responding to the above remarks of a developing country delegate who (he did not know) is a highly respected, well-educated, well-informed woman who was an active participant in the CTE.

<sup>259</sup> The annual budget for Greenpeace rose from US\$24 million in 1985 to some US\$100 million in 1990. See THOMAS PRINCEN AND MATTHIAS FINGER, *ENVIRONMENTAL NGOS IN WORLD POLITICS : LINKING THE LOCAL AND THE GLOBAL 2* (1994). Greenpeace’s total income for 1998 was US\$125,297,000. See Greenpeace, *Greenpeace 1998 Annual Report*, (June 16, 1999) <<http://www.greenpeace.org/report98/index.html>>. WWF International, just one of WWF’s many branches, had a 1998 total income of US\$53,450,000. See World Wildlife Fund, *Annual Report 1998* (visited Oct, 19, 1999) <<http://www.panda.org/wwf/Report98/accounts.html>>. See overviews of Greenpeace and WWF--World Wide Fund For Nature in WAPNER, *WORLD CIVIC POLITICS*, supra note 40, at 41-116. **GET BUDGET FOR ALL WWF BRANCHES AND FOR WTO AND UNEP IN/AROUND 1998**. See e.g. comments of Edward Goldsmith, Co-founder of International Forum on Globalization, in *Policing the Global Economy*, supra note 190, 171, 173 (noting UNEP’s “annual budget of a mere \$70 million—a third of that of an NGO such as the World Wildlife Fund for Nature.”)

circulate statements and pamphlets,<sup>260</sup> coordinate lobbying campaigns, call press conferences,<sup>261</sup> take out full page adds in major publications, such as the New York Times,<sup>262</sup> and, more recently, submit amicus briefs to WTO dispute settlement panels.<sup>263</sup> Non-governmental organizations such as the WWF--World Wide Fund For Nature proactively fund major symposia held within the United Nations to which they invite state delegates and representatives of the World Trade Organization and other international organizations.<sup>264</sup> WWF--World Wide Fund For Nature has even created a parallel CTE, which it calls the Expert Group on Trade and the Environment,

---

<sup>260</sup> See, e.g., *The GATT Trade and Environment Work Programmes: A Joint NGO Statement*, signed on March 3, 1994 in Gland, Switzerland (WWF International's headquarters) and signed by WWF International and 20 WWF national affiliates, as well as by Greenpeace International and 10 Greenpeace national affiliates, and 29 other NGOs. This document was then attached by Friends of the Earth International in its statement "concerning the environmental implications of the Uruguay Round of GATT" to the Subcommittee on Economic Policy, Trade and Environment of the Committee on Foreign Affairs of the U.S. House of Representatives, 103rd Congress, 2nd Session, March 8, 1994, at 83-103.

<sup>261</sup> See, e.g., Michael Battye, *Environmental Groups Blast World Trade Body*, REUTER EUR. COMMUNITY REP. (Dec. 8, 1996).

<sup>262</sup> See, e.g., *Invisible Government*, N.Y. Times, Nov. 29, 1999 (consisting of an anti-WTO advertisement by the Turning Point Project, a coalition of over 60 non-profits formed specifically to produce a series of advertisements for publication in the New York Times, see Turning Point Project (visited Dec. 5, 1999) <<http://www.turnpoint.org/>>); *Top Secret: New MAI Treaty: Should Corporations Govern the World?* N.Y. TIMES, Feb. 13, 1998, at A13 (an ad taken out by the International Forum on Globalization, a network of NGOs, including Sierra Club, Public Citizen and Friends of the Earth).

<sup>263</sup> In the shrimp-turtle case, the WTO Appellate Body admitted an amicus brief jointly submitted by WWF--World Wide Fund For Nature and FIELD. In addition, an amicus brief prepared by the Washington DC-based Center for International Environmental Law (CIEL), in association with other NGOs, was attached as a supporting annex to the U.S. submission to the Appellate Body. See discussion in Shaffer, *Shrimp-Turtle Dispute*, *supra* note 103.

<sup>264</sup> The WWF-UNEP conference on fisheries, held in June 1997 at the UN in Geneva, was funded primarily by WWF--World Wide Fund For Nature. It brought together state delegates to the CTE, representatives of the CTE secretariat, representatives of other international organizations (including of the United Nations Environmental Program, the United Nations Development Program, the Food and Agricultural Organization and the OECD. The conference was seen as a model by CTE secretariat members. See *supra* note 81. Studies from the conference were cited seven times by the CTE secretariat in its paper concerning the environmental benefits of removing state subsidies. See *Environmental Benefits of Removing Trade Restrictions and Distortions: Note by the Secretariat* [WT/CTE/W/67], *supra* note 96.

Similarly, James Cameron, the co-director of the London-based Foundation for International and Environmental Law and Development (FIELD), is also co-director of the publisher Cameron & May, which organizes annual symposia on WTO dispute settlement and related matters.

consisting of trade and environment specialists from developed and developing countries.<sup>265</sup>

In particular, northern environmental NGOs attempt to harness the media to shape perceptions of problems and desired outcomes.<sup>266</sup> They can more effectively work the media not only because of their greater resources, but because of the media's determination of what is worthy for print, in large part a reflection of the international media's primary audiences located in developed countries.<sup>267</sup> For example, in response to the December 1999 demonstrations at the

---

<sup>265</sup> The group meets a few times per year and issues periodic reports that WWF International then distributes to the CTE secretariat and state delegates to the CTE, as well as any other interested party. *See, e.g.*, Expert Panel on Trade and Sustainable Development, 2<sup>nd</sup> meeting, Cairo, 16-18 February 1997, WWF EPTSD Secretariat Report, at 1. The original panelists included developing country representatives to the Committee on Trade and Environment who were active in the debates leading to the 1996 Report (Magda Shahin of Egypt, Hector Torres of Argentina and Chiedu Osakwe of Nigeria), developed country representatives, representatives from the United Nations Conference on Trade and Development, the World Bank and the WTO (including the leading neoliberal academic and member of the WTO secretariat Ernst-Ulrich Petersmann), representatives from three northern NGOs (including Greenpeace International and FIELD), three southern NGOs (including Third World Network), the Executive Director of the north-south NGO consortium International Centre for Trade and Sustainable Development, and business representatives (including the President of the US Council for International Business).

<sup>266</sup> As Deborah Rhode writes, "The way journalists frame their coverage helps reshape the legal world that they claim only to represent. What gets lost in translation also gets lost in public policy debates. As social science research consistently demonstrates, the media influence not only what we know but also what sense we make of that knowledge." Rhode, *A Bad Press on Bad Lawyers: The Media Sees Research, Research Sees the Media*, in Patrick Ewick, Robert Kagan and Austin Sarat, eds. *SOCIAL SCIENCE, SOCIAL POLICY AND LAW* (1999), at 139 (citing John Fiske, *MEDIA MATTERS: EVERYDAY CULTURE AND POLITICAL CHANGE* (1994), among others). Northern international environmental NGOs engage with the media in an attempt to define the issues in public debate. *See* Alison Anderson, *Source-media relations: The production of the environmental agenda*, in Andrew Hansen, ed. *THE MASS MEDIA AND ENVIRONMENTAL ISSUES* 51-68 (1993) (noting how environmental NGOs hire scientists and consultants in order to gain legitimacy as primary sources and definers of issues before the media)

<sup>267</sup> By international media, I refer to that available, read and/or viewed worldwide, and in particular in international capitals such as Geneva, Switzerland. This media includes CNN, Sky TV, the International Herald Tribune (joint venture of the New York Times and Washington Post), the Financial Times, the Wall Street Journal, and wire dispatches such as AP, Reuters and Agence France-Presse. The Indian environmental, activist Vandana Shiva, claims that "Within the dominant discourse on development, the 'local' has been written out of environmental concerns; now all environmental problems are portrayed as global problems requiring global solutions.... The 'global' is the political space which enables such dominant local interests [from the north] to free themselves from local, national and international restraints.... The 'global' thus creates the moral base for green imperialism." Shiva, *The Greening of Global Reach*, 22 *THE ECOLOGIST* 258 (Nov.-Dec. 1992).

Although northern-based critics of the WTO critique the mainstream media for its pro-WTO coverage. *See e.g.* Seth Ackerman, *Prattle in Seattle: WTO Coverage Misrepresented Issues, Protests*, 13 *EXTRA!* 13-17 (Jan./Feb. 2000), they fail to note that such coverage still reflects a northern focus on the relation of WTO rules to U.S. environmental laws restricting developing country imports. *See e.g.* the New York Times editorial *Messages for the W.T.O.* published in response to the protests in Seattle, *infra* note 267. Northern-based media tend to cover environmental issues important to northern-based NGOs, such as trade bans imposed for the preservation of endangered species in developing countries, more than those important to developing country NGOs, such as the provision of clean water and sewage systems and other local concerns.

WTO Ministerial Meeting in Seattle, the New York Times wrote in its lead editorial entitled “Messages for the W.T.O.:

“The lesson from the demonstrators this week is that future trade panels must not just talk about protecting the environment but actually do so.... The W.T.O. is now on notice that future panels should bend over backward to side with the environmental advocates when the cause is just and not a disguised form of protectionism.”<sup>268</sup> The New York Times editorial, of course, did not bend over backwards to take account of the views of developing country constituencies about the appropriateness of unilateral US sanctions.

In these information campaigns, however, northern environmental NGOs do not represent *the* environmental perspective.<sup>269</sup> Rather, the term environment has vastly different meanings to a northern public than to stakeholders in developing countries. In developing countries, it is much more difficult to separate the notion of the “environment” from that of “development” because people’s livelihoods are more intimately connected on a day-to-day basis with the environment. Developing country stakeholders are thus much less likely to adhere to a “preservationist” perspective of environmental protection when their lives and livelihoods are directly at stake.<sup>270</sup>

While northern environmental NGOs may be “internationalist” in orientation and more likely than the WTO secretariat to represent the “trees,” they do not represent a “global civil

---

<sup>268</sup> See *Messages for the W.T.O.*, N.Y. TIMES A30 (Dec. 2, 1999). Although the statement is vague, the editorial could only have been referring to the controversial US shrimp-turtle case about which US environmental groups were protesting in Seattle.

<sup>269</sup> Similarly, there is not a single northern environmental group perspective. For differences among U.S. environmental groups on U.S. ratification of the North American Free Trade Agreement, see John J. Audley, Green Politics and Global Trade: NAFTA and the Future of Environmental Politics, *supra* note 45 (“environmental community was bitterly divided,” *Id.* at 2); Keith Schneider, *Environmentalists Fight Each Other over Trade Accord*, New York Times, Spet. 16, 1993, at A1. For an assessment of the immense variety of environmental problems and perspectives within the United States itself, see e.g. Michael Lacey, *The Environmental Revolution and the Growth of the State: Overview and Introduction*, in *Government and Environmental Politics* (Michael Lacey, ed., 1991) (noting how “vast and varied are its ideologically charged concerns”); Eric Orts, *Reflexive Environmental Law*, 89 Nw. U.L. Rev. 1227 (1995).

<sup>270</sup> For an assessment of the different treatment of the environment in the United Kingdom and India, see Graham Chaywan, Keval Kumar, Caroline Fraser & Ivor Gabel, *Environmentalism and the Mass Media: The North-South Divide* (1997) (noting the different perceptions of the word “environment” in Britain and India, and that in India, because many people’s livelihood is directly connected to the environment, “it is difficult to separate it from development” (at xiv)). For an examination of environmentalism from a wide variety of perspectives, see *World views and Ecology*, Mary Evelyn Taucker & John Grim, eds. 1993.

society.”<sup>271</sup> They have a specifically northern perspective, and often, even more specifically, an Anglo-Saxon one.<sup>272</sup> Their representatives were raised and educated in the north. Almost all of their funding comes from contributors from the north. They obtain their financing by focusing on single issues that strike the northern public’s imagination, in particular animal rights and species preservation issues--the motivating force for their demand for changes in WTO rules under item 1 following the two tuna-dolphin decisions.<sup>273</sup> Southern states and southern NGOs thus distrust

---

<sup>271</sup> For a call for the development of a “cosmopolitan” state-decentered politics, see, for example, David Held, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995); and A. Linklater, *THE TRANSFORMATION OF POLITICAL COMMUNITY* (1998). The sense that northern environmental groups’ views represent a “global” and not a parochial northern outlook is reflected in the statement by Held et al., “Environmentalism has become synonymous with a global outlook.” DAVID HELD & ANTHONY MCGREW, DAVID GLODBLATT & JONATHAN PERRATON, *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* (1999), at 376. Similarly, in his review of Christopher Stone’s proposal “to establish a system of guardians who would be legal representatives for the natural environment,” Jeffrey Dunoff states that these guardians may already exist, citing “international NGOs, such as WorldWide Fund for Nature, the Sierra Club, and Friends of the Earth.” Dunoff, *From Green to Global: Toward the Transformation of International Environmental Law*, 19 Harv. L. Rev. 241, 276 (1995). Yet Dunoff fails to address the issue that he cites only northern-based NGOs with northern perspectives. At least Wapner in his book on the development of a “world civic politics” confirms that, in focusing on NGOs based in the developed world, he is “assuming that an understanding of northern organizations will shed light upon all transnational groups.” WAPNER, *WORLD CIVIC POLITICS*, supra note 40, at 16. See also Anne-Marie Clark, Elisabeth J. Friedman, and Kathryn Hochstetter, *The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women*, 51 *WORLD POLITICS* (noting that geographical representation has been skewed in favor of northern NGOs, which are better funded and more influential).

<sup>272</sup> The largest and wealthiest environmental non-governmental organizations are typically located (or headquartered) in Anglo-Saxon countries. The four environmental NGOs that most actively followed and commented on CTE developments were WWF International (based in Gland, Switzerland, near Geneva), Center for International and Environmental Law (CIEL) (based in Washington D.C.), Foundation for International and Environmental Law and Development (FIELD) (based in London, England), and International Institute for Sustainable Development (IISD) (based in Winnipeg, Canada). Though WWF International is based in Switzerland, it has affiliates throughout the world, the most important being WWF (USA), and many of its staff are Anglo-Saxon, including the long-time head of its trade and environment division, Mr Charles Arden-Clarke, who is English and just recently joined the United Nations Environmental Programme’s trade and environment division.

While non-governmental organizations exist throughout Europe, those located in southern Europe typically do not have the finances of those based in northern Europe. Although financing is of relatively less importance for purposes of local networking to influence local policy, it is much more important if one wishes to follow and participate in negotiations in international fora, such as the Geneva-based WTO and its Committee on Trade and Environment. Moreover, non-governmental organizations generally play a less influential role in countries such as France with strong centralized state institutions. See e.g. Vivien Schmidt, *FROM STATE TO MARKET? THE TRANSFORMATION OF FRENCH BUSINESS AND GOVERNMENT* (1996) (noting how France is not a pluralist or corporatist system, but rather one she characterizes as “statist”).

<sup>273</sup> The logo of the WWF--World Wide Fund For Nature, probably the NGO most actively following and commenting on the CTE debate, is the endangered panda bear, a large furry animal living in a rapidly growing developing country, the People’s Republic of China, that most WWF members will not only never see, but not even

their demands for greater WTO transparency in the sense of more access for private groups to WTO decision-making. Southern interests are wary that greater WTO transparency will merely permit northern non-governmental organizations, defending northern interests, to better exploit the media to pressure state delegates, the WTO secretariat and WTO dispute settlement panelists to take their views into account and thereby advance northern ends.<sup>274</sup> Southern delegates precisely fear these “constructivist” aspects of the stakeholder model. As a developing country consultant to World Wildlife Fund-India itself states, “there is an urgent need to contest the anti-environment image of the WTO so assiduously disseminated by northern academics and environment groups” pursuant to their “dual strategy” of pressuring WTO dispute settlement bodies through critiques and *amicus curiae* briefs, on the one hand, and pressuring northern governments to include trade-environment issues in the next round of WTO negotiations, on the other.<sup>275</sup>

Non-governmental organizations from the United States and Europe, are already relatively powerful in affecting WTO agendas and outcomes precisely because they can work

---

be within thousands of miles-- other than a zoo.

<sup>274</sup> As a former representative from UNCTAD confirmed, “developing countries are concerned about the weighting of the transparency process, that it will be northern-dominated, that it will be biased in that it will predominantly present the views of northern interests.” Interview with Veena Jha, in Geneva, Switzerland (June 11, 1997). For developing country views on participation of NGOs in WTO dispute settlement, see e.g. Chakravarthi Raghavan, *NGOs Have More Rights than WTO Members!*, South-North Development Monitor (SUNS) 4719 (July 27, 2000) (on file with author) (noting developing country complaints about the acceptance by WTO dispute settlement panels of NGO *amicus* briefs ).

Nonetheless, where greater NGO involvement could support state trading interests, developing countries switched their stances on NGO involvement. For example, when northern NGOs supported developing country demands to modify the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Egypt advocated that NGO views be integrated “through a formal or informal round table discussion or seminar.” Egypt argued that the views of “development and environment NGOs... should not be neglected”, because otherwise the Committee on Trade and Environment would “be confronted with the same kind of situation which had confronted the TRIPs Agreement, namely the criticism that it had been negotiated out of the public’s view.” See *Report of the Meeting Held on 21-22 June 1995* [WT/CTE/M/3], *supra* note 112, at par. 34 (citing Egypt’s remarks). Similarly, southern non-governmental organizations have often worked with northern non-governmental organizations to block development projects financed by international banks and development agencies. See WAPNER, *WORLD CIVIC POLITICS*, *supra* note 40. However, this latter example presents a completely different context than those confronted within the WTO. In the World Trade Organization, northern environmental groups work with northern commercial interests and northern governments to ban imports from developing countries. See e.g. the WTO shrimp-turtle case discussed in Shaffer, *Shrimp-Turtle Dispute*, *supra* note 103.

<sup>275</sup> B.S. Chimni, *WTO and Environment*, *supra* note 15, at 1752.

with and through the WTO's most powerful states. They simply lobby and otherwise pressure their national representatives.<sup>276</sup> Developing countries question whether a stakeholder model would, in fact, exacerbate this disequilibrium. While communitarian and civic republican models may work relatively better at the local level, they are much more problematic at the international level where numbers, complexity and inequality of access to information and decision-makers increase.<sup>277</sup>

#### **D. Relation of State and Stakeholder Positions**

It is certainly true that the views of U.S. and European non-governmental organizations on trade and environment matters conflict with those of most states—although in particular of southern states. It is also true that this is, in part, because business and economic concerns hold a privileged position in defining state interests. Yet what is often ignored in critiques of state-based WTO models<sup>278</sup> is that, although there are divisions within states, NGO stakeholders' strongest defenders in the World Trade Organization on the trade and environment matters addressed within the WTO Committee on Trade and Environment are typically their own national

---

<sup>276</sup>See *supra* notes 252, 259-261, 265.

<sup>277</sup> See e.g. Veena Jha and Rene Vossenaar, *Breaking the Deadlock: A Positive Agenda on Trade, Environment, and Development?*, in *Trade, Environment and the Millennium*, *supra* note \_\_, 65, 69 (“However, there is a risk that certain proposals that may be labelled under the heading ‘transparency’... could, in practice, accentuate certain imbalances in the agenda. This is because NGOs in the south have fewer financial resources to avail themselves of such opportunities.”).

This, however, is not necessarily an argument for limited WTO transparency. The ultimate question, of course, is a comparative one— that is, while there may be minoritarian biases under a stakeholder model, how do they compare to the biases under the current system. This author, for example, is a strong supporter of making all WTO submissions immediately publicly available in order to facilitate constituents' pressure on state representatives to take their views into account. Yet it remains important to point out that not all stakeholders will equally participate in the process. As Gary Sampson points out, “some larger countries [in particular the United States]—frequently the most vocal ones in claiming support for NGO involvement—provide the least funds, or none at all” to make it possible for small NGOs from developing countries to come to Geneva to deliberate over trade-environment issues. SAMPSON, *TRADE, ENVIRONMENT AND THE WTO*, *supra* note 160, at 126. A stakeholder model in which interest groups are able to attend and participate in WTO proceedings would be subject to severe problems of minoritarian bias in favor of well-organized interests in developed countries.

<sup>278</sup> See, e.g., Shell, *supra* note 19.

representatives.<sup>279</sup> While interest groups may wish their national representatives to take stronger

---

<sup>279</sup> At a high level of generalization, one can argue that this statement does not apply to northern and southern activist groups who call for the disbandment or radical curtailment of the World Trade Organization and generally oppose trade liberalization policies. For a categorization of NGO perspectives on the WTO as conformist, reformist and radical, see Jan Aart Scholte, *The WTO and Civil Society*, 33 J. of World Trade 107 (1999). However, northern and southern groups expressing *general* views opposed to trade liberalization policies nonetheless typically diverge on *specific* issues such as the politically controversial issue of U.S. unilateral measures taken for environmental or any other social ends. See e.g. Joint NGO Statement on Issues and Proposals for the WTO Ministerial Conference, signed by 34 NGOs from developing countries, including Bangladesh, Brazil, Colombia, Dominican Republic, Ghana, Guyana, India, Indonesia, Kenya, Malaysia, Mexico, Nepal, Philippines, South Africa, Thailand, Uruguay, and Zimbabwe, available at the Third World Network web site at <http://www.twinside.org.sg/title/issue-cn.htm> (visited Aug. 13, 2000), at 8-11 (clearly stating “The environment should not be made use of as an issue for protectionism by the powerful for that would unfairly shift the adjustment cost to the weaker countries and people.... There should be no recourse to unilateral trade actions for any purpose.” and rejecting “the idea of introducing labour standards or a ‘social clause.’”). Groups that are considered radical within the United States political context, such as the Earth Island Institute, strongly support such measures and in fact commence legal proceedings before U.S. courts to compel a more U.S. aggressive stance, while groups that are considered relatively radical within developing country contexts, such as Third World Network, oppose such U.S. measures. See Shaffer, WTO Shrimp-Turtle Dispute, *supra* note \_.

Many southern NGOs may be critics of globalization processes facilitated by trade liberalization under WTO auspices. The most radical, for example, such as the “People’s Global Action” network involving grassroots “people’s movements such as the Zapatistas and the Peasant Movement of the Philippines” call for local autonomy, resistance to globalization and the dismantling of the WTO. See Lucy Ford, *Social Movements and the Globalisation of Environmental Governance*, 30 IDS BULLETIN 68, 71-73 (no. 3, 1999). However, on specific trade-environment disputes between the United States, pressed by U.S. environmental NGOs, and their home governments, they generally support their home governments. For example, in respect of the shrimp-turtle dispute between India and the United States, the Center for Science and Environment (CSE), an Indian environmental NGO, critiques the Indian government for not insisting “that all trawlers catching shrimp must use a turtle excluder device.” As it says, “trust the government of India and its arms like the ministry of environment and forests to sit idle while the turtle massacre goes on.... The government of India is probably the most hypocritical government of the Earth.” Yet in the same publication, the CSE confirms that it “has consistently opposed the use of trade sanctions to conserve the global environment because of the simple reason that only economically powerful nations can impose effective trade sanctions against less economically powerful nations.” Anil Agarwal, *Turtles Shrimp and a Ban*, DOWN TO EARTH (June 15, 1998). See also, *Trade Control is Not a Fair Instrument*, DOWN TO EARTH 4 (Aug. 15, 1992) (referring to how “trade and human rights are being used today as sticks to beat the South”).

Certainly exceptions can be found where developing country NGOs (especially those in networks financed by developed country NGOs) support northern sanctions against developing country governments on environmental grounds. See e.g. the amicus brief submitted in the WTO shrimp-turtle case by The Center for International Environmental Law and the Center for Marine Conservation, based in Washington D.C., in which they were joined by three groups based in developing countries, The Environmental Foundation Ltd of Sri Lanka, The Philippine Ecological Network and the Red Nacional de Accion Ecologica of Chile. However, the Washington-based Center for International Environmental Law drafted the briefs. Moreover, the developing country NGOs had close ties with U.S. NGOs. For example, Ms. Sara Larrain, the coordinator of Red Nacional de Accion Ecologica (also known as “National Ecological Action Group” or RENACE), also founded and directed the Greenpeace Office in Chile and is a member of the U.S.-based groups International Forum on Globalization and People-Centered Development Forum. See background note in Views from Sub-Saharan Africa and Latin America, *supra* note 110, at 417.

A separate caveat to the statement that national positions, relatively speaking, more closely reflect the positions of national NGOs, is the position of development NGOs in the United States and Europe. Developed country NGOs that focus on southern development, such as OXFAM, typically assume a more “development”-oriented stance, and thus are more likely to adhere to developing country positions, including on the controversial

positions in respect of the World Trade Organization,<sup>280</sup> the positions taken by their representatives on specific trade-environment issues are typically closer to their own views than those taken by other states. This is clearly seen on the issues that were arguably the two most important for northern environmental NGOs—greater WTO accommodation of trade measures taken on environmental grounds, and greater transparency of WTO decision-making.

On the issue of the transparency of WTO decision-making, southern environmental and developmental non-governmental organizations largely support their national representatives in keeping the WTO process closed to private observers, while northern governments—lobbied by northern environmental NGOs—demand greater participatory rights for NGOs.<sup>281</sup> This is an easy issue for northern governments because northern business groups also adopt the civic republican “stakeholder” language to support northern environmental groups’ demands for more transparency and “stakeholder” participation. In the words of the International Chamber of Commerce, the World Trade Organization must become more “transparent and open to all stakeholders—and in particular to the international business community—so that the

---

issue of U.S. trade restrictions imposed on environmental grounds. These northern development NGOs, however, receive considerably less media attention in relation to the WTO, and have considerably less political clout within the United States and EU, than do environmental NGOs such as Greenpeace, the Sierra Club, and Earth Island Institute.

<sup>280</sup> See e.g. Cheryl Hogue, *Environmental Groups Want Administration to Press for Reforms at WTO Ministerial*, BNA International Environment Daily, Oct 1, 1999 (quoting representatives of various U.S. environmental groups criticizing the U.S. administration for not making a clearer “commitment for environmental reform of the WTO”). Cf. Daniel Pruzin, *New Round of Discussion Must Address Environmental Issues, U.S. Official Says*, Oct. 13, 1999 (noting “the Clinton administration will continue to push for conclusion of labor and environment issues on the agenda of the new round of global trade talks... An overwhelming majority of the WTO’s membership opposes inclusion of environmental and labor topics on the agenda.”); and *Developing Countries Resist Expansion of Environment Role for World Trade Body*, BNA International Environment Daily, March 17, 1999 (citing remarks of representatives from Brazil, India and Mexico); and *Preparations Continue for WTO Ministerial, BusinessWorld (Philippines)*, Oct. 12, 1999 (noting that the Group of 77, comprised of 132 developing countries, and China “took a strong stance against linking trade to labor and environment:”).

<sup>281</sup> For the EU negotiating position on the issue of transparency for a Millennium Round, see e.g. Communication from the Commission to the Council and to the European Parliament: The EU Approach to the Millennium Round 14-15 (“Within the WTO itself the Community has been a leading proponent of the need to improve transparency, by making proposals for the early derestriction of documents and minutes of meetings, and supporting more regular and structured contacts and exchanges with NGOs”) (on file) **NEED CITE AS FROM EUROPA WEB SITE**. For the U.S. position, see e.g. Charlene Barshefsky, WTO Objectives, Testimony before the Senate Committee on Finance, Sept. 29, 1999 (noting need for “institutional reforms to ensure that the public can see the WTO and its processes, notably dispute settlement, in action; and contribute to its work”). **NEED OFFICIAL CITE**

stakeholders may be informed and involved in an effective manner.”<sup>282</sup> In response to business lobbying, the United States consistently advocates direct business participation in WTO policy-making, more recently for the development of rules governing “electronic commerce.”<sup>283</sup> Given their vast resources, business interests are well-positioned to exploit such openness. Yet for southern NGOs, the issue of transparency revolves not around the participation of private interest groups, but rather that of their own national representatives.<sup>284</sup> They complain that developing country representatives are typically not even present at critical WTO negotiations. Opening up WTO negotiations to northern corporations and northern environmental NGOs with resources that exceed most developing countries’ national budgets could only worsen existing biases.<sup>285</sup>

---

<sup>282</sup> ICC, Commission on International Trade and Investment Policy and the Commission on Environment, *Trade Measures for environmental Purposes*, par. 3. (Oct. 24, 1996), <[http://www.iccwbo.org/home/statements\\_rules/statements/1996/trade\\_measures.asp](http://www.iccwbo.org/home/statements_rules/statements/1996/trade_measures.asp)>. See also ICC Policy Statement, *Multiple Criteria-based Third Party Environmental Labeling Schemes (ELS)*, Document no. 210/515 rev.3 and no. 240/362 rev.3 (July 30, 1996), at 4 (noting in relation to the development of environmental labeling schemes that “Representation on bodies responsible for the general framework could be provided by nominees of well-established and widely-representative business organizations, such as Chambers of Commerce, industry and employers’ federations and trade associations. Representation on issue-specific working groups, however, should draw experts from the industry concerned.”).

<sup>283</sup> See William J. Clinton & Albert Gore, Jr., *A Framework For Global Electronic Commerce*, 3 (July 1, 1997) <<http://www.ecommerce.gov/framework.htm>> (“Where government action or intergovernmental agreements [on electronic commerce] are necessary, on taxation for example, private sector participation should be a formal part of the policy making process.”). For an example of general U.S. support of increased transparency within the WTO, see U.S. comments at the WTO General Counsel meeting of \_\_\_ in WT/GC/W/139. **NEED PRINTOUT AND ADD DATE AND TITLE.**

<sup>284</sup> Southern NGOs are more concerned about how the United States drives the WTO agenda, working behind the scenes with the EC, Canada and other developed countries to place developing countries always on the defensive, having to react to U.S. initiatives, such as over intellectual property rights, liberalization of service sectors, and, more recently, electronic commerce. As Chakravarthi Raghavan, editor of the SUNS bulletin (published by Third World Network) in Malaysia, notes in respect of north-south structural imbalances within the World Trade Organization, “the [southern] Missions in Geneva had the task of safeguarding the interests of their countries. Since they were overstretched, representatives of developing countries are forced to think on their feet and to constantly react to proposals from the North.” See Martin Khor, *South Concerned over New Issues at WTO*, *supra* note 35. Confirmed in interviews with Pradeep Mehta, Secretary General, Consumer Unity & Trust Society (CUTS) (Jaipur, India) and Roberto Bissio, Executive Director, Instituto del Tercer Mundo, (Montivideo, Uruguay), at UNCTAD conference in Geneva in June 1998 on UNCTAD’s relations with NGOs.

In contrast, for a more neoliberal explanation for skepticism toward making the WTO more transparent, see Sampson, *Trade, Environment and the WTO*, *supra* note 160, at 27-28 (applying public choice analysis in noting that greater WTO transparency can render trade policy more susceptible to control by protectionist interests against public welfare).

<sup>285</sup> See *supra* note 158-161.

Similarly, on the issue of the relation of WTO rules to environmental protection measures, although northern business interests may critique their own national representatives for going slightly too far, they nonetheless support an amendment of GATT Article XX to accommodate some environmental measures, unlike southern NGOs. The International Chamber of Commerce, for example “proposed a way to make unilateral actions to protect an endangered species, such as the shrimp embargo, compatible with international rules.”<sup>286</sup> Northern business groups were willing to compromise with northern environmental NGOs because they feared disputes over Asian sea turtles could derail trade liberalization negotiations over electronic commerce, financial services, insurance services, telecommunications and other high-value sectors.<sup>287</sup> With too much to lose from negative publicity, multinational corporations create groups such as the World Business Council for Sustainable Development to “correct the

---

<sup>286</sup> See Abraham Katz, *Trade and Environment: Let's Talk*, J. COMM. (April 29, 1998). Katz refers to ICC paper, *Trade Measures for Environmental Purposes*, Document no. 103/187 Rev. and Document no. 210/535 Rev., Oct. 24, 1996. See also “UNICE Position on the Relationship between the Provisions of the Multilateral Trading System and Trade Measures For Environmental Purposes, including those pursuant to Multilateral Environmental Agreements (MEAs), July 22, 1996 (maintaining “UNICE considers that trade measures taken pursuant to MEAs should be accommodated by the WTO. The accommodation of these trade measures could be achieved by introducing into GATT Article XX(B) the words “and the environment” and by adding to this amendment an Understanding on the relationship between trade measures taken pursuant to MEAs and the WTO rules”). Obtained from UNICE’s representative on trade and environment matters, Dr. Reinhold Quick. See also WBCSD’s confirmation of this position in World Business Council for Sustainable Development, *Trade and Environment: A Business Perspective*, non-dated, 1995 at 38-41 [hereinafter WBCSD, *Trade and Environment: A Business Perspective*].

<sup>287</sup> In the United States, environmental groups raised environmental issues to help block the grant of fast track authority to the executive. See *supra* notes \_\_\_. In both the United States and EC, environmental groups played important roles in the collapse of the negotiations of a Multilateral Agreement on Investment. See e.g. Charlotte Denny, *Computers and the Net: Rough Trade Exposed*, Guardian, April 16, 1998, at T4 (“Pressure from environmentalists and development lobbyists have played a big part in derailing the [MAI] negotiators’ timetable”). A reflection of political pressure within Europe is the European Parliament’s demand for the Commission to be more proactive on item 1 of the CTE agenda concerning the relation of WTO rules to trade restrictions imposed on environmental grounds, including pursuant to multilateral environmental agreements. See *Environment: Euro-MPs Urge WTO to Incorporate Environmental Protection*, European Report, April 18, 1998. See also *European Parliament Urges EU-Wide Fair Trade Labeling*, 15 Int’l Trade Rep. (BNA) 1215 (July 15, 1998) (noting a resolution of the European Parliament “that growing demand for ‘fair trade’ products with social and environmental benefits in developing countries be fostered by a common European Fair Trade label.” The article notes how “EU industrial groups were becoming ‘increasingly sensitive to the impact of fair trade policy publicity’ and were responding by identifying certain of their own products as meeting fairness criteria in order to offer their own lines of ethical products”).

misapprehensions” that business interests are adverse to environmental protection.<sup>288</sup> They create working groups “to demonstrate compatibility between principles of free trade and environmental protection.”<sup>289</sup> Northern business interests are not so much directly threatened by WTO decisions involving GATT Article XX, such as the tuna-dolphin or shrimp-turtle disputes, as they are indirectly threatened because these decisions rally environmental groups to generally oppose trade and investment liberalization initiatives. Although divisions within the United States and Europe have made it difficult for northern governments to play a significant entrepreneurial role within the WTO Committee on Trade Environment, the relative convergence of interests of northern businesses and environmental groups (vis-a-vis those of southern groups) has made it politically easier for the United States and Europe to demand greater accommodation

---

<sup>288</sup>WBCSD, *Trade and Environment: A Business Perspective*, supra note 285 at 8 (referring to the misapprehension that “weak environmental laws and law enforcement practices motivate business investment decisions” and referring to the WBCSD’s “public education and participation roles,” *id.* at 9). Similarly, among the “aims” of the ICC’s 1991 Business Charter for Sustainable Development was “To demonstrate to governments and society that business is taking its environmental responsibilities seriously, thereby helping to reduce the pressures on governments to over-legislate and strengthening the business voice in debate on public policy.” Presentation by Peter Bright (of Shell International Petroleum Company, Chairman of ICC Working Party on Sustainable Development), *ICC Business Charter for Sustainable Development: Principles for Environmental Management*, WICEM II, Second Conference on Environmental Management, Conference Report and Background Papers, April 10-12, Rotterdam, Netherlands. WICEM II was organized by the ICC in cooperation with the United Nations Environmental Programme and the UN Conference on Environment and Development, in preparation of the formal Conference in Rio de Janeiro, Brazil in 1992.

<sup>289</sup> Margaret Flaherty, *Trade and Environment: A Business Perspective*, RECIEL, vol 4, no. 2, 95, at 97 (describing the premise to the work of the WBCSD’s Trade and Environment Working Group). Flaherty, an American lawyer, is the Project Manager of WBCSD in Geneva, Switzerland. As Flaherty states, “The international business community must play an active role in demonstrating their priorities and concerns for the benefit of the environment and the benefit of economic development.” *Id.*

In addition, in the event threatened trade rules are used to leverage up standards abroad, northern business interests also have a competitive advantage in meeting environmental requirements, over small and medium-sized businesses in developing countries, because of their economies of scale. Moreover, since more stringent environmental regulations exist in developed country markets, they have already adapted to them by developing new forms of technology or managerial and production know-how, reinforcing their competitive advantage. This argument is developed in DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* (1995); Michael Porter, *America’s Green Strategy*, *Scientific American* 168 (April 1991) (“Environmental protection can benefit America’s competitiveness”); Lawrence Susskind, *New Corporate Roles in Global Environmental Treaty Making*, 27 *Columbia J. of World Business* 62 (Fall/Winter 1992) (noting the “variety of benefits that a great many corporations can realize by supporting the globalization of environmental treaty-making”).

of environmental measures within the World Trade Organization.<sup>290</sup>

Southern environmental non-governmental organizations, on the other hand, understand that Article XX is primarily invoked by northern states to restrict imports from the south, and not vice versa.<sup>291</sup> The Indian NGO Centre for Science and the Environment, in terms not so different than India's representative, "characterized the use of trade measures in MEAs [multilateral environmental agreements] as an inequitable lever available only to stronger countries."<sup>292</sup> A number of developing country NGOs similarly signed a joint statement declaring "our

---

<sup>290</sup> This is reflected in U.S. and EU negotiating positions for a "Millennium Round" of trade negotiations. See Communication from the Commission to the Council and to the European Parliament: The EU Approach to the Millennium Round 14-15 ("Accordingly, consensus should be sought on the accommodation within WTO rule of trade measures taken pursuant to MEAs and on the types of multilateral agreements which constitute MEAs") (on file) **NEED CITE AS FROM EUROPA WEB SITE**; Charlene Barshefsky, WTO Objectives, Testimony before the Senate Committee on Finance, Sept. 29, 1999 (noting the need to maintain high environmental standards, but not addressing the appropriateness of trade measures as used by the US in the WTO shrimp-turtle dispute). **NEED OFFICIAL CITE**

<sup>291</sup> See e.g. James Fahn, *The WTO Battle that Had to Happen*, The Nation (Thailand), May 7, 1999 (noting "Even the activists from the South who devote their lives to helping the oppressed or protecting the environment seem distinctly uneasy at the prospect of linking these issues to trade, if not downright opposed to the idea. They fear that if linkages are put in place, the rules will simply be imposed by the North."). For a sub-Saharan African position, see Nicholas Kitikiti, *The Use of Trade Measures for Environmental Purposes: an African View*, in *Trade, Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America*, supra note 110, 171, 181 ("the region must... see to it that the WTO upholds the principle that domestic environmental policies of the rich should not have an extra-territorial impact by way of trade-related environmental measures, requiring instead that environmental measures must be subjected to a 'least trade-restrictive test.'). Kitikiti is a Zimbabwean who has worked with the NGOs ZERO and SEATINI (Southern and Eastern African Trade, Information and Negotiations Initiative). See also, Martin Khor (the Malaysian director of Third World Network), *The WTO and the South: Implications and Recent Developments*, 161 TWE (May 1997), published by Third World Network, available at <http://www.southside.org.sg/souths/twn/title/pli-cn.htm> (visited Oct. 31, 1999) (part 5 is entitled "Dangers of the Proliferation of 'Trade Related Issues,' and refers negatively to the trade-related environmental and labor issues pushed by northern governments "to their advantage," at 6).

Similarly, on the issue of a "high level meeting," northern environmental and business groups supported this, while southern states supported by southern NGOs were opposed because they felt that the only issues to be discussed were issues of importance to the north. See, e.g. critique from the Indian NGO Consumer Unity & Trust (CUTS) in its newsletter *Economiquity* because Brittan's proposal identifies as "key(?) problems in this field: MEAs, ecolabelling, process and production methods (PPMs) and the precautionary principle... [which] are the issues which are anathematical (sic) to the developing world, because each of them are loaded with high potential for protectionism." *The Unending Debate on Trade and Environment*, *ECONOMIQUITY* 3 (Jan.-April 1998). CUTS notes that "Brittan conveniently ignores the [CTE] issues which are in the South's interest: TRIPs and biodiversity, transfer of environmentally sound technologies; and trade in domestically prohibited goods and hazardous wastes." *Id.*

<sup>292</sup> Comments of Sunita Narain, representative of the Indian NGO Centre for Science and Environment, on the issue "Multilateral Environmental Agreements and the WTO," in Chad Carpenter & Aaron Cosbey [of IISD], *WTO Symposium on Trade, Environment and Sustainable Development* (May 27, 1997) [hereinafter 1997 NGO Symposium Transcript].

unambiguous opposition to Linkage of Labour and Environmental Standards to WTO and to trade treaties. We also wish to disabuse the media and the governments in the developed countries of the notion that those who oppose Linkage are corporate interests and malign governments.”<sup>293</sup> These southern NGOs, while they may focus on environmental concerns in the south, also have a “southern” perspective on social justice, and are concerned by U.S. and EC coercion affecting southern development and rights of self-determination.<sup>294</sup> As Judith Mayer notes in her study of Indonesian environmental NGOs, southern non-governmental organizations tend to focus on the “human use of nature,” and especially on protecting “the resource rights of... citizens in remote areas,” placing their views “more in common with the state’s development imperatives than with preservationist orientations of many ‘Western’ environmentalists.”<sup>295</sup> While environmental NGOs severely criticize their national governments at the national level, at the international level their champions are typically their own governments.<sup>296</sup>

---

<sup>293</sup> *Third World Intellectuals and NGOs Statement Against Linkage (TWIN-SAL)* (proposing that labor and environmental issues be handled in labor and environmental agencies, such as the International Labour Organization and the United Nations Environmental Programme, and listing 99 third world intellectuals and NGOs as signatories) (on file).

<sup>294</sup> See e.g. comments of Vandana Shiva, Director of the Research Foundation for Science, Technology and Natural Resource Policy, India, in *POLICING THE GLOBAL ECONOMY*, *supra* note 190, at 194, 105 (“the principle that was the basis of the negotiation of the Rio treaty... was a principle of human rights, democracy, sovereignty and development. It was the right to development, which also implies the full realization of the right of peoples to self-determination, which in turn includes the exercise of their inalienable rights to full sovereignty over all their natural wealth and resources. That right to development, to me, is the key test in every dispute decision by the WTO.”).

<sup>295</sup> Mayer, *Environmental Organizing in Indonesia: The Search for a Newer Order*, in LIPSHUTZ, *GLOBAL CIVIL SOCIETY*, **ADD DATE**, at 179. See also Porter and Welsh, *GLOBAL ENVIRONMENTAL POLITICS*, *supra* note 23, at 52 (“Environmental NGOs in developing countries tend to be as much concerned with poverty and other development issues as with strictly environmental issues.”).

<sup>296</sup> See e.g., Porter and Welsh, *GLOBAL ENVIRONMENTAL POLITICS*, *supra* note 23, at 54 in respect of the negotiations at the United Nations Conference on Environment and Development in Rio (“the southern NGOs’ position tended to parallel their governments”). Similarly, in her study of Indonesian NGOs, including their positions in international fora such as the 1992 “Earth Summit” in Rio, Mayer confirms, “Within Indonesia, they [Indonesian environmental NGOs] act as critics of government policies that affect Indonesia’s own environment and people. Yet on many issues, in international arenas they have lent their support to the government’s positions vis-a-vis those of foreign governments, and some of the more extreme demands of international environmental conservation groups.... In an international forum such as the 1992 “Earth Summit” (UNCED) and the preparatory meetings leading up to it, representatives of several of Indonesia’s most influential environmental groups took stands that were largely compatible with official Indonesian positions.” Mayer, *Environmental Organizing in Indonesia: The Search for a Newer Order*, in LIPSHUTZ, *GLOBAL CIVIL SOCIETY*, *supra* note 293, at 174.

The primary area where developed country non-governmental organizations have supported developing country positions concerns the need to modify the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights to advance sustainable development and equity objectives.<sup>297</sup> Some developing country representatives realize that they could benefit in international negotiations over intellectual property rights through alliances made with northern NGOs.<sup>298</sup> Northern NGOs could, in turn, pressure northern politicians to accommodate developing country concerns, as they have in regards to U.S. policy over the AIDS epidemic in sub-Saharan Africa.<sup>299</sup> However, developed country NGOs generally have lobbied less forcefully over this issue than over trade sanctions to protect animal welfare and habitat abroad. Moreover, where they have lobbied, they have generally been unsuccessful in domestic policy debates within the United States and Europe.

That divisions between northern and southern non-governmental organizations largely parallel divisions between northern and southern states was made clear in the NGO symposia that the CTE secretariat organized concerning the CTE's agenda. For example, a representative from a northern NGO (MS-Denmark) "supported international coordination of an EU-like process, where, as trade barriers went down, environmental standards rose." Yet he was countered by an Argentinian NGO (the Centro de Investigaciones para la Transformación) who "observed that larger companies with newer equipment seem to do well with trade liberalization and demands

---

<sup>297</sup> **NEED CITES FROM DEVELOPED COUNTRY ENVIRONMENTAL AND DEVELOPMENTAL NGOS, SUCH AS WWF, FRIENDS OF THE EARTH, GLOBAL EXCHANGE, OXFAM AND/OR DOCTORS WITHOUT BORDERS, ETC**

<sup>298</sup> See e.g. Magda Shahin, *Trade and Environment: How Real is the Debate?*, supra note 102 at 52-53 ("It is worth stressing at this juncture that developmental and environmental NGOs from the North as well as from the South latched on to the issue [of TRIPs and sustainable development] that developing countries should have been tackling in depth much earlier.... The recent failure of the lengthy negotiations on the Multilateral Agreement on Investment in the Organization for Economic Cooperation and Development... clearly denotes the strength and skills of environmental NGOs and, if they feel sidelined, TRIPs could be next in turn.").

<sup>299</sup> See Steven Meyers, *South Africa and U.S. End Dispute Over Drugs*, NEW YORK TIMES, Sept. 18, 1999, at A8 (stating that 300 protesters gathered in Philadelphia in June, 1999 to chant "Gore's greed kills!"); Doug Ireland, *AIDS Drugs for Africa*, NATION, Oct. 4, 1999, at 5 (noting how demonstrators from ACT UP chanted "Gore's greed kills" in order to pressure the administration to change its policies vis-a-vis South Africa). Gore was co-chairman of the U.S.-South Africa Bi-national Commission on pharmaceutical issues. Eventually the Administration capitulated. See Gary Yerkey, *President Orders Easing of IPR Policy For Sub-Saharan Africa to Help Fight AIDS*, 17 Int'l Trade Rep. (BNA) 792, May 18, 2000.

for environmental performance [while] small and medium-sized enterprises are often so vulnerable they cannot implement even local regulations.” A Thai NGO (Focus on the Global South) concurred with his South American counterpart, citing studies of the United Nations Conference on Trade and Development which “highlight many of the potential market-restricting impacts that higher green standards in the North might have in the South.”<sup>300</sup> As NGO symposia discussions largely mirrored national differences within the WTO Committee on Trade and Environment, southern governments eventually became more comfortable holding them.

**V. Legacies of the WTO Committee on Trade and Environment:  
Spillover Effects Within and Outside of the World Trade Organization**

The most enduring results of the WTO Committee on Trade and Environment are not the rather banal CTE reports nor the interminable debates over the CTE’s ten point agenda. Rather, the importance of the CTE process primarily lies in its enhancement of the *transparency of WTO decision-making*, and its facilitation of inter and intra-state *coordination of trade-environment policy*, albeit primarily in protection of state trading interests. The first legacy is partially in line with the predictions of a civil society/stakeholder approach. The second is partially in line with those of a supranational technocratic one. Yet in each case, state interests continue to predominate so that these developments operate at the margins.

**A. The CTE as a Laboratory for Increased WTO Transparency:  
Enhancing the Role of Civil Society?**

The CTE process served as a laboratory for opening up WTO internal processes to the

---

<sup>300</sup> Similarly, a representative of the Canadian NGO, IISD, “asked why a system that could protect Madonna’s royalties by imposing trade barriers against pirated production of her music could not also protect dolphins by imposing trade barriers against tuna caught using ‘dolphin unfriendly’ methods.” See Transcript of CTE’s 1997 NGO Symposium, *infra* note 302, at 4. A southern non-governmental group (OLDEPESCA- Latin American Organization for Fisheries Development), on the other hand, “objected to being forced to protect animals such as dolphins in a region where millions of children die each year from poverty-related preventable diseases.” *Id.*, at 12. The cosmopolitan character of the representatives of developed country NGOs is further shown by the fact that the representative of the Canadian NGO, financed in large part by the Canadian government, was Konrad von Molke, a German who at the time was teaching at a University in Holland, having formally taught at Dartmouth College in the United States.

public. The WTO secretariat assigned to the Committee on Trade and Environment was the first to create a section of the WTO web site providing relatively timely and detailed reporting of a WTO committee's deliberations. The CTE secretariat published the results of CTE meetings well before the meetings' official minutes were made public.<sup>301</sup> It worked with states toward expeditiously making all CTE submissions publicly available— whether proposals by states or analysis of the CTE secretariat. All CTE submissions may now be relatively quickly downloaded from the WTO web site.<sup>302</sup> This was a unique development for WTO committees.

The secretariat assigned to the Committee on Trade and Environment organized the first WTO symposia to which non-governmental organizations were invited to interact with the secretariat and those state delegates who chose to attend. Few state delegates attended the first two symposia, one held following the second tuna-dolphin decision and the other in the midst of negotiation of the CTE 1996 Report.<sup>303</sup> Yet with the formal Report behind them, by the fourth symposia (held in 1998), state delegates and non-governmental organizations were asking and

---

<sup>301</sup> These are available from the WTO's web site. More recent bulletins now provide direct hyperlinks to unrestricted and derestricted state and secretariat submissions to CTE meetings. State delegates to the CTE have increasingly agreed to immediately make their submissions publicly available, even though WTO General Council rules do not require this. For example, Canada and Colombia submitted their papers on eco-labeling in March 1998 on an unrestricted basis. The March 1998 secretariat paper on the "Environmental Benefits of Trade liberalization" was also derestricted upon the request of Canada's and Australia's delegates despite initial EC, Japanese and Korean opposition. The EC delegate was, in particular, placed in a delicate position, as the EC had been calling for greater transparency of WTO decision-making, but French, Spanish and other member states, protective of their agricultural and fishing sectors, at first opposed quick release of the secretariat paper. Confirmed in interviews with EC, Canadian, Korean and Japanese delegates in Geneva, (June 1998).

<sup>302</sup> According to Sabrina Shaw of the secretariat's Trade and Environment Division, all submission of the CTE have been immediately "derestricted" (i.e. made publicly available) and states no longer submit "non-papers." Interview, Geneva, June 13, 2000. On non-papers, *see supra* note 103.

<sup>303</sup> The first NGO symposium was primarily reactive, organized by the WTO secretariat just after the second tuna-dolphin decision to attempt to defuse the backlash. At the meeting, environmental groups, bitter over the tuna-dolphin decision and the just-initialed Uruguay Round agreements, harangued the WTO secretariat and those few state delegates who attended but did not speak. This is when Greenpeace welcomed participants with its banner of a giant white shark devouring a dolphin. Discussed briefly in 1997 NGO Symposium, *infra* note 302.

State delegates did not even attend the second NGO symposium, which was held shortly before the CTE finalized its 1996 Report. They were too preoccupied with the negotiation of the 1996 Report. Rather, representatives of the CTE Secretariat took the brunt of the invectives of the 35 invited NGOs who knew that the long-awaited CTE 1996 Report would not offer the modifications they desired. The symposia nonetheless served as an exchange of ideas for future WTO relations with NGOs. For an overview of the second Trade and Environment NGO Symposium, see 1996 NGO Symposium, *supra* note 256.

responding to each other's questions.<sup>304</sup> Gradually, even non-governmental organizations confirm that state delegates have become more comfortable engaging with them in such public fora, in large part because developing countries' fear of being isolated was assuaged.<sup>305</sup> In line with two-level intergovernmentalist predictions, divisions among states were largely reflected in divisions among NGOs.<sup>306</sup>

More significantly, the issue of ensuring open, transparent decision-making migrated from the Committee on Trade and Environment to the WTO General Council. Following his participation in the fourth CTE-NGO symposium, Director General Ruggiero publicly announced in July 1998 "a plan for enhanced cooperation with Non-governmental Organizations."<sup>307</sup> The

---

<sup>304</sup> The third NGO symposium was more widely attended by states as the pressure on them to negotiate a formal report was over. Twice the number of NGOs participated, an increase from thirty-five to seventy. State delegates not only attended, they responded and asked questions to NGO participants, and conversed between sessions in the hallways. A consortium of NGOs, the International Center for Trade and Sustainable Development, organized a small follow-up meeting to discuss the potential for future NGO symposia, which the author attended as an observer. Overviews of the third NGO symposium (in 1997) are compiled in the 1997 NGO Symposium Transcript, as well as in Trade and Environment Bulletin No. 19, *WTO Symposium on Trade, Environment and Sustainable Development*, PRESS/TE019 (July 1997), available at <[www.wto.org/wto/environ/te019.htm](http://www.wto.org/wto/environ/te019.htm)> [hereinafter *1997 NGO Symposium*].

The fourth NGO trade and environment symposium was again larger. Attendees included more than sixty state delegates and over one hundred and fifty representatives from environment and development NGOs, business associations and research and academic institutes. The meeting's symbolic significance was punctuated by the participation of high level figures, including the Director-General of the WTO (Mr. Renato Ruggiero), the Secretary-General of UNCTAD (Mr. Rubens Ricupero), the Executive Director of UNEP (Mr. Klaus Topfer), and the Director of the Bureau of Development Policy of UNDP (Ms. Eimi Wantanabe). For an overview of the fourth NGO symposium, see IISD, *Report of the World Trade Organization Symposium of Non-Governmental Organizations on Trade, Environment and Sustainable Development*, (March 17-18, 1998) [hereinafter 1998 NGO Symposium] available at <<http://www.iisd.ca/linkages/sd/wtosymp/sdvol12no1e.html>>.

A fifth NGO symposium was held in Geneva in March 1999 in conjunction with the High Level Symposium on Trade and Environment and the High Level Symposium on Trade and Development. Full documentation of these symposia may be obtained from the WTO web site at <<http://www.wto.org/wto/hlms/highlevel.htm>>. A meeting with NGOs was also organized as part of the December 1999 WTO Ministerial Meeting in Seattle. See Sam Howe Verhovek, *For Seattle, Triumph and Protest: City Set for Prestigious Conference and So Are Demonstrators*, N.Y. TIMES (Oct. 13, 1999), at A12.

<sup>305</sup> In consequence, as a representative from a Canadian environmental NGO, the International Institute for Sustainable Development (IISD), concluded about the 1998 exchange, participants felt that "this symposium had witnessed more sophisticated commentary than previous sessions," and that "most came away with a greater understanding, though perhaps not sympathy, for the positions of their traditional 'opponents'." 1998 NGO Symposium, *supra* note 302, at 2 & 17.

<sup>306</sup> See *supra* note 278-298.

<sup>307</sup> WTO, *Ruggiero Announces Enhanced WTO Plan For Cooperation With NGOs*, PRESS/107 (July 17, 1998), available at <[www.wto.org/wto/new/press107.htm](http://www.wto.org/wto/new/press107.htm)>.

plan included “regular briefings for NGOs on the work of WTO committees and working groups,” the circulation to state delegations of “a list of documents, position papers and newsletters submitted by NGOs” and “a special section of the WTO Website... devoted to NGOs issues.” The new Director General, Michael Moore, has confirmed that he will continue to promote greater openness.<sup>308</sup> State representatives still zealously safeguard their state’s economic interests. Yet the move toward greater transparency—that is, toward greater document availability, reporting of deliberations within the organization, outreach to the media for dissemination abroad, and open interaction with NGOs—which started in the WTO Committee on Trade and Environment has now infiltrated the organization and is seeping through its sundry committees.<sup>309</sup> So far, however, this relative opening of the World Trade Organization to public scrutiny has not resulted in shifts in national positions, nor shifted the structure of the overall debate within the organization.

### **B. The CTE as a Mechanism for Overseeing Environmental Policy: Enhancing the Role of Technocratic Elites?**

The CTE process has also made environmental issues more transparent for trade officials and trading interests. In line with institutionalist theory,<sup>310</sup> states have used the CTE process to reduce information-gathering, monitoring and coordination costs, and thereby enhance state

---

<sup>308</sup> See, e.g., *Moore Sees Least-Developed Nations, Transparency as WTO Challenges*, INSIDE U.S. TRADE 23 (Oct. 1, 1999) (citing Moore’s statement “If we are not inclusive, we cannot expect public support.”). For an overview of the WTO’s relations with NGOs written by two members of the WTO secretariat, see Gabrielle Marceau and Peter Pedersen, *Is the WTO Open and Transparent— A Discussion of the Relationship of the WTO with Non-Governmental Organizations and Civil Society’s Claim for More Transparency and Public Participation*, 33 *Journal of World Trade* 5 (Feb. 1999).

<sup>309</sup> All three initiatives started in the CTE. The CTE was the first WTO Committee to conduct a briefing of NGOs. The CTE web site includes “Trade and Environment Bulletins” which periodically report on developments in the committee, including detailed summaries of discussions at CTE meetings and references to CTE documents which can be downloaded. No other WTO committee publishes such a bulletin. The idea “for the Secretariat to serve as an information clearing house for NGO reports and analysis and to maintain a bibliography, accessible to WTO members and NGOs, of relevant publications dealing with trade, environment and sustainable development issues” was first raised at the second trade-environment symposium. 1996 NGO Symposium, *supra* note 256.

<sup>310</sup> See *supra* notes 21-22. [CUT THIS NOTE]

policy coordination.<sup>311</sup> States used the WTO Committee on Trade and Environment to monitor and subject developments in international environmental fora to greater oversight. They used the WTO secretariat assigned to the Committee on Trade and Environment as agents to attend meetings of international environmental fora and to report on developments. The secretariat has prepared over twenty papers on such developments, including concerning the Rio Conference, the Commission on Sustainable Development, the Montreal Protocol on the Ozone Layer, the Kyoto Conference on Climate Change, the Basel Convention on the Control of Transboundary Movements of Wastes, the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the Food and Agricultural Organization, the International Tropical Timber Organization and the Convention on Biodiversity.<sup>312</sup> Little now takes place in environmental fora

---

<sup>311</sup> Concerning rational institutionalist theory, see *supra* notes 21-22. As the Austrian representative stated within the EMIT Working Group, “[Multilateral environmental agreements] were not fixed but were evolving over time, and this evolution had to be closely monitored. This could be done in two ways: by continuous contact between the Secretariat of GATT and the respective Secretariats of the various MEAs and by inviting the Secretariats of these MEAs to attend the Group’s meetings as observers.” EMIT, *Report of the Meeting Held on 9-10 July 1992*, TRE/6 (Aug. 18, 1992), par. 193. Similarly, in discussing the convening of the EMIT Working Group, Australia noted that “Contracting parties involved in negotiations toward an international environmental agreement might also request that the Secretariat act as an advisory body to ensure that GATT’s views were incorporated therein.”

<sup>312</sup> This count is through \_\_ DATE, and the provision of reports continues. These include reports on developments in: (i) the *Commission on Sustainable Development* responsible for the UNCED follow-up. See, e.g., EMIT, *UNCED Follow-up: Results of the First Session of the Commission on Sustainable Development and Other Related Activities: Note from the Secretariat*, TRE/W/15 (July 21, 1993); CTE, *UNCED Follow-up: Results of the Third Session of the Commission on Sustainable Development: Note by the Secretariat*, WT/CTE/W/7 (May 18, 1995); CTE, *Results of the Fourth Session of the Commission on Sustainable Development: Note by the Secretariat*, WT/CTE/W/30 (May 22, 1996).

(ii) the *Working Group of Parties to the Montreal Protocol*. See, e.g., CTE, *Trade Measures for Environmental Purposes Taken pursuant to Multilateral Environmental Agreements: Recent Developments: Note by the Secretariat*, WT/CTE/W/12 (Oct. 10, 1995); CTE, *Seventh Meeting of the Parties to the Montreal Protocol: Note by the Secretariat*, WT/CTE/W/19 (Jan. 23, 1996); CTE, *Multilateral Environmental Agreements. Recent Developments: Note by the Secretariat*, WT/CTE/W/44 (March 20, 1997); CTE, *The Montreal Protocol on Substances that Deplete the Ozone Layer: Recent Developments: Note by the Secretariat*, WT/CTE/W/68 (Nov. 14, 1997).

(iii) the *Conference of the Parties to the 1992 UN Framework Convention on Climate Change*. See, e.g., CTE, *United Nations Framework Convention on Climate Change: Note by the Secretariat*, WT/CTE/W/74 (March 3, 1998) (reporting on the third Conference of the Parties held in Kyoto, Japan in December 1997).

(iv) the *Conference of Parties to the Basel Convention*. See, e.g., CTE, *Trade Measures for Environmental Purposes Taken pursuant to Multilateral Environmental Agreements: Recent Developments: Note by Secretariat*, WT/CTE/W/12 (Oct. 10, 1995) (reporting on conferences of Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Wastes and their Disposal, which the Secretariat attended as an observer).

(v) the *Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora*. See, e.g., CTE, *Convention on International Trade in Endangered Species of Wild Fauna and*

without taking account of WTO rules.<sup>313</sup> State trade delegates were able to use the Committee on Trade and Environment to more effectively ensure that trading interests and trading rules were taken into account in international environmental fora.

The CTE process also provided states with better information about each other's domestic environmental regulations affecting trade. Early in CTE debates, member states "emphasized the importance for traders and producers of comprehensive and uniform information about trade-

---

*Flora: Note by the Secretariat*, WT/CTE/W/71 (Nov. 21, 1997) (reporting on the tenth meeting of the Conference of the Parties in June 1997).

(vi) the *Food and Agricultural Organization* on fisheries. *See, e.g.*, CTE, *FAO Code of Conduct for Responsible Fisheries: Note by the Secretariat*, WT/CTE/W/15 (Dec. 1, 1995), whose section entitled "Responsible International Trade" commences "The provisions of this Code should be interpreted and applied in accordance with the principles, rights and obligations established in the World Trade Organization (WTO) Agreement."

(vii) the *UN Ad Hoc Intergovernmental Panel on Forests*. *See, e.g.*, CTE, *Results of the Ad Hoc Intergovernmental Panel on Forests: Note by the Secretariat*, WT/CTE/W/48 (May 14, 1997).

(viii) the *Conference of Parties to the Convention on Biological Diversity*. *See, e.g.*, CTE, *Convention on Biological Diversity: Recent Developments: Note by the Secretariat*, WT/CTE/W/18 (Jan. 12, 1996); "Multilateral Environmental Agreements: Recent Developments", note by Secretariat, WT/CTE/W/44 (March 20, 1997).

(ix) The secretariat also reported on work programs in other international economic fora concerning the market access implications of eco-labeling. *See, e.g.*, CTE, *Eco-labeling: Overview of Current Work in Various International Fora: Note from the Secretariat*, WT/CTE/W/45 (April 15, 1997) (reporting on the work programs in the International Organization for Standardization (ISO)--developing international standards, Codex Alimentarius--on labeling for organically developed food, the International Trade Center (ITC), UNCTAD and UNIDO--looking at the issue from the perspective of impacts on developing countries, the OECD and UNEP). *See also* CTE, *Eco-packaging: Overview of Current Work in Other International Fora*; WT/CTE/W/75 (March 5, 1998) (reporting on recent work undertaken in the ITC--providing exporters from developing countries with information about developed country eco-packaging requirements, the OECD and ISO).

<sup>313</sup> The CTE Chairman's "Summary of Activities of the CTE 1995" notes "that the Secretariat had received several requests for information and advice from MEAs [secretariats responsible for multilateral environmental agreements]." CTE, *Summary of Activities of the Committee on Trade and Environment (1995) Presented by the Chairman of the Committee*, WT/CTE/W/17 at 2 (Dec. 12, 1995). For example, the secretariat for the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol requests the WTO Secretariat "for clarification as to whether certain proposals [which it was considering] were consistent with GATT," implying they might be altered were this not the case. *See* CTE, *The Montreal Protocol and Trade Measures*, WT/CTE/W/57 (Aug. 28, 1996), at 6. Similarly, the secretariat for the UN Convention on the Law of the Sea (UNCLOS) confirms the "deference" of the convention's provisions on deep seabed mining "to GATT in trade-related matters," including GATT's "anti-subsidy provisions" and its "dispute settlement procedures." The submission confirms that "whenever applicable, the authority of free trade agreements and of customs union agreements was also recognized." *See* CTE, *The 1994 Agreement Relating to the Implementation of Part XI of the 1982 UN Convention on the Law of the Sea: Provisions Dealing with Production Policy for Deep Seabed Minerals*, WT/CTE/W/62 (Sept. 16, 1997), at 5. Article 1b of Section 6 (on "Production Policy") to the 1994 Agreement relating to the implementation of Part XI (on deep seabed mining) of the 1982 UNCLOS provides, "The provisions of the General Agreement on Tariffs and Trade, its relevant codes and successor or superseding agreements shall apply with respect to activities in the Area." *See id.* [WT/CTE/W/62] at Annex I.

related environmental measures and environment-related trade measures.”<sup>314</sup> Ultimately, states’ sole substantive decision in the CTE 1996 Report was to instruct the secretariat to compile and update a data base of domestic “trade-related environmental measures.”<sup>315</sup> The secretariat has since created a WTO Environmental Database listing all such measures notified to it and periodically expands it based on new notifications.<sup>316</sup> These notifications permit states and their commercial constituents to better monitor the application of domestic environmental measures. Ultimately, states hope to manage the trade impacts of domestic environmental measures at an early stage before disputes flare.<sup>317</sup>

By obtaining higher quality information from the CTE secretariat, state representatives could attempt to better defend WTO principles and rules at home in inter-agency debates and legislative deliberations. The secretariat prepared and cited numerous studies for state delegates purporting to show that trade rules and environmental protection goals are mutually compatible. Drawing from these findings, the Australian delegate argued, “the CTE report should reject perceptions that a conflict existed between objectives of trade liberalization and environmental

---

<sup>314</sup> See Trade and Environment Bulletin No. 10, *WTO Trade and Environment Committee Discusses Proposals on Transparency, Multilateral Environmental Agreements, Market Access and Domestically Prohibited Goods, and Adopts Work Programme to Singapore*, PRESS/TE010, at 2 (July 1, 1996) (concerning the CTE meeting of May 28-29, 1996).

<sup>315</sup> CTE 1996 Report, *supra* note 89, at par. 192. Again, however, this was not a purely neoliberal initiative, as it was demanded primarily by smaller developed and developing countries disadvantaged by proliferating U.S. and EC requirements. The U.S. and EC blocked an attempt to require all WTO members to notify all environmental measures not because they were less “neoliberal,” but because it would be more expensive for them to comply with such requirement given the amount of U.S. and European requirements potentially at issue. As a U.S. delegate stated, “transparency is not without cost.” See CTE, *Report of the Meeting Held on 14 December 1995*, WT/CTE/M/6, at par. 14 (Jan. 17, 1996).

<sup>316</sup> This was updated by the Secretariat in 1999 in document WT/CTE/W/118.

<sup>317</sup> A prototype for such monitoring is the “early warning system” recently negotiated between U.S. and EC representatives to address potential regulatory initiatives before they become law and spark a trade dispute. See Bob Davis, *U.S. and EU Agree to Set Up a System To Head Off Potential Trade Disputes*, WALL ST. J., June 22, 1999, at A24. An example of the warning system in action was the EC’s agreement to (at least temporarily) postpone a directive enforcing the use of air hush kits by airlines in response to U.S. requests following protests from U.S. airlines that stated that the Directive would have a disproportionate impact on their operations vis-a-vis their European competitors. See *Trade with Europe Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 106th Cong. (Sept. 29, 1999) (statement of Charles M. Ludolph, Deputy Assistant Secretary for Europe Market Access and Compliance Unit, International Trade Administration, U.S. Department of Commerce) available in 1999 WL 27594952.

protection.”<sup>318</sup> As the Egyptian delegate concluded, the CTE 1996 Report was in good measure a public relations document, “a political statement largely to address the environmental community.”<sup>319</sup> As the Canadian delegate confirmed, “the WTO Secretariat helps us manage the interface of the public and the WTO” on trade and environment matters.<sup>320</sup> In the end, the result of the CTE process has been more of an attempt to “GATT the greens” than to “green the GATT.”<sup>321</sup> As a CTE secretariat member observed, “Environmental ministries started to take greater notice of the GATT and trade delegates were able to feedback information to domestic ministries.”<sup>322</sup>

At first glance, this would appear to confirm the predictions of a supranational technocratic perspective. However, this attempt to GATT the greens has primarily been an effort by states through the WTO’s agency, not by an independent WTO acting on its own. Moreover, the “GATting” has been far from successful. Responding to internal domestic pressures, states also continue to adopt environmental measures having extraterritorial trade effects, as witnessed by the WTO shrimp-turtle dispute.<sup>323</sup> They also continue to adopt new environmental agreements

---

<sup>318</sup> See Trade and Environment Bulletin No. 10, *supra* note 312, at 4; Trade and Environment Bulletin No. 13, *supra* note 113, at 4.

<sup>319</sup> See *Report of the Meetings Held on 30 October and 6-8 November 1996* [CTE/M/13], *supra* note 130, at par. 26.

<sup>320</sup> Interview with Andrew Griffith, Canadian delegate to the CTE, in Geneva, Switzerland (June 1997).

<sup>321</sup> As the observer to the CTE from the United Nations Environmental Programme affirmed, “the forum, the structure of the debate, the structure of the agenda, the whole thing defined itself as a trade discussion on environmentally relevant issues and not vice versa.” See UNEP representative interview, *supra* note 170.

<sup>322</sup> Interview with Sabrina Shaw, Economic Affairs Officer of the Trade and Environment Division of the Secretariat, June 9, 1997, in Geneva. Even in the early EMIT Working Group discussions, “several delegations... noted the importance of an educational process occurring in capitals on the subject of trade and environment” to avoid conflicts with GATT norms and rules. See EMIT, *Report of the Meeting Held on 10-11 March 1992*, TRE/4, at 1 (13 April 1992). Similarly, in his report to the GATT contracting parties at the end of 1993, the Chair of the EMIT Working Group reports, “Possibilities of conflicts in the future over the trade provisions contained in MEAs will be minimized through better coordination between trade and environment officials in national capitals. That remains a sine qua non for cooperation at the multilateral level. A process of enhanced policy coordination is underway already in many countries; it will certainly contribute to reducing unnecessary tensions in this area.” *Report by the Chairman of the Group on Environmental Measures and International Trade Presented to the Contracting Parties at their Forty-ninth Session* [L/7402], *supra* note 86, at par 16.

<sup>323</sup> See discussion of the shrimp-turtle case in Shaffer, *Shrimp-Turtle Dispute*, *supra* note 103.

with trade-restraining provisions, as witnessed by the Cartagena Protocol on Biosafety.<sup>324</sup> Contrary to the predictions of a supranational technocratic model of governance, in the politically charged area of trade-environment policy, states' positions continue to reflect differing domestic constituency values, priorities and interests.<sup>325</sup>

Thus, the struggle over trade, environmental and developmental goals continues. State officials may use the Committee on Trade and Environment to help defend the WTO system in domestic interagency and political debates. Yet northern environmental and other groups, disaffected with global economic processes, continue to target their disdain on the World Trade Organization, as witnessed by the mass demonstrations at the 1999 WTO Ministerial Meeting in Seattle.<sup>326</sup> Although the CTE process has facilitated policy coordination within governments and among intergovernmental organizations, it has not defused entrenched grassroots opposition in the United States and Europe to economic globalization processes, symbolized—and thereby creating a target for attack—in the World Trade Organization.

## **VI. Conclusions: The World Trade Organization as a Conduit for States Responding to Domestic Pressures; The Prospects of a World Environment Organization**

### **A. A Two-Level Intergovernmental Game: The WTO as an Agent of States**

---

<sup>324</sup> See discussion of the results of the negotiation of the Cartagena Protocol on Biosafety, which arguably conflicts with the WTO Agreement on Sanitary and Phytosanitary Measures, in Pollack and Shaffer, *GMOs*, *supra* note 150.

<sup>325</sup> While a formal goal of the Committee on Trade and Environment proclaims is “to enhance the dialogue among policy-makers from different ministries in WTO member governments,” this dialogue has not resulted in any significant change in state positions, even though representatives of environmental ministries from developed countries now attend CTE meetings. Since developing countries do not have the financial means to send representatives from multiple ministries to Geneva, the WTO secretariat has organized a “series of regional seminars on trade and environment for government officials from developing and least developed countries.” See *The WTO and its Committee on Trade and Environment*, at [http://www.wto.org/english/tratop\\_e/envir\\_e/issu1\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/issu1_e.htm) (visited July 12, 2000). However, the outcome of these dialogues between national ministries depends on the social priorities, social values and political processes within the country itself. Since developing countries tend to place a relatively greater priority on poverty eradication and human development, these southern inter-agency dialogues have not resulted in any southern demands for greater global environmental protection. See also *supra* notes 166-167.

<sup>326</sup> See *supra* note 2.

The World Trade Organization is often critiqued by non-governmental organizations as if it were an undemocratic force independent of states. Yet the explanation for the stalemate within the WTO Committee on Trade and Environment lies in conflicts within and between states, not independent action of the World Trade Organization. In fact, from the standpoint of the pluralist representation of civil interests, the views of northern and southern non-governmental organizations on the CTE's agenda have been *most* closely aligned with those advanced by their own governments. Although the interests of northern businesses and northern environmental non-governmental organizations often conflicted, the former were more willing to accommodate a limited expansion and clarification of GATT's exception clause (Article XX) to permit certain trade restrictions on environmental grounds, than were southern non-governmental organizations.<sup>327</sup> Those issues that were most strongly asserted by southern non-governmental organizations, such as a recognition of indigenous knowledge as an intellectual property right, were taken up by southern states. Yet here WTO rule changes were blocked by northern states defending northern business interests. Moreover, these southern environmental issues were less strongly endorsed by many northern non-governmental organizations whose constituencies were more concerned with the use of trade measures to protect animal life abroad. In short, the WTO's Committee on Trade and Environment served as a conduit for states responding to domestic pressures. In this sense, the World Trade Organization is a much more democratically accountable institution than its critics claim.<sup>328</sup>

The WTO secretariat did not block changes to WTO rules. Ultimately, WTO rule changes desired by northern environmental non-governmental organizations were blocked on account of

---

<sup>327</sup> See *supra* note 285-289.

<sup>328</sup> Decision-making in any complex society involving large numbers of constituents raises questions of democratic accountability. All choices are imperfect. Yet in response to democratic critiques of the World Trade Organization, it is not necessary just to point to the fact that the Agreement Establishing the World Trade Organization was ratified by the United States Congress and legislatures throughout the world. It is also important to note that, in the absence of the World Trade Organization, U.S., EC and other states with large markets would still wield coercive power, and in such case, not be constrained by internationally agreed rules. See *infra* note 355. This of course also raises serious issues of participation that are assessed in an ongoing project of the author. See Gregory Shaffer, *A Comparative Institutional Analysis of the World Trade Organization's Treatment of Trade and Environment Matters: Judicial, Political and Market Processes* (work-in-progress, on file).

northern NGO failure to win domestic policy debates.<sup>329</sup> Where there were divisions among powerful domestic constituencies, governments—including those of the most powerful states—avoided taking a clear proactive stance within the WTO Committee on Trade and Environment. In the end analysis, the United States and EC were simply unwilling to adopt any of the strategies cited by intergovernmental theorists—from targeting threats or concessions, linking issues, manipulating information, or offering side payments—to induce developing countries to agree to amend WTO rules in a manner that developing countries justifiably believed would adversely affect their economic interests. Rather, under pressure from certain domestic constituencies, U.S. and EC representatives took issues to the WTO’s Committee on Trade and Environment, such as the permissibility of unilateral trade restrictions for environmental ends, about which they felt ambivalently, and which they knew could not be resolved through the WTO political process unless they took a strong stance and were willing to offer trade concessions in return.

In the Uruguay Round of trade negotiations, the United States and EC successfully negotiated new WTO rules mandating the protection of intellectual property rights despite developing country opposition. Rightly or wrongly, developing countries agreed to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights in response to relentless U.S. and EC pressure, as well as U.S. and EC agreement to reduce, over time, trade barriers to textile and other products. Were U.S. and European environmental interest groups able to convince their own national representatives to so prioritize environmental issues, WTO rules, rightly or wrongly, would also more likely be changed. Northern environmental groups were simply unsuccessful in harnessing U.S. and EC clout to attain their aims. Internal divisions within the United States and Europe hamstrung the ability of the U.S. and EC to exercise

---

<sup>329</sup> As an example of ongoing divisions within the United States on the linkage between trade rules and environmental, health and other social issues, at approximately the same time that demonstrators massed in Seattle against the WTO’s treatment of various social issues, U.S. Democratic and Republican legislators proposed amending Section 301 “by establishing a ‘hit list’ of countries that use health and safety regulations to block imports of U.S. agricultural produces.” See Corbett B. Daly, *Levin Introduces Measure to Strengthen Section 301*, 16 INT’L TRADE REP. (BNA) 1908 (Nov. 24, 1999). A central concern behind the proposed legislation is the EC’s banning of products produced with genetically-modified organizations, which involve health and environmental issues. Section 301 of the Trade Act of 1974 (as amended) is codified at 19 U.S.C. 2411-2420. It provides for the right of businesses to petition the United States Trade Representative to challenge foreign trade barriers to their exports.

political and economic power in furtherance of northern environmental groups' goals.<sup>330</sup> If there is any problem as to the political accountability and democratic representativeness of U.S. and EC positions within the World Trade Organization, it lies at the national level, and not within the World Trade Organization itself.<sup>331</sup>

In answer to this article's initial question, the *two-level intergovernmental model* best explains how trade and environment issues have been addressed to date within the World Trade Organization.<sup>332</sup> Although the WTO institutional context creates a framework in which negotiations occur, and although the WTO secretariat can play a role as a broker within that framework, the World Trade Organization is not an institution controlled by a neoliberal ideological elite that is independent of states.<sup>333</sup> Rather, state representatives closely defended their constituencies' interests within the WTO Committee on Trade and Environment. Trade-

---

<sup>330</sup> Similarly, Porter and Brown note, "The U.S. environmental movement is the largest and best organized in the world, but it was unable in the late 1980s and early 1990s to sway U.S. policy in the negotiation of climate and hazardous waste trade regimes, in part because powerful interests were arrayed against it and it had not been able to influence the outcomes of congressional or presidential elections." GLOBAL ENVIRONMENTAL POLITICS, *supra* note 23, at 36.

<sup>331</sup> One study has shown that formal mechanisms at the national level for consultation with NGOs over WTO matters are rare. See Christophe Bellmann and Richard Gerster, *Accountability in the World Trade Organization*, 30 *Journal of World Trade* (Dec. 1996) (finding only three governments out of a survey of thirty countries had such formal mechanisms). As to issues of the accountability of the United States Trade Representative, as well as of the trade representatives of other WTO members, see *supra* notes 172-194 and 205 and accompanying texts. For an empirical study of the relationship between U.S. and European business interest groups and their national trade representatives in WTO litigation, and negotiation within its shadow, see Gregory Shaffer, *The Blurring of the Intergovernmental: Public-Private Partnerships in the Bringing of U.S. and EC Trade Claims*, in POLLACK AND SHAFFER, TRANSATLANTIC GOVERNANCE, *supra* note 18; Gregory Shaffer, *The Law-in-Action of International Trade Litigation in the United States and Europe: The Melding of the Public and the Private* (work-in-progress, on file). In the end analysis, however, stakeholder positions were typically most closely reflected in the positions presented by their own states before the WTO Committee on Trade and Environment. See *supra* notes 278-289 and accompanying text.

<sup>332</sup> See *supra* note 16.

<sup>333</sup> To give one more example, the WTO secretariat's endeavors to make the WTO decision-making process more open and transparent have been hampered by developing countries who remain fearful that information would be used against them by northern non-governmental organizations best positioned to exploit it. See *supra* notes 255-267. But as for the WTO itself, its Director General has forthrightly stated to WTO members before the General Council in July 1998, "We will not make real progress [on transparency] unless there is a strong commitment from national governments . . . . We can do better and we can do more." See Statement by then Director-General Ruggiero on *Transparency and Interaction with Civil Society* to the WTO General Council, 15 July 1998, at <[www.wto.org/wto/new/dgspnote](http://www.wto.org/wto/new/dgspnote)>.

environment issues are high profile items reported in the news media and heavily lobbied in U.S., European and other capitals precisely because of their potential environmental and economic impacts. In presenting national positions before the WTO Committee on Trade and Environment, state delegates, while they may attempt to manipulate domestic processes to enhance their policy-making discretion, must still take into account and respond to domestic pressures. The more issues become politicized, as has been the case of trade-environment issues, the less discretion trade delegates (or any other national representatives) have. In the end, from both instrumentalist and constructivist perspectives,<sup>334</sup> U.S. and European environmental groups simply failed to sufficiently shape the CTE's agenda, frame its treatment of the issues, or influence the outcome of CTE debates to accomplish their goals.

U.S. and European environmental groups are, not surprisingly, frustrated. Although they speak of the need to create a more *transparent* WTO under a *stakeholder* model, they are primarily piqued by results, not processes.<sup>335</sup> They have tried to intervene at the international level, in particular through lobbying delegates in Geneva, submitting amicus briefs on trade-environment disputes before WTO dispute settlement panels, and engaging in mass protests at WTO ministerial meetings. They have also tried to harness U.S. and EC economic and political power to modify WTO rules. Yet they have been thwarted because their interests conflict with those of U.S. and EC export-oriented businesses domestically, and those of businesses as well as other non-governmental constituents from developing and smaller developed countries. Malcontent U.S. and European environmental groups consequently critique the World Trade Organization as an autonomous neoliberal institution. While their critiques are factually wrong, they are strategically adept. By focusing their critiques on the institution that oversees the trade liberalization process, they are able to join forces with an odd array of allies—from isolationist conservatives concerned about sovereignty to labor unions concerned about labor's declining

---

<sup>334</sup> See *supra* note 37.

<sup>335</sup> See e.g. response of Durkwood Zaelke following an NGO meeting with WTO Director-General Ruggiero, "We're only talking about process at this point, and we have got to speed that up so we can get to the substance. We've got some very tough substantive problems to resolve and we're only talking about the dialogue.... That's not the answer." Rossella Brevetti, *Ruggiero Meets with NGOs in Effort to Broaden WTO Transparency*, 15 Int'l Trade Repr. 1874 (Nov. 11, 1998).

bargaining power. They thereby more effectively oppose U.S. and EC trade liberalization initiatives supported by export-oriented businesses. The Clinton administration remains unable to obtain “fast-track” trade negotiating authority. The European Commission remains unable to monopolize competence over all WTO matters, complicating intra-EC member state decision-making and hampering the Commission’s trade liberalization initiatives.

Business interests have long held a preferential position in policy-making.<sup>336</sup> Their importance for investment and employment in capitalist economies provides them with a privileged position in dealings with government. Yet the environmental opposition to the World Trade Organization, working with other disaffected constituencies, has threatened to successfully impede export-oriented businesses’ efforts to further liberalize global markets.<sup>337</sup>

Through their persistent critiques of the World Trade Organization and its Committee on Trade and Environment, U.S. and European environmental groups have also won at least a marginal victory within the World Trade Organization. They have significantly opened up the WTO decision-making process, a trend toward greater transparency of how the WTO operates that will unlikely change. This facilitates their pressure on home governments, and enables them, where possible, to better coordinate with foreign affiliated groups to concurrently pressure foreign governments. Yet unfortunately for environmental advocates of the stakeholder model, increased WTO transparency also enables other interest groups to better monitor trade-environment matters, and, in particular, environmentalists’ traditional domestic antagonists—business interests. Thus, from a two-level intergovernmentalist perspective, the prospects for significant change of WTO trade and environment rules through action by the Committee on Trade and Environment remains small.

---

<sup>336</sup> See, e.g., LINDBLOM, *POLITICS AND MARKETS*, *supra* note 36. This has arguably been enhanced by the globalization of production. See HELD, *GLOBAL TRANSFORMATIONS*, *supra* note 270 (arguing that “the globalization of production enhances the structural power of corporate capital”) and DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR* (1997) (assessing the impact of globalization on labor and social protection policies). For commentary on privileged business-government relations in developing countries, see Gareth Porter, *Trade Competition and Pollution Standards: “Race to the Bottom” or “Stuck at the Bottom”?*, 8 *J. of Env’t & Dev.* 133 (June 1, 1999).  
**GET BETTER CITES/BOOKS RE DEVELOPING COUNTRIES**

<sup>337</sup> As relatively more dramatic issues receive media attention, such as WTO cases finding U.S. laws with a purportedly environmental purpose in violation of WTO rules, public protest can upset the otherwise preferential position that business interests may otherwise have in public policymaking.

## **B. A Possible Byproduct of WTO Trade-Environment Conflicts: The Practicable Role and Limits of a World Environment Organization**

For most of the world's citizens, the deadlock within the WTO Committee on Trade and Environment may not be a bad outcome. The United States and EC have been unable to modify a WTO rule in a way that only they, in practice, would have the power to exploit.<sup>338</sup> Yet because of adverse NGO reactions within the United States and Europe, the CTE stalemate has been highly problematic for multilateral trade liberalization initiatives, including developing country demands for the removal of U.S. and European tariff barriers to textiles, agricultural products and processed goods.<sup>339</sup> In order to defuse environmentalist critiques of the World Trade Organization and thereby facilitate further trade liberalization, even the WTO's former Director General and staunchly neoliberal publications such as *The Economist*, now call for the formation of a World Environment Organization.<sup>340</sup>

This leads to the query, would the creation of a World Environment Organization make any difference? If a World Environment Organization were run by a technocratic supranational "environmental" elite, per a "supranational technocratic" model of governance, then a World Environment Organization conceivably could make a significant difference as a counterbalance to a supranational technocratic "trade" organization. Yet as we have seen, WTO negotiations

---

<sup>338</sup> See, e.g. southern NGO characterization of "the use of trade measures in MEAs as an inequitable lever available only to stronger countries." Sunita Narain comments in 1997 NGO Symposium Transcript, *supra* note 302.

<sup>339</sup> Developing country delegates remark that, whereas the United States and Europe pedaled free trade during the 1986-1994 Uruguay Round trade negotiations, roles have since reversed. Developing countries now press the U.S. and EC to open their markets to developing country exports, while the U.S. and EC resort to anti-dumping suits and call for tying market access to meeting labor and environmental standards. Interview with South Asian diplomat in Geneva, Switzerland, June 12, 2000. See generally, *Developing Countries and the Multilateral Trading System: Past and Present: Background Note by Secretariat*, 25 (March 17-18, 1999) prepared for the High Level Symposium on Trade and Development (referring to "adverse effects of tariff escalation and tariff peaks both in relation to agricultural products and industrial goods"), available at <<http://www.wto.org/wto/hlms/highlevel.htm>>.

<sup>340</sup> See, e.g., *Why Greens Should Love Trade*, *ECONOMIST* 17, 18 (Oct. 9, 1999). See also *supra* note 6. For comments of political leaders in support of an international environmental organization, see e.g. comments of French President Jacques Chirac, Speech before the IUCN (World Conservation Union), Fontainebleau, France, Nov. 3, 1999; of French Environmental Minister Dominique Voynet -**GET, SUMMER 2000 cite; OF KOHL IN GERMANY - GET**; of New Zealand's representative to the UN General Assembly, Rt. Hon. Geoffrey Palmer, General Debate Statement of New Zealand Government, UN Doc. A/44/PV.15, at 61,76 (1989).

over trade-environment policy are dominated not by international civil servants nor by ideologically single-minded national trade bureaucrats, but by state representatives attempting to advance national interests as determined per a two-level intergovernmental model. Since the primary explanation for the stalemate over trade-environment policy in the Committee on Trade and Environment is a conflict between states, including between—and within—the WTO’s most powerful members (the United States and European Union), erecting yet another international bureaucracy, this one dubbed a World Environment Organization, would arguably not resolve the issues that have been debated within the WTO Committee on Trade and Environment.

While, in theory, environmental ministers could play a marginally larger role in representing state positions before a World Environment Organization than before the World Trade Organization, this should not materially change outcomes. As witnessed by the 1992 United Nations Conference on Environment and Development in Rio de Janeiro (“Earth Summit”) and the Kyoto Protocol to the United Nations Framework Convention on Climate Change, environmental ministers do not determine national positions.<sup>341</sup> Rather, national positions in developed countries are coordinated through inter-agency processes. Commercial constituencies, and their representatives in trade, commercial and foreign ministries, seek to ensure that national economic interests are not sacrificed by environmental ministries lobbied by environmental non-governmental organizations. Developing country environmental ministries, where they exist, would certainly not dictate national positions on matters affecting their nation’s development. States, whatever the level of their development, strive to safeguard their national economic interests in negotiations “where words have consequences.” The mere denomination of

---

<sup>341</sup> On the politics of the 1992 UN Conference on Environment and Development, see Porter and Brown, *GLOBAL ENVIRONMENTAL POLITICS*, *supra* note 23, at 115-129. Although in his assessment of the negotiations of the Convention on Biological Diversity at the UN Conference, Kal Raustiala maintains that domestic institutions play “an important role in determining state choices,” he confirms that “as the negotiations grew more politicized—reflecting the juxtaposition of environment and development that was the hallmark of the UNCED process—epistemic variables cannot account well for the observed decisions and outcomes.” Raustiala, *Domestic Institutions and International Regulatory Cooperation: Comparative Responses to the Convention on Biological Diversity*, 49 *WORLD POLITICS* 482, 506, 509 (July 1997). For a critique of the Earth Summit as a “debacle” for the environment on account of the role economic and commercial interests played, see Nicholas Hildyard, *Foxes in Charge of the Chickens*, in Wolfgang Sachs, ed., *GLOBAL ECOLOGY: A NEW ARENA OF POLITICAL CONFLICT* 22-35 (1995) (arguing that “both North and South have done everything in their powers to protect the interests of their industrial and commercial lobbies,” at 19).

the organization should not matter.

Similarly, were the explanation of the stalemate within the Committee on Trade and Environment that governments have been simply out of touch with civil society stakeholders, then perhaps the formation of yet another organization, this time based on a “civil society stakeholder” model and dubbed a World Environment Organization, could make a difference. Yet as we have seen, interest group positions on “dollars and cents” trade and environment matters also conflict.<sup>342</sup> The views of northern environmental groups and southern development groups have, in the end, been most closely defended by their own governments within the World Trade Organization, per a “two-level intergovernmental” model.

While advocates of a stakeholder model often speak in terms of the need to incorporate the views of the “environmental community” as a counterpart to the “trade community” and other “communities,” this is disingenuous.<sup>343</sup> These labels merely reflect the denominations of certain well-organized interest groups that would like to enhance their policymaking power. But the labels have no substance in reality in terms of “civil society.” All of us, as members of “civil society,” must integrate our views on matters involving the environment, development, trade, human rights, race, gender, equity, efficiency, economic growth and so on. In light of developing countries’ immense challenges to meet the basic needs of the majority of their human populations, southern constituencies typically place less saliency on the social value of environmental preservation than on economic and social development and poverty eradication.<sup>344</sup>

---

<sup>342</sup> As Rubens Ricupero, Secretary-General of UNCTAD states, “One can speak about a universal consensus around the concepts of human rights and the environment only in very general terms. But every time we attempt to translate these principles from the abstract to the concrete, from the paper they are written on to reality, we clash with vested political or economic interests that are hard to reconcile with human or environmental goals.” Ricupero, in the session on *UN Reform: Balancing the WTO with a Proposed ‘World Environment Organization,’* in *Policing the Global Economy*, *supra* note 190, at 128, 131.

<sup>343</sup> Even trade liberals addressing the concerns of developing countries adopt the term “environmental community” as if it is monolithic, see e.g. John Whalley, *Trade and Environment, the WTO, and the Developing Countries*, in *Emerging Agenda for Global Trade: High Stakes for Developing Countries* (eds. Robert Lawrence, Dani Rodrik and John Whalley) 81, 84 (1996) (“the environmental community argues that trade policy should no longer come first...”). See also use of the term in *supra* notes 205 and 317.

<sup>344</sup> Developing countries made clear in the 1992 Convention on Biological Diversity that its implementation shall “take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties.” Convention on Biological Diversity, art 20(4), June 5, 1992, 31 I.L.M. 822 (entered into force Dec. 29, 1993). See also Nicholas Kitikiti, *An African View*, *supra* note \_\_,

It is thus no surprise that southern interest groups are highly skeptical, and in fact outright oppose, the efforts of northern environmental groups to loosen WTO rules to facilitate unilateral trade sanctions in tuna-dolphin and shrimp-turtle type cases. They realize that such changes would impose costs on southern development without any funding, compensation or other assistance from the developed world.

Until there is more consensus among states and state constituents on fundamental social values and priorities, the notion of a “World Environment Organization” will encounter great skepticism and opposition. Developing countries fear that northern environmental groups could use the organization as leverage to press developing countries to privilege environmental conservation over human development. As a Philippine representative to the WTO remarks, “If only we were elephants, developed countries might be more concerned about us.”<sup>345</sup>

A more politically astute title for such an organization might therefore be the “World Sustainable Development Organization.”<sup>346</sup> Yet successfully packaging multiple concepts in a single title does not itself make for consensus. The term “sustainable development” is popular because it is fluid. For northern environmentalists, the term “sustainable” can be a proxy for environmental protection which “development” threatens to undue. In contrast, for developing countries, the term “development” broadcasts an urgent policy goal that the term “sustainable” threatens to undermine. Division over a concept’s meaning bodes poorly for its practical implementation.

Ironically, the formation of a World Environment/Sustainable Development Organization faces two fundamental contradictory challenges—the thought of its success and the thought of its failure. If successful, the organization could facilitate the enactment of global environmental

---

at 179, 184 (citing a 1986 EU poll showing that 50% of EU citizens placed a priority on environment and only 9% on development. Kitikiti notes that “if a similar poll were carried out in a developing country, it would confirm that the public’s choice there would be economic growth.”). **SEARCH FOR MORE UPDATED POLLS.**

<sup>345</sup> Interview in Geneva, Switzerland, June 9, 2000.

<sup>346</sup> Daniel Esty uses the name “Global Environmental Organization” with the acronym “GEO” on account of its more felicitous ring. *See e.g.* ESTY, GREENING THE GATT, *supra* note 5, at 73-98. Yet while this possibly would be a more politically astute title on account of the U.S. Congress’ wariness of “world” government, Congress would not be won over by a title and southern nations would still refuse to privilege environmental conservation over their own development.

regulation for states to implement, enforced by economic sanctions. A regional model for the enactment of environmental legislation already operates. The European Union adopts scores of environmental regulations and directives each year which mandate member state implementation and are typically directly applicable to, and enforceable by, EU citizens.<sup>347</sup> At the global level, however, this smacks of global government, something which might (or might not) be a positive development, but at this stage faces a simple problem—most of the globe’s citizens don’t want it. While the European Union itself faces internal opposition, there is much greater consensus over social values and social priorities and much more equality of economic development within the European Union than there is throughout the world.<sup>348</sup>

Concurrently, some states might agree to the creation of a World Environment or Sustainable Development Organization not because it would be successful in promoting global environmental regulation, but because it might not. That is, states might use a World Environment or Sustainable Development Organization to, in large part, replicate the status quo within the WTO Committee on Trade and Environment, or even to strengthen their position against trade restrictions on environmental grounds.<sup>349</sup> Were both a World Trade Organization

---

<sup>347</sup> All EU *regulations* are directly applicable to, and may be invoked by, residents of the EU’s fifteen member states. EU *directives*, on the other hand, must be implemented by member state legislation. However, EU directives are directly enforceable by member state residents against actions of member state governments and government-controlled entities. Although directives are not directly applicable against private persons, EU residents may seek damages against member states for failing to implement directives. The European Commission also has standing to sue member state governments before the European Court of Justice for failure to implement EU directives, and the Court may impose monetary sanctions. For an overview of EU regulations, directives and enforcement measures, see Jo Shaw, *LAW OF THE EUROPEAN UNION* (1996)

<sup>348</sup> See e.g. discussion in Nichols, *Trade Without Values*, supra note 5, at 694-695. On the relation of the European Union and social values, see Philip Allott, *The European Community is Not the True Community*, 100 *Yale L.J.* 2485, 2499 (1991).

<sup>349</sup> Such an organization would *not* be more accommodating toward unilateral trade bans than are current WTO rules. A World Environment or Sustainable Development Organization would surely promote implementation of three fundamental principles agreed to in the Rio Declaration on Environment and Development signed at the Rio Conference, namely (i) that developing and developed countries have differing responsibilities to enact domestic measures to protect the environment; (ii) that international transfers are necessary to assist developing countries upgrade their environmental protection measures; and (iii) that unilateral trade measures are to be avoided. For an overview of the Rio Declaration, see MICHAEL GRUBB ET AL., *THE ‘EARTH SUMMIT’ AGREEMENTS: A GUIDE AND ASSESSMENT* 85-95 (1993). Principle 7 provides that “States have common but differentiated responsibilities.” Principle 6 affirms that “The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority.” Principle 12 avows that “Trade policy measures for environmental purposes should not constitute a *means of arbitrary or unjustifiable discrimination or a*

and a World Environment/Sustainable Development Organization to pronounce against unilateral U.S. trade bans, developing countries' legal position could be strengthened, as could the World Trade Organization's presentation in the media.<sup>350</sup> This time, since the word "trade" would not appear within the organization's title, it could be more difficult to blame international trade-environment policy on the machinations of an international trade elite. A World Environment/Sustainable Development Organization could possibly (but not necessarily) absorb some of the pressure that northern protest groups now target on the World Trade Organization.

This analysis does not signify that no environmental goals could conceivably be advanced through the creation of an international environmental or sustainable development organization.<sup>351</sup> Environmental protection requires positive, discrete actions, whether in the form

---

*disguised restriction on international trade*. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided" (italics added). Id., at 87. The italicized language is taken precisely from GATT Article XX, which provides in its headnote: "Subject to the requirement that such measures are not applied in a manner which would constitute a *means of arbitrary or unjustifiable discrimination* between countries where the same conditions prevail, *or a disguised restriction on international trade*" (italics added). In setting and overseeing implementation of the rules of a world environment or sustainable development organization, almost all states would oppose unilateral measures imposed by the United States on environmental grounds.

<sup>350</sup> For trade liberals, the World Trade Organization might be somewhat freed to proceed with facilitating inter-state negotiations over the removal of trade barriers. For developing countries, the current environmentalist-labor-nationalist alliance within developed countries against trade liberalization might be somewhat loosened, thereby strengthening their demands that remaining high tariff barriers protecting textile, agricultural and other U.S. and European sectors from developing country imports be removed. In addition, a world environment or sustainable development organization tailored to provide financing for environmental assessments and improvement measures could, in many cases, represent an advance over the status quo that developing countries now face. For example, while Thailand, Malaysia, India and Pakistan technically won the WTO shrimp-turtle case, the United States has in fact been able to retain its ban on shrimp imports from countries that do not mandate the use of U.S.-prescribed turtle excluder devices. United States regulations have been simply slightly modified to comply with the WTO Appellate Body's new procedural requirements. Developing countries have received no compensation or financial assistance to assess the local environmental issues or to adopt appropriate environmental measures. For an overview, see Shaffer, *Shrimp-Turtle Dispute*, *supra* note 103. For this reason, some developing country delegates support exploring the idea of a World Environment Organization as a WTO counterpart. See e.g. Magda Shahin, *Trade and Environment: How Real is the Debate?*, *supra* note 102, at 35, 60 ("The so-called 'Ruggiero' option presented earlier: a World Environment Organization to be the counterpart to the WTO. This is a pragmatic and likely workable option in view of the difficulties encountered so far").

<sup>351</sup> There is a vast literature on international environmental governance mechanisms. For just a sampling, see e.g. Oran Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (1988); *Global Environmental Change and International Governance* (Oran Young et al, eds. 1991); *Institutions for the Earth: Sources of Effective International Environmental Protection* (Peter M. Haas et al. Eds., 1993); *Institutions for Environmental Aid* (ed. Robert Keohane and Marc Levy) (1996); ABRAM CHAYES AND ANTONIA CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 3 (1995) (presenting "an alternative 'managerial model,' relying primarily on a cooperative, problem-solving approach instead of a coercive one"); David

of reductions in the use of ozone-depleting substances or the adoption of new fishing techniques or logging practices. A World Environment/Sustainable Development Organization could, in theory, provide mediation services fostering agreements whereby developing countries (with differing priorities, values and economic interests) accede to some northern environmentalist demands in exchange for U.S. and European funding of desired environmental policies or provision of other economic incentives. In this way, such an organization could, on a case-by-case basis, help channel funds for the protection of animal life and habitat in developing countries and in the global commons, problems which have been the subject of some of the WTO's and GATT's most controversial disputes. By making it more apparent that confrontations involving trade-environment issues are not domineered by an international trade cabal, but ensue from differences in social priorities, social values, and economic interests between and within states, a World Environment/Sustainable Development Organization could conceivably facilitate hard bargaining on these issues, in addition to ideological posturing. Whereas the debate within the WTO Committee on Trade and Environment has focused on whether trade sanctions should be permissible on environmental grounds, a World Environment/Sustainable Development Organization could also address the appropriateness of positive environmental measures in

---

Victor, Kal Raustiala and Eugene Skolnikoff, eds., *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* (1998)); LAWRENCE SUSSKIND, *ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS* 1994.

For arguments in support of the creation of a World Environment Organization, *see e.g.* ESTY, *GREENING THE GATT*, *supra* note 5, at 77-98; C. FORD RUNGE, *FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS* 100-107 (1994) (arguing for the creation of an "overarching body, in relation to what will be a highly complex international management structure"); Steven Charnovitz, *The Environment versus Trade Rules: Defogging the Debate*, 23 *Environmental Law* 481, 511-517 (1993) (proposing modeling a WEO after the International Labor Organization); Jeffrey Dunoff, *International Misfits: The GATT, the ICJ, and trade/environment disputes*, *supra* note 5; Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 *Am. J. Int'l L.* 259 (April 1992) (arguing for a new environmental organization modeled on the International Labor Organization); Elliot L. Richardson, *Climate Change: Problems of Law-Making*, in Hurrell and Kingsbury, *International Politics*, *supra* note 20, at 166-182 (advancing general arguments in the context of negotiations over climate change). For a critique of the creation of a World Environment Organization because it would likely serve to legitimate the World Trade Organization's pursuit of "ever-freer trade," *see* Sara Dillon, *Trade and the Environment: A Challenge to the GATT/WTO Principle of "Ever-Freer Trade,"* 11 *ST. JOHN'S J. LEGAL COMMENT* 351, 387 ("For an environmental organization to accept all the underlying principles of free trade would nearly guarantee its incompetence for purposes of reversing environmental degradation.").

specific cases, such as technology transfers and project financing.<sup>352</sup>

An international organization with an environmental component that is dedicated to facilitating the resolution of ad hoc trade-environment disputes as they arise is a decidedly more limited—and more pragmatic—entity than a global government.<sup>353</sup> The role of the existing United Nations Environmental Programme (UNEP) could, for example, be upgraded.<sup>354</sup>

---

<sup>352</sup> The focus of negotiations within the WTO Committee on Trade and Environment on negative trade measures, as opposed to positive environmental measures to enhance environmental protection is pointed out in Osakwe, *Finding New Packages*, supra note 103, at 48-53. See also Rene Vossenaar and Veena Jha, *Implementation of MEAs at the National Level and the Use of Trade and Non-Trade Related Measures: Results of Developing Country Case Studies*, in *Trade and the Environment: Bridging the Gap* (eds. Agata Fijalkowski and James Cameron) 66 (1998) (noting that “it is important to examine and improve the effectiveness of provisions on positive measures” *Id.* At 82). Developing countries complain that whereas northern governments support a modification or interpretation of WTO rules to accommodate trade restrictions on environmental grounds, they have refused to meet their promises at the United Nations Conference on Environment and Development in Rio to finance sustainable development projects in developing countries. See e.g. Shahin, *Trade and Environment: How Real is the Debate?*, supra note 102, at 36-38 (“developed countries are in effect retreating from the holistic approach to sustainable development agreed at Rio. Their focus is now on unilateral measures and on environmental conditionalities attached to trade and investment.”); *Environment, International Competitiveness and Development*, Report by the UNCTAD secretariat, TD/B/WG.6/10 (Sept 12, 1995) (“‘Positive measures’ (rather than trade restrictive measures) should be implemented to support the developing countries in their efforts to move towards more stringent environmental standards”); Chimni, *WTO and Environment*, supra note 15, at 1760 (advocating a “rewards-based approach” of financial assistance and technology transfer). On the real world difficulties of funding effective positive environmental measures, see e.g. Robert Keohane, *Analyzing the Effectiveness of International Environmental Institutions*, in *Institutions for Environmental Aid*, supra note 349, 3, 25 (“At the most basic level, self-interest is the key constraint on concern: on the willingness of rich countries to fund financial transfers; of recipient governments to take effective action against privileged families or groups that benefit from environmental exploitation; and of international organizations to cooperate with one another.”). Yet as Keohane points out on the problem of ineffectiveness, “we must ask, ‘ineffective compared to what?’” *Id.*

<sup>353</sup> Similarly, Ricupero states that the formation of a World Environment Organization is unrealistic in the current political climate and favors a more gradual approach. See Ricupero, in *Policing the Global Economy*, supra note 190, at 129. He notes with approval calls for the formation of a “Standing Conference on Trade and Environment,” which appears to be an expansion of the symposia so far organized by the WTO secretariat, to include representatives of multiple international organizations and international NGOs. This proposal, however, could be given a more functional application in line with the standing committee proposed below. *Id.* at 135.

<sup>354</sup> Before creating a new organization, one must ask why the United Nations Environmental Programme (UNEP) cannot be simply upgraded and better financed, and if desired, have its name changed. Criticisms of UNEP are well-known. For example, UNEP’s headquarters are in Nairobi, Kenya, somewhat marginalizing it, as UNEP is far from the locus of decision-making on international trade and economic matters. Moreover, because UNEP does not offer a central organization, as does the World Trade Organization, a proliferation of diverse and sometimes overlapping international environmental treaties and treaty secretariats has arisen. See Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 *Geo. L.J.* 675, 697 (1993) (referring to this as the problem of “treaty congestion”). For assessments of UNEP, see e.g. ESTY, *GREENING THE GATT*, supra note 5, at 78; Mark Allen Gray, *The United Nations Environment Programme: An Assessment*, 20 *Env’tl L.J.* 292 (1990).

Proponents of institutional reform maintain that a World Environment or Sustainable Development

Alternatively, a standing committee or agency could be formed under joint WTO-UNEP auspices to address specific trade-environment claims as they arise.<sup>355</sup> The organization could be a forum to engage experts to assess the local environmental, social and developmental issues at stake,

---

Organization could offer more coherence on cross-border environmental matters, be located in or near Geneva, and have the capacity and financing to potentially broker deals to defuse trade-environment conflicts, while promoting environmental protection. The German government has offered Bonn, the former capital of the Federal Republic of Germany, as a location for a World Environment Organization. *See* \_\_ GET. As Newell and Whalley assert, a World Environment Organization could “(i) act as an intermediary and initiator of cross-country internalisation deals...; (ii) extend and deepen treaty commitments...; (iii) facilitate environmental and non-environmental policy linkages...; and (iv) use an international structure to underpin domestic environmental policy” (at 18-21). They argue that it could thereby lead to package agreements along the lines that the WTO now operates. *See* Peter Newell & John Whalley, *Towards a World Environment Organisation?* 30 IDS Bulletin, 16, 20 (1999).

However, developing countries will surely not wish UNEP, the one international organization that they now host, to move to Europe. Moreover, the more power that states grant to an international environmental organization, the more states will closely safeguard their interests within it. States distrust a weak UNEP because of UNEP’s relatively close ties to non-governmental organizations. UNEP’s ties to NGOs, however, are induced in part because of states’ insufficient financing of and attention to UNEP. Were states to create a more powerful international environmental organization or one with more significant financing, they would clearly wish to control its decision-making process.

<sup>355</sup> The United Nations Conference on Trade and Development (UNCTAD) and/or the United Nations Development Programme (UNDP) could also be co-sponsors of such an agency or committee. Their involvement may be politically important since developing countries would be more confident that these agencies would better protect their development interests. The “Joint Session of the Trade and Environment Committees” of the Organization of Economic Cooperation and Development (OECD) could serve as an example. On the OECD’s Joint Session, *see supra* notes 53, 226. In the year 2,000, UNEP and UNCTAD formed a Capacity Building Task Force on Trade, Environment and Development, although with a very modest budget of US\$4 million. *See* UNEP-UNCTAD Capacity Building Task Force on Trade, Environment and Development (on file with author), as well as their presentation of this to the CTE in WT/CTE/W/138- **ADD DATE**. Similarly, there are already joint UNCTAD/UNDP and UNEP/UNDP projects. An example of the latter is the UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa, which provide technical assistance to governments on environmental legislation, but not the assessment, financing and brokerage functions described above. *See* Benjamin Richardson, *Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum*, 11 *Colo. J. Int’l Envtl. L. and Pol’y* 1 (2000), citing *UNEP, Environmental Law and Institutions*, at <http://www.unep.org/unep/convention/env4.htm>. The WTO Committee on Trade and Environment has held Information Sessions with various secretariats of multilateral environmental agreements, but these constitute reports on trade-related developments in these agreements, and not a fora to negotiate and fund solutions to new and on-going trade-environment issues. *See e.g.* Trade and Environment Bulletin 33, TE/033—10 July 2000, available on the WTO web site. UNEP and UNDP are operational agencies that could assist with the assessment and financing of sustainable development projects on an ad hoc basis in implementation of political resolutions to trade-environment disputes. Reflective of the greater importance given to development issues, UNDP dwarfs UNEP in terms of personnel and resources. *See* Porter and Welsh, *GLOBAL ENVIRONMENTAL POLITICS*, *supra* note 23, at 40-46 (notes UNEP had a budget of \$60 million and staff of 240 and UNDP a budget of \$1.4 billion and staff of 6,600 in 1993). **GET NEW FIGURES**

negotiate compromise solutions, and raise funds to implement them.<sup>356</sup> Negotiations structured to resolve ad hoc trade-environment disputes by facilitating financial transfers to developing countries or the provision of other incentives could be more equitable and, since developing country local environmental and developmental conditions and constituency views could be more closely assessed, more legitimate and democratic than the alternative of unilateral U.S. and European sanctions.<sup>357</sup> A standing committee or agency would also more likely be supported (and

---

<sup>356</sup> Some policymakers might be concerned about conflicts between the WTO dispute settlement system and that of an international environmental or sustainable development organization, an issue which is already identified as item 5 in the CTE's agenda. In practice, however, this issue could be of little significance. First, an international environmental or sustainable development organization does not necessarily need a centralized dispute settlement system. As Abram and Antonia Chayes pointed out, environmental organizations can advance environmental protection without recourse to judicial enforcement. (See ABRAM CHAYES AND ANTONIA CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995). See also David Victor, Kal Raustiala and Eugene Skolnikoff, eds., *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* (1998)). The process of negotiating commitments itself can lead to changed production methods and an improved environment, as in the case of the Montreal Protocol on Substances that Deplete the Ozone Layer. (See *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 Sept. 1987, 26 ILM 1550 (1987)). Cf. Dunoff, *Institutional Misfits*, *supra* note 5, at 1108-1128 (proposing non-binding forum to resolve trade-environment disputes, yet based on an implicit waiver of GATT-WTO rights).

Moreover, the WTO Appellate Body, in its application of current WTO rules governing environment-based trade restrictions, already focuses on the *process* through which restrictions are implemented. In the U.S. shrimp-turtle case, the WTO Appellate Body held against the United States precisely because it did not take "into consideration different conditions which may occur in the territories of ... other Members," and had not seriously attempted to negotiate an agreement with the developing country complainants. (See Appellate Body Shrimp Report, paras. 164, 166-170). The advantage of a parallel international environmental or sustainable development forum is precisely that it could provide these two functions. Such an organization could help conduct and finance environmental assessments and broker negotiated solutions. Deliberations could be open to the public, with financial assistance provided to assure input from local constituencies.

<sup>357</sup> One could criticize the idea of a standing committee to address trade-environment disputes because environmental priorities would be set through trade disputes triggered by pressure from northern constituencies. However, donor countries already play a central role in determining priorities, often to appease northern constituencies. See Barbara Connolly, *Increments for the Earth: The Politics of Environmental Aid*, in *Institutions for Environmental Aid*, *supra* note 349, at 307, 329-333 ("donors... determine which problems will receive aid, how those problems will be defined, and what solutions aid programs will seek to implement... [d]onors do not always provide aid in order to solve *environmental* problems. Often, aid programs are about solving *political* problems"). The issue of fairness ultimately must be addressed through assessing institutional alternatives. Certainly case-by-case multilateral negotiations under the auspices of a WTO-UNEP standing committee or an international environmental or sustainable development organization would take better account of developing country conditions and stakeholder interests than would an amendment of WTO rules to accommodate U.S. unilateral sanctions against developing country imports on environmental grounds.

Although the United States and EC have no power to directly determine developing country positions, they can wield significant influence through threatening to restrict access of developing country imports to U.S. and EC markets. As Albert Hirschman has noted, the essence of economic power is the capacity to obstruct commercial exchange. A state's large market provides it with leverage on other states' domestic policies because access to its market matters. In Hirschman's words,

financed) by a wary U.S. Congress and other northern governments than would a large, more ambitious international organization with an ominous-sounding title such as a World Environment Organization.

Yet the formation of such an organization will continue to face significant hurdles. This is the case despite neoliberal and northern environmentalist advocacy precisely because states—and not neoliberals nor northern environmental stakeholders—will decide whether to create and fund it. Given U.S. and European lukewarm support of foreign aid, coupled with budgetary constraints, they are not keen on providing significant funding to a new environment or sustainable development organization. Because of developing countries' justifiable fear of civil and commercial groups' harnessing state power to block their exports to the world's largest markets, an organization under whatever denomination will operate under severe constraints. Conflicting interests wielding countervailing power retain their stakes. States, representing constituencies with different social priorities, will closely monitor any organization which could affect their economic and developmental prospects.

As represented by the multifaceted agenda of the WTO's Committee on Trade and Environment, trade-environment frictions proliferate. They will be managed by neither quick nor easy institutional or procedural panaceas—whether in terms of civil society/stakeholder models or desired more friendly “environmental” fora. Simplistic calls for “democratizing” the World Trade Organization will *not* provide the answer. Similarly, while creation of a World Environment Organization could serve to somewhat shield the WTO from critiques (because the same conflicts between state and stakeholder interests would persist in an “environmental” fora), and although it could potentially (but not necessarily) assist in channeling resources from northern states and stakeholder groups to confront southern environmental problems that concern them, it would also *not* eliminate trade-environment conflicts. Ultimately, these conflicts are

---

“Thus, the power to interrupt commercial or financial relations with any country considered as an attribute of national sovereignty, is the root cause of the influence or power position which a country acquires in other countries... What we have called the influence effect of foreign trade derives from the fact that the trade conducted between country A, on the one hand, and countries B, C, D, etc., on the other, is worth *something* to B, C, D, etc., and that they would therefore consent to grant A certain advantages— military, political, economic— in order to retain the possibility of trading with A.”

*See* HIRSCHMAN, NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE 16-17 (1945). Enforceable international rules help constrain the exercise of such market power.

grounded in differing environmental and developmental values and priorities and differing financial stakes. In the end, in line with a two-level intergovernmental model of governance, decisions will be made by states, reacting to input from their constituencies, and using their political and market power as leverage to pursue their perceptions of state interests. However, northern environmentalist critiques of the World Trade Organization, though misleading in fact, may be one way in practice to spur the United States and Europe to fund further international environmental institutional development and environmental protection efforts abroad.

**TABLE I: THE CTE AGENDA AND STATE PARTICIPATION<sup>358</sup>**

ITEM NUMBER	ITEM CLUSTER <sup>359</sup> AND RELATIVE STATE INTEREST	MOST ACTIVE STATES <sup>360</sup>	NO. STATE/ SECRETARIAT PAPERS <sup>361</sup>
<u>Item 1. Trade Measures for Environmental Purposes.</u> <i>“The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements”</i>	Links Between Environment and Trade Agendas: U.S. and EC Interest	EC, New Zealand (2 each)	State: 14 Secretariat: 26
<u>Item 2. Trade-environment Catch-all.</u> <i>“The relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system”</i>	Market Access Cluster: Discussion not focused	U.S. (2), Canada, India, Sweden (1 each)	State: 5 Secretariat: 1
<u>Item 3. Eco-labeling, Packaging and Environmental Taxes.</u> <i>“The relationship between the provisions of the multilateral trading system and: (a) charges and taxes for environmental purposes; (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labeling and recycling”</i>	Market Access Cluster: Of great interest to all	U.S.(5) Canada (4) EC (3) Egypt, India, among others	State: 17 Secretariat: 9

<sup>358</sup> This represents the author’s best count of papers submitted, based on data through December 31, 1998. The calculations in columns 3 and 4 are approximate, as (i) some items overlapped or were collapsed into each other; (ii) states at times addressed more than one item in a single paper; (iii) multiple states sometimes submitted a paper collectively; and (iv) some “non-papers” were found, but others were not. The calculations include submissions before the EMIT Working Group on its three agenda items, which were revised slightly to become items 1, 2 and 3 of the CTE agenda, as well as all ten items addressed by the Preparatory Committee to the CTE during the eight and a half month period between signature of the Uruguay Round Agreements and formation of the WTO.

<sup>359</sup>On the two clusters, *see supra* note 88 and accompanying text.

<sup>360</sup> Most active states refers to those states submitting the greatest number of written submissions to the Committee on Trade and Environment. As for the most active states in terms of spoken interjections reported in the minutes of meetings, *see supra* notes 158-159 and accompanying text.

<sup>361</sup> The secretariat submitted a number of general papers that are not identified with any one category.

<p><u>Item 4. Making Environmental Measures Transparent.</u> <i>“The provisions of the multilateral system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects”</i></p>	<p>Market Access Cluster: Of interest to all. Sole issue to result in substantive development: a new WTO database</p>	<p>Hong Kong(1)</p>	<p>State: 1 Secretariat: 8</p>
<p><u>Item 5. Dispute Settlement.</u> <i>“The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements”</i></p>	<p>Links Between Environment and Trade Agendas: collapsed into item 1</p>	<p>Chile(1)</p>	<p>State: 1 Secretariat: 1</p>
<p><u>Item 6. Market Access and the Environmental Benefits of Removing Trade Distortions.</u> <i>“The effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions”</i></p>	<p>Market Access Cluster: Of great interest to all, particularly the U.S. and Cairns Group<sup>362</sup></p>	<p>EC(3), US(2), Japan (2), Argentina, Australia, Brazil, India, Korea, among others</p>	<p>State: 17<sup>363</sup> Secretariat: 7</p>
<p><u>Item 7. Restricting Exports of Domestically Prohibited Goods (DPGs).</u> <i>“The issue of the export of domestically prohibited goods”</i></p>	<p>Links Between Environment and Trade Agendas: African Interest</p>	<p>Nigeria(3)</p>	<p>State: 3 Secretariat: 4</p>
<p><u>Item 8. TRIPS.</u> <i>“The relevant provisions of the Agreement on Trade-related Aspects of Intellectual Property Rights”</i></p>	<p>Links Between Environment and Trade Agendas: India’s Interest</p>	<p>India(4) Australia, Korea (1 each)</p>	<p>State: 6 Secretariat: 3</p>
<p><u>Item 9. GATS.</u> <i>“The work programme envisaged in the Decision on Trade in Services and the Environment”</i></p>	<p>Links Between Environment and Trade Agendas: Little discussed</p>	<p>U.S. and India (each 1)</p>	<p>State: 2 Secretariat: 2</p>

<sup>362</sup> The “Cairns Group” consists of a group of fourteen predominately agricultural exporting countries, formed in Cairns Australia early in the Uruguay Round of trade negotiations, that includes developed and developing countries. The original members were Argentina, Australia, Brazil, Canada, Chile, Fiji, Hungary, Indonesia, Malaysia, Philippines, New Zealand, Thailand and Uruguay. See JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* 30-31 (1995).

<sup>363</sup> States made nine further submissions on this market access Item in 1999, in anticipation of a new round of trade negotiations. In contrast, only one state submitted a separate paper on one of the other nine Items.

<p><u>Item 10. Relations with Intergovernmental Organizations and NGOs.</u> <i>“Input to the relevant bodies in respect of appropriate arrangements for relations with intergovernmental and non-governmental organizations referred to in Article V of the WTO”</i></p>	<p>Links Between Environment and Trade Agendas: U.S. and EC Interest. Debate moved to Council</p>	<p>U.S.(1)</p>	<p>State: 1 Secretariat: 2</p>
--	---	----------------	------------------------------------