TRADE AND THE ENVIRONMENT: EQUILIBRIUM OR IMBALANCE?

DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE. Washington: Institute for International Economics, 1994. xvi + 319 pp.

C. FORD RUNGE, FRANÇOIS ORTALO-MAGNÉ & PHILIP VANDE KAMP, FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS. New York: Council on Foreign Relations Press, 1994. xii + 146 pp.

TRADE AND THE ENVIRONMENT: THE SEARCH FOR BALANCE (James Cameron, Paul Demaret & Damien Geradin, eds.). London: Cameron May, Ltd., 1994. 475 pp.

DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY. Cambridge, Massachusetts: Harvard University Press, 1995. xiii + 322 pp.

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INTRODUCTION

The trade-and-environment controversy continues to simmer, with the pot boiling over at fairly frequent intervals. For example, the first dispute settlement panel convened under the auspices of the World Trade Organization (WTO) has just concluded that the treatment of foreign refiners in a federal regulation designed to protect air quality through the use of reformulated gasoline contravenes the United States' obligations under WTO rules.[1] A recent amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal that would ban exports of hazardous wastes from industrialized to developing countries has provoked substantial

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1. United States — Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/R (Jan. 17, 1996).

controversy.[2] The executive branch recently announced that it will challenge, in the WTO, the European Union's (EU's) ban on meat produced from animals treated with growth hormones as a non-tariff barrier to trade.[3]

The four books examined in this review reflect the intense interest in the trade-and-environment connection over the past several years. The trade-and-environment debate has a number of unique features that have attracted these authors and others. Both trade and environmental policies are intended to improve human welfare. With no "black hats," the trade-and-environment nexus presents more nuances than the popular paradigm of free trader versus self-serving protectionist or the familiar model of environmentalist pitted against greedy polluters. The observation that the ongoing public dialogue over trade and the environment involves a conflict of cultures has already become a cliché. But the readily discernible clash between international regimes raises intellectual questions of sufficient sophistication to attract writers as distinguished as the authors of each of these books.

Although these authors represent a variety of disciplines, all of them, consistent with the demands of the subject matter, recognize the need to adopt an integrated approach that spans narrowly defined specialties. Daniel Esty, a lawyer and former high-ranking official in the Environmental Protection Agency during the Bush administration, consciously introduces an economic perspective. This book is very thorough, surveying every nook and cranny of the trade-and-environment landscape. The author purposely adopts a policy-based and reformist approach. Each of the analytical chapters in the latter portion of the book concludes with a multiplicity of micro- and macro-level recommendations for policy change.

C. Ford Runge, an economist, wrote his work based on insights gained as co-director of the Trade and Environment Study Group organized under the auspices of the Council on Foreign Relations during 1992 and 1993. Adopting an approach similar to Esty, Runge synthesizes economic, environmental, and legal analysis in his text. By comparison with the Esty book, this project is less an attempt at a prescriptive solution, and more an attempt to articulate an overarching analytical framework for reconciling conflicts between environmental and international trade policies. Where Esty's book reads like testimony to a congressional

2. *See, e.g., Ban on Waste Exports Outside OECD Pushed Through Basel Treaty Meeting*, 18 Int'l Env't Rep. (BNA) 753 (Oct. 4, 1995).

3. Statement of Ambassador Mickey Kantor, United States Trade Representative (Jan. 11, 1996) (on file with *Michigan Journal of International Law*).

committee, Runge's effort is more of a "thought experiment" at a lower level of detail and somewhat higher level of generality.

David Vogel, approaching his project from the perspective of a political scientist, likewise grapples with the legal, environmental, and economic features characteristic of the field. In the author's own words, the main theoretical contribution of this work is a "comparative study of regulatory policy to that of international political economy."[4] The goal of the book is to demonstrate "how trade liberalization and agreements to promote it, rather than undermining effective regulatory standards, have often served to strengthen them."[5] This author meticulously surveys the historical and factual detail in the field and is particularly scrupulous in canvassing all points of view. The book contains case studies of the EU, including the seminal *Cassis de Dijon* case, the 1947 General Agreement on Tariffs and Trade (GATT),[6] the so-called "tuna-dolphin" dispute, and the North American Free Trade Agreement (NAFTA). This book demonstrates the proposition that one can never be entirely free of a particular disciplinary focus. Readers approaching the material from a legal perspective will find disconcerting the author's practice of citing secondary sources, such as newspaper stories, as authority for governmental actions.

James Cameron, Paul Demaret, and Damien Geradin, the editors of the two-volume work *Trade and the Environment: The Search for Balance*, have assembled an impressive array of authors and documents covering a wide scope in the trade-and-environment field. In addition to contributions from each of the editors, the first volume contains essays from leading GATT legal scholars (John Jackson, Ernst-Ulrich Petersmann), economists (Edward Barbier, David Pearce), law professors in Europe and the United States (Daniel Esty, Thomas Schoenbaum, Richard Stewart, and John Usher), and officials from international institutions such as the EU and the European Bank for Reconstruction and Development (Christoph Bail, Luc Gyselen, and Alke Schmidt). The remaining contributions in this nineteen-essay volume are written by several legal associates at Cameron's home institution, the British-based Foundation for International Law and Development (FIELD). The very useful second volume is a documentary supplement containing several of the most important primary sources relevant to this area of study. The

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4. DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 1 (1995).

5. *Id.* at 3.

6. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 194 (Jan. 12, 1948) [hereinafter GATT 1947].

collection includes significant GATT and NAFTA documents, texts of selected international environmental agreements, and a variety of EU and United States court decisions.

The first volume of this set explores the trade-and-environment relationship from the experiences within the GATT (now WTO), the EU, the United States, and the NAFTA. The first section, "Trade and the Environment in the GATT Context," suffers somewhat from the tendency of many of the authors to recycle their views from previous efforts and an unnecessarily protracted analysis and criticism of the 1991 tuna-dolphin dispute. Still, the careful reader is rewarded with several interesting perspectives on the trade-and-environment policy linkage. In particular, the second section of the volume, "Trade and the Environment in the European Community Context," provides a welcome European viewpoint of these issues that is too often neglected in North America. Regrettably, with a few exceptions, little effort is made to compare the approaches taken in the GATT, the NAFTA, the EU, and the United States with one another. Instead, each region or agreement's experience is often presented in isolation, a gap that might have been closed through a somewhat more active posture on the part of the editors. As it is, an intriguing opportunity to explore the potential transferability of lessons learned in each regime's trade-and-environment practice is inadequately pursued or missed entirely. The volume betrays evidence of hasty editing, and there is no index.

Not surprisingly, there is considerable common ground among these works. Each contains thoughtful reflections on the ongoing trade-and-environment dialogue. All traverse ground that is now reasonably well-trodden and clearly defined from the point of view of analytical discourse and real-world policy making: public participation in trade agreement dispute resolution processes, the interaction of trade-based regimes with multilateral environmental agreements, and the like. Instead of revisiting these themes, this review attempts to evaluate the contributions of these four books on a number of the major questions now outstanding in the trade-and-environment dialogue: (1) the potential abuse of environmental regulations for protectionist purposes; (2) unilateralism versus multilateralism in the use of trade measures to achieve environmental goals; (3) the appropriate linkages, if any, between the establishment of environmental and international trade policies; (4) institutional questions on the international level; and (5) an overarching perspective on the trade-and-environment debate.

I. NON-TARIFF BARRIERS AND UNILATERAL ACTIONS

One of the issues that has bedeviled many of those working in the trade-and-environment area is how to distinguish a legitimate environmental or public health measure from protectionism wrapped in environmental garb. While this question has attracted the attention of many, the extent of the problem is still far from clear. For instance, at the time of the negotiation of the NAFTA,[7] there appear to have been no cases in which any of the three NAFTA countries had abused measures designed to protect human health in a way that could plausibly be characterized as a non-tariff barrier to trade.

The authors adopt a variety of approaches to this issue, one of the core dilemmas of the trade-and-environment problem. The emphasis among these writers is on articulating tests for distinguishing legitimate environmental measures from protectionism masquerading as environmental regulation. As a general matter, these efforts, all of which are unsatisfying to some degree, demonstrate the complexity of crafting generic rules to address a potentially enormous variety of possible cases.

Esty asserts the need to "rebalance" GATT/WTO rules "to give greater deference to the judgments of national decision makers about environmental goals and the means chosen to pursue them."[8] He proposes a three-part test, the first prong of which would measure intent and effect. One of the obvious problems with such an approach is that intent, particularly in a democracy, is not necessarily unitary but often multifarious. The motivation for a national measure may be both protectionist and legitimately environmental, and various legislators may differ in their individual motivations.[9] David Pearce, in his contribution to *Trade and the Environment*, underscores this crucial point by noting that most environmental measures will contain some form of incidental "protectionist" element. "Deciding when protection or conservation is the *primary* motive could be very difficult."[10]

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7. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1993).

8. DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 135 (1994).

9. *See, e.g.*, United States-Canada Bilateral Panel, In the Matter of Lobsters From Canada, Panel No. USA 89-1807-01, paras. 9.7.1–9.7.3, 9.9.1 (May 25, 1990) (minority report reaching application of Article XX(g), incorporated by reference into Article 1201 of United States-Canada Free-Trade Agreement, concluding that challenged measure was at least in part trade-protective, and therefore not "primarily aimed at conservation" as required by Article XX(g)), *available in* LEXIS, Intlaw Library, Uscfta File.

10. David Pearce, *The Greening of the GATT: Some Economic Considerations*, *in* 1 TRADE AND THE ENVIRONMENT: THE SEARCH FOR BALANCE 20, 28 (James Cameron et al. eds., 1994) [hereinafter TRADE AND THE ENVIRONMENT].

Esty's second prong is environmental legitimacy. In this section he establishes a hierarchy that distinguishes among different cases, depending on the locus of the harm. This question of the use of trade restrictions to protect the environment outside of a state's jurisdiction is among the most contentious in the trade-and-environment relationship. In descending order of urgency, Esty would first array effects purely within a country's own jurisdiction, and then transboundary harm originating from abroad but causing harm domestically. Impacts on the global commons beyond the reach of national jurisdiction would be next in order of importance, and finally, injuries purely within a foreign country's jurisdiction.[11]

While this ranking might have some intuitive appeal, it does not necessarily withstand closer scrutiny. For example, effects on the global commons may be a more compelling case for trade measures than are transboundary harms. In the latter case, all manner of bilateral suasion not relying on trade measures, such as diplomatic communications, are available to affect the behavior of the state from which the harm originates, and the "victim" state has every motivation to make ample use of those existing channels. By contrast, injuries to areas beyond national jurisdiction are in many ways "orphan" problems, involving perhaps as much or more environmental harm, but often lacking a directly affected constituency that can effectively generate the political will for change.

In all these areas, Esty acknowledges the need for scientific underpinnings to trade measures to prevent environmental harm. However, adjudicating scientific controversies in a forum such as a WTO dispute settlement panel is fraught with irreducible difficulties.[12] In the absence of a clear scientific justification, Esty advocates deference to social value choices, which he labels "moral judgments," but only those that "are widely shared, as measured by whether the ethical position at issue is reflected in an international agreement."[13]

As his last prong, Esty urges the adoption of a criterion based on a measure of unjustified trade disruption. This proposal would consciously relax the "necessary" test found in Article XX(b) of the GATT, one of the principal avenues for justifying an environmental measure, and the particularly rigorous interpretation espoused by some GATT panels that

11. Other writers in this field have adopted a similar matrix for analyzing these situations. *See, e.g.*, Richard B. Stewart, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1351–61 (1992).

12. *See, e.g.*, David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 CORNELL INT'L L.J. 817 (1994).

13. ESTY, *supra* note 8, at 120.

turns on the trade effect of the measure considered.[14] Instead, Esty would substitute a requirement similar to the "proportionality" standard found in EU law. But, as Damien Geradin[15] and Ernst-Ulrich Petersmann[16] point out in *Trade and the Environment*, this approach, like many balancing tests, can be quite subjective in practical application. It may also elude attempts at clarification to a high level of predictability and analytical rigor.[17] Interestingly, Petersmann is convinced that the EU principle of proportionality places far more rigorous constraints on national environmental regulatory powers than the GATT/WTO regime does.[18]

Where Esty advises a total rethinking of the non-tariff barrier problem, Runge counsels a closer look at the utility of those approaches that have already been applied. In particular, he endorses the approach of a panel report produced under the auspices of the United States-Canada bilateral free trade agreement (CFTA),[19] a precursor to NAFTA, in a dispute settlement proceeding that otherwise has received limited attention. At issue were Canadian regulations requiring that all commercial harvests of roe herring and five species of salmon caught in Canadian waters, including those intended for export from Canada, be off-loaded or "landed" in Canadian territory. The panel concluded that the effect of

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14. *E.g.*, Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes, GATT Doc. No. DS10/R, paras. 74–81 (Nov. 7, 1990) (import restrictions not justified by Article XX(b) in light of availability of GATT-consistent or less GATT-inconsistent measures), *in* GENERAL AGREEMENT ON TARIFFS AND TRADE: BASIC INSTRUMENTS AND SELECTED DOCUMENTS [hereinafter BISD] 200, 223–26 (37th Supp. 1991), *reprinted in* 30 I.L.M. 1122, 1137–39 (1991); *cf.* United States — Measures Affecting Alcoholic and Malt Beverages, GATT Doc. No. DS23/R, paras. 5.41–43, 5.52 (June 19, 1992) (measures relating to import of beer are not the least trade-restrictive and therefore not "necessary" within meaning of Article XX(d), which exempts "measures necessary to secure compliance with laws or regulations which are not inconsistent with" GATT), *in* BISD 206, 282–83, 287–88 (39th Supp. 1993); United States — Section 337 of the Tariff Act of 1930, GATT Doc. L/6439, paras. 5.25–5.35 (Nov. 7, 1989) (availability of GATT-consistent or less GATT-inconsistent alternatives implies that challenged measures are not "necessary" under Article XX(d)), *in* BISD 345, 392–96 (36th Supp. 1990).

15. Damien Geradin, *Balancing Free Trade and Environmental Protection — The Interplay Between the European Court of Justice and the Community Legislator*, *in* 1 TRADE AND THE ENVIRONMENT, *supra* note 10, at 204, 213.

16. Ernst-Ulrich Petersmann, *Trade and Environmental Protection: The Practice of GATT and the European Community Compared*, *in* 1 TRADE AND THE ENVIRONMENT, *supra* note 10, at 147, 176.

17. *See, e.g.*, Case 302/86, Commission v. Denmark, 1988 E.C.R. 4607, 4632, 1 C.M.L.R. 619, 632 (1989) (concluding that Danish recycling scheme establishing numerical limitation on beverages that could be sold in unapproved containers was disproportionate to the environmental objective and therefore inconsistent with Treaty of Rome).

18. Petersmann, *supra* note 16, at 175.

19. Canada-United States Free Trade Agreement, Dec. 22, 1987–Jan. 2, 1988, Can.-U.S., 102 Stat. 1851, 27 I.L.M. 281 (1988) [hereinafter CFTA].

the "landing" requirement constituted an impermissible export restriction contrary to the GATT, the relevant provisions of which were incorporated by reference into the bilateral agreement.[20]

By comparison with Esty's proposed approach, which would "presume the legitimacy of any environmental standards[,]"[21] the panel in this dispute applied a highly intrusive and demanding slate of criteria that can only be described as overtly hostile to regulation of environmental problems and natural resources generally. For one, the panel read into the GATT a new requirement not found in the text of that instrument that would require a balancing of the costs and benefits of the challenged measure, taking into account the regulatory burdens to foreign commercial interests. Consequently, a panel must determine "whether the government would have been prepared to adopt that measure if its own nationals had to bear the actual costs of the measure."[22] Certainly one can appreciate the panel's sensitivity to the problem of shifting regulatory burdens to foreign interests that are not represented in the political process through which those burdens were imposed. But a cost-benefit test of the sort articulated by this panel has been expressly rejected in much environmental regulation, including a great deal of federal legislation in the United States, whose legitimacy from a trade perspective has never been challenged. Taken to its logical conclusion, the panel's approach in this report could result in overlaying a cost-benefit criterion on all environmental requirements with trade effects — clearly an excessively sweeping and blunt-edged instrument.

Similarly, the CFTA *Salmon and Herring* panel's treatment of scientific questions, an issue identified by Esty and others as one of major importance, is quite troubling. Apparently without the aid of any expert advice other than that available among the panelists, the panel concluded that sampling no more than eighty to ninety percent of the catch, and not 100 percent as required by the Canadian measure, would be sufficient to achieve its conservation purposes.[23] With respect to the question of scientific uncertainty, the panel opined that "it is never easy to justify

20. United States-Canada Binational Panel, In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring, Panel No. CDA 89-1807-01, para. 6.13 (Oct. 16, 1989), *available in* LEXIS, Intlaw Library, Uscfta File [hereinafter *Salmon & Herring* panel].

21. ESTY, *supra* note 8, at 117.

22. *Salmon & Herring* panel, *supra* note 20, para. 7.09; *cf.* para. 7.38 ("[T]he conservation benefits and other advantages that would have been derived from a landing requirement applicable to 100% of the salmon and herring catch would not have justified its adoption as a conservation measure.").

23. *Id.* paras. 7.34, 7.40.

imposing tangible burdens for the purpose of avoiding uncertain risks."[24] Overall, this report demonstrates little, if any, deference to the resolution of scientific questions by national regulatory authorities[25] and invites reexamination of scientific questions before panels in a manner that would be unthinkable in a proceeding for judicial review on the domestic level.

The reader can sympathize with Runge's desire for a yardstick to measure environmental regulations alleged to be non-tariff barriers that is both predictable and a "synthesis of law, economics, and environmental perspectives."[26] The result in the CFTA *Salmon and Herring* dispute might also have been "correct" in that the measure at issue was protectionist in intent and effect. However, the larger implications of the analytical approach adopted by that panel can hardly be regarded as anything but a source for concern: a highly flawed "synthesis" that gives grossly excessive weight to economic factors and scientific certainty and significantly insufficient deference to the determinations of national decisionmakers. Often the most thoughtful of these writers, Runge explicitly identifies the need to give due weight to an expressly environmental perspective in the trade-and-environment discourse.[27] Nonetheless, the reader is left wondering whether this author fully appreciates the long-term consequences of his endorsement of the analytical approach adopted by the panel in the CFTA *Salmon and Herring* dispute.

Although David Vogel's "primary focus is on the relationship between trade agreements, treaties, and conflicts and regulatory *standards*,"[28] his approach is more descriptive than prescriptive; this author does not offer detailed policy recommendations on a level of detail similar to those of Esty and Runge. Vogel's principal contribution to the discussion in this area directly addresses the concern that "legitimate"

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24. *Id.* para. 7.37.

25. *See, e.g.*, Wirth, *supra* note 12, at 845 (criticizing CFTA *Salmon and Herring* panel report for

> its intrusive review of the exercise of expert scientific judgement by national regulatory authorities; its lack of deference to science-based decisions of technically-oriented policy makers; its willingness to substitute the panel's own judgment for the numerical determinations of governmental experts based on the panel's own reading of scientific texts; and its relatively limited appreciation of the significance of scientific uncertainty in the regulatory process, which leads to an adjudicatory review that is exactly contrary to that prescribed by precautionary approaches.).

26. C. FORD RUNGE ET AL., FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL ISSUES 80 (1994).

27. *Id.* at 31–33.

28. VOGEL, *supra* note 4, at ix.

environmental constituencies may end up associated, perhaps unwittingly, with protectionist interests. The danger from a trade perspective inherent in such alliances amounts to an article of faith among supporters of trade liberalization.[29]

Vogel, applying the label "Baptist-bootlegger coalitions[,]" analogizes the situation to "the politics of prohibition in the United States: political support for keeping certain southern counties 'dry' has come from both Baptists, who favor prohibition on moral grounds, and bootleggers, whose business depends on keeping alcohol sales illegal."[30] Quite refreshingly and entirely contrary to the received wisdom, Vogel does not condemn these unholy relationships from a normative or evaluative point of view. Rather, he acknowledges, at least on this occasion, that such a convergence of interests is an essential element of the political and policy engine in which one state adopts a leading role. Baptist-bootlegger coalitions, he asserts, can operate as a counterweight to the least-common-denominator effect on national regulatory standards often cited as a concern about free trade agreements. At least in some situations, he concludes, "Baptist-bootlegger coalitions can serve to advance the legitimate interests of both Baptists *and* bootleggers."[31]

David Pearce, in his essay in the multiple-author *Trade and the Environment*, takes on the politically charged distinction between products, which if contaminated or substandard may be subject to trade measures under GATT/WTO rules, and the process by which those products are produced, which is generally thought to be beyond the reach of import restrictions at the national level. This was one of the most contentious points in the GATT's so-called "tuna-dolphin" panel report, which concluded that a United States ban on the import of tuna caught in a manner that endangers dolphins is contrary to GATT rules.[32]

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29. *See, e.g.*, 1 CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, INTERNATIONAL TRADE '90–'91, at 19–39 (1992) (GATT publication asserting that "[t]here is much evidence which points to a serious risk of environmental issues and concerns being exploited by protectionists for their own benefit." *Id.* at 21.).

30. VOGEL, *supra* note 4, at 20.

31. *Id.* at 261.

32. United States — Restrictions on Imports of Tuna, GATT Doc. No. DS21/R (1991), *in* BISD 155 (39th Supp. 1993), *reprinted in* 30 I.L.M. 1594 (1991) [hereinafter *Tuna Dolphin I Panel Report*]. Mexico did not seek the adoption of this report at the time of its release, and the GATT Council rejected a request by the EU to adopt the report. The EU and the Netherlands subsequently initiated their own challenge to the secondary import ban, which is designed to discourage "tuna laundering" by intermediary nations which purchase yellowfin tuna abroad and export it to the United States. This panel report, like the first, found that the secondary import prohibition is inconsistent with the United States' obligations pursuant to the GATT. United States — Restrictions on Imports of Tuna, GATT Doc. No. DS29/R (June 1994), *reprinted in* 33 I.L.M. 842, *available in* LEXIS, Intlaw Library, Gattpd File (1994). Neither report was adopted by the GATT Council, which ceased to exist as of the end of

In criticizing this report, Pearce emphasizes that, from an economic perspective, the GATT distinction between environmental damage arising from the product and damage arising from its method of production is an artificial one. Pearce points out that both the product *and* the method of production may respectively cause environmental damage in the exporting country and welfare loss in the importing country.[33]

Henry Thaggert, in an insightful intellectual twist on this well-worn topic, convincingly argues that the GATT/WTO regime currently allows distinctions in products based on the methods by which they are produced, specifically in the application of indirect taxes and subsequent border tax adjustments. He notes that there is no explicit definition of "like product" in the GATT and that there is ample evidence in the drafting history to suggest that "otherwise like products may be deemed 'unlike' based upon differences in production[.]"[34] Thaggert then suggests that the indirect tax precedent indicates that a process-based regulation undertaken in the name of environmental protection should be acceptable in the GATT/WTO regime so long as that measure does not afford protection to domestic production. Indeed, many of the authors represented in *Trade and the Environment* emphasize that GATT/WTO dispute settlement panels examining environmental trade measures should worry less about strictly interpreting the definition of "like product" and should concentrate instead on whether the trade restriction in question is applied in a discriminatory manner that favors domestic products. Esty similarly advocates a relaxation, if not outright abandonment, of the product-process distinction.[35] The level of consensus among these authors on this important question appears to be sufficiently widespread that policymakers might well take note.

Unilateralism versus multilateralism represents another, albeit related, line of cleavage in the trade-and-environment colloquy. As pointed out by John Jackson in his essay in *Trade and the Environment*, proponents of free trade fear undermining a liberalized international trading system through the imposition of unilateral standards on foreign societies potentially resulting in a crazy quilt of trade-based restrictions

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1995. Hence, these two reports do not represent authoritative interpretations of GATT/WTO obligations by the contracting parties to the GATT. *See* William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 94 (1987).

33. Pearce, *supra* note 10, at 29.

34. Henry L. Thaggert, *A Closer Look at the Tuna-Dolphin Case: "Like Products" and "Extrajurisdictionality" in the Trade and Environment Context*, *in* 1 TRADE AND THE ENVIRONMENT, *supra* note 10, at 69, 72.

35. ESTY, *supra* note 8, at 134.

around the globe.[36] If the past is any guide, unilateral measures are far more likely to inspire GATT/WTO dispute settlement challenges than multilateral environmental protection efforts. Indeed, the first tuna-dolphin report expressly articulated a preference for multilateral over unilateral measures,[37] and no national measure taken pursuant to a multilateral environmental agreement has ever been challenged in the GATT or WTO.

These books also demonstrate that what one person perceives as unilateralism can well be interpreted as leadership by another. As Esty correctly notes, "The intrinsic difficulty of multilateral decision making and the lack of existing institutional structures for effective international environmental policymaking . . . makes unilateral action a necessary, if unfortunate, policy option in some circumstances."[38] In short, the GATT/WTO regime provides a skewed, one-sided response to the current dilemma in most multilateral negotiations: how to overcome the downward drag of consensus-based processes in which the natural momentum inevitably tends toward least-common-denominator results. The authors represented in *Trade and the Environment*, many of whom react specifically to the issues identified in the first tuna-dolphin panel report, are perhaps representative of current thought in this area. In a welcome development, a majority of those contributors see a need for greater receptivity on the part of the GATT/WTO regime to unilateral measures to protect resources of the global commons. James Cameron and Zen Makuch emphasize that "[t]he importance of multilateral international agreements should not . . . obscure the value of unilateral or bilateral action."[39]

As Henry Thaggert writes, "The fact that a measure is unilaterally executed should not in itself be the grounds for invalidating it."[40] In Thaggert's view, a state of import that has suffered actual injury to its domestic environment, the global commons, or a migratory species that passes through its jurisdiction, and that has imposed certain restrictions on its own domestic producers of a like good contributing to the environmental damage, should be permitted by GATT/WTO rules to ban

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36. John H. Jackson, *Greening the GATT: Trade Rules and Environmental Policy*, *in* 1 TRADE AND THE ENVIRONMENT, *supra* note 10, at 39, 44.

37. *Tuna Dolphin I Panel Report*, *supra* note 32, at para. 5.28, BISD at 199–200, 30 I.L.M. at 1620.

38. ESTY, *supra* note 8, at 144.

39. James Cameron & Zen Makuch, *Implementation of the United Nations Framework Convention on Climate Change: International Trade Law Implications*, *in* 1 TRADE AND THE ENVIRONMENT, *supra* note 10, at 116, 120.

40. Thaggert, *supra* note 34, at 82.

import of the product if the process by which the product is produced contributes to the same damage regulated by the state of import. Thaggert attaches a useful appendix to his article that proposes the development of a framework for allowing the imposition of product-based distinctions beyond national borders. In like manner, Demaret, in one of his essays in *Trade and the Environment*, supports the use of trade restrictions to protect the global commons, allowing exceptional trade measures for species on the verge of extinction, even in the absence of international cooperation.[41] Significantly, Petersmann sees few limitations in GATT/WTO rules on "extrajurisdictional" trade restrictions if foreign production and exports cause transboundary pollution or injury to the global commons.[42] As with the non-tariff barrier issue, the scope of the "problem" is less than clear. Unilateral measures to protect resources outside a state's jurisdiction appear to have been rarely, if ever, directed at unrelated products except in situations closely tied to the purpose of a multilateral environmental agreement. But somewhat soberingly, Christoph Bail notes that the European Commission continues to support the position that a country should not unilaterally restrict imports on environmental grounds if the damage does not have an impact in that state's territory.[43] In a captivating permutation on the multilateral/unilateral duality, Cameron and Makuch speculate on the use of trade measures, particularly carbon dioxide or energy taxes, in the context of the U.N. Climate Change Convention.[44] This is a very important contribution because this agreement, unlike others that have assumed importance in the trade-and-environment discourse, does not expressly authorize trade-based environmental measures.

II. Linkages and Institutional Concerns

Throughout these works, a tug-of-war dynamic between trade realities and environmental concerns is readily discernible. Competing, but constant, themes alternately strengthen and sever the trade-and-environment connection. Runge's work is a good example of the ebb and flow of these motifs. He argues for bifurcation in policy tools: "*trade targets*

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41. Paul Demaret, *TREMs, Multilateralism, Unilateralism and the GATT*, *in* 1 Trade and the Environment, *supra* note 10, at 52, 64.

42. Petersmann, *supra* note 16, at 159.

43. Christoph Bail, *The Promotion of Policy Coherence on Trade and Environment: A Role for the European Community*, *in* 1 Trade and the Environment, *supra* note 10, at 333, 335.

44. United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 38, 102d Cong., 2d Sess. (1992), 31 I.L.M. 851 (1992) [hereinafter U.N. Climate Change Convention].

should be matched with trade instruments, and environmental targets with environmental instruments."[45] On the other hand, Runge repeatedly emphasizes the need for tightened environmental regulation to offset the deregulatory effect of trade liberalization.[46] But the vehicle for achieving this goal, at least at the international level, would not be an institutional structure to address the connection between trade and environment, but a new "World Environmental Organization" (WEO), portrayed as a vigorous multilateral institution whose mandate is confined to the environment. In a return to the theme of linkage, Runge acknowledges that trade agreements are inherently deals in which market access is provided on a consensual basis through the vehicle of a trade agreement. Runge then emphasizes that there is no reason why the price of market access should not be improved environmental standards and performance.[47] These themes are complementary, not mutually exclusive. Far from representing any confusion on the part of this author or others, each of these strains, appropriately understood, has a place in a comprehensive view of the trade-and-environment problem.

It is clear that there is a significant disparity in the primary institutional fora on the international level in which trade and environmental matters are considered. Most environmental problems have been treated on the international level in a segmented, compartmentalized manner. International environmental agreements are largely separate and uncoordinated attempts to deal with discrete problems like protection of the stratospheric ozone layer,[48] conservation of endangered species,[49] and environmental harm from international shipments of hazardous wastes,[50] to name three of the areas that have attracted the most attention in a trade context. Dispute settlement and enforcement provisions in most multilateral environmental agreements are weak.

Despite the great activity in drafting new international environmental treaties in recent years, the field of international environmental law has

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45. RUNGE ET AL., *supra* note 26, at 29.

46. *Id.* at 52.

47. *Id.* at 27.

48. *See* Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. No. 10, 100th Cong., 1st Sess. (1987), 26 I.L.M. 1550 (1987) (*adjusted and amended* June 29, 1990, S. TREATY DOC. No. 4, 102d Cong., 1st Sess. (1991), 30 I.L.M. 539 (1991), *and* Nov. 25, 1992, S. TREATY DOC. No. 9, 103d Cong., 1st Sess. (1993), 32 I.L.M. 875 (1993)).

49. *See* Convention on International Trade in Endangered Species, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

50. *See* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, S. TREATY DOC. No. 5, 102d Cong., 1st Sess. (1991), 28 I.L.M. 657 (1989) [hereinafter Basel Convention].

not been accompanied by a commensurate level of institutional growth. The result has been a lack of coordination and a high degree of fragmentation. Only one international organization, the United Nations Environment Program (UNEP), has a mission that is exclusively environmental. Numerous other international organizations established for a variety of other purposes have also played significant roles in international environmental challenges. Some of these organizations include the International Maritime Organization (IMO), under whose auspices a number of marine pollution agreements have been negotiated; the U.N. Economic Commission for Europe (ECE), which has been the vehicle for negotiating a number of important agreements on traditional air pollution issues; the Organization for Economic Cooperation and Development (OECD), which in the past has been a principal forum for discussing transboundary pollution and is now working on the trade-and-environment nexus; and the U.N. Food and Agriculture Organization (FAO), which has played a major role in work on pesticides at the international level. The negotiation of the U.N. Climate Change Convention adopted in 1992 was entrusted to another new body, the Intergovernmental Negotiating Committee (INC). Even more institutional fragmentation has taken place as the secretariats for environmental agreements have increasingly acquired an independent character and have located far from one another.

In contrast, the WTO now serves as a central focal point in the trade arena with broad-gauge rule-making authority potentially covering the entire range of trade-related matters, including environmental standards, intellectual property, and agricultural subsidies. Bilateral or regional trade agreements, such as NAFTA, generally rely on fundamental GATT/WTO principles and are consciously structured to be consistent with the global regime. The GATT's dispute settlement mechanisms, which were already quite effective by comparison with those in most multilateral environmental agreements, were further strengthened by the Uruguay Round of Multilateral Trade Negotiations and the creation of the WTO. Petersmann is particularly perceptive in recognizing these significant asymmetries between the international trade and environmental regimes.[51]

Both Runge and Esty strongly and correctly emphasize the need for more effective environmental rule-making mechanisms on the international level. Esty's "Global Environmental Organization" (GEO) is similar to the WEO proposed by Runge. The central need, as both

51. Petersmann, *supra* note 16, at 147–48.

recognize, is to overcome the inertial rigidity of an international system based on consent and consensus.[52] The core dilemma is to determine the attributes of this new organization which, presumably, will respond effectively to the problems of the past. Runge succeeds somewhat better than Esty at identifying institutional rules and mechanisms that might provide some incremental improvements. In the end, both are considerably less than satisfying, which is perhaps inevitable. Even the International Labor Organization (ILO), whose institutional structures still seem innovative by today's standards, has been only partially successful in achieving the kind of results Runge and Esty anticipate. It is neither reasonable nor necessarily desirable to advocate the formation of a global environmental legislature. Ultimately, as Vogel might opine, the determinative factor may well be political will and not institutional mechanisms. As Vogel states in his last sentence, perhaps there is no escaping that "[i]n the final analysis, the impact of trade and trade agreements on regulatory standards is determined by the interaction of domestic and international politics."[53]

Consequently, there is likely to be a continuing need not only to emphasize the efficacy of environmental regulatory mechanisms, but also to reassert the connections between international trade and the environment. The international trade regime has been driven by the central, overarching goal of liberalizing trade through the systematic elimination of affirmative governmental measures such as tariffs. Indeed, the history of the international trade regime since the Second World War can be seen as incremental but persistent progress in extending this purpose to include not only tariffs, but export subsidies and non-tariff barriers as well. The efficacy of the trade regime can be accounted for to a large extent by the simplicity of this central message: less governmental intervention, almost by definition, promotes liberalized trade. By contrast, international obligations with respect to the environment, and many other areas as well, anticipate and require the implementation of affirmative governmental actions intended to address particular problems. In a microcosm, this explains the recent clash between trade and the environment. One regime is designed to facilitate the implementation of affirmative governmental measures while the other is intended to assure their absence. From the point of view of an environmentally-motivated standard or regulation, the international trade regime as currently structured is a no-win proposition. There are no mechanisms

52. ESTY, *supra* note 8, at 89–95.

53. VOGEL, *supra* note 4, at 270.

for assuring the implementation of minimum governmental measures, and once those policies that do exist are subjected to trade-based scrutiny, nothing more than maintenance of the *status quo* can be expected in even the best possible case. As Esty succinctly puts the problem:

> The GATT currently is asymmetric. It provides for assessments that an environmental standard is, in some sense, "too high" and a burden on trade flows. But no comparable provision exists to allow a determination that an environmental standard is "too low" and is burdening other countries with pollution externalities. Such judgments are needed to determine whether a nation is "free riding" rather than participating in efforts to address transboundary or global environmental problems and, in doing so, perhaps reducing its manufacturing costs and obtaining an unfair trade advantage.[54]

At this point, Vogel enters the colloquy with a provocative and perhaps counterintuitive thesis: that trade liberalization, of its own force, "has, on balance, contributed to strengthening national regulatory policies, especially for traded goods and . . . for domestic production standards as well."[55] He attributes this to a "California effect":

> named for the state that has been on the cutting edge of environmental regulation, both nationally and globally, for nearly three decades. The California effect refers to the critical role of powerful and wealthy "green" political jurisdictions in promoting a regulatory "race to the top" among their trading partners.[56]

Ultimately, however, the analysis is disappointing. Although the author repeatedly refers to the GATT (now WTO) as a relatively weak institution by comparison with the United States government or the supranational EU, he fails to appreciate the important *qualitative* distinctions.

The "California effect" arises not from trade liberalization in the GATT/WTO sense, but as a result of the affirmative regulatory activity characteristic of a higher degree of structural integration than that found in most free trade agreements. As Runge would recognize, the "California effect" is dependent on the strength of institutions empowered to make environmental rules, not those whose mission is to promote trade liberalization in the deregulatory sense. Nowhere is this clearer than in Vogel's observation that "[p]aradoxically, the more authority nations concede over the making of national regulatory standards, the more

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54. ESTY, *supra* note 8, at 232.

55. VOGEL, *supra* note 4, at 269–70.

56. *Id.* at 6.

likely these standards will be *strengthened*."[57] Put somewhat differently, instead of a dilution of regulatory standards catalyzed by trade liberalization, Vogel envisages a "race to the top" led by those jurisdictions with higher standards. In cases in which this statement is true, it is not paradoxical at all, but a phenomenon entirely to be expected. The effect, contrary to Vogel's assertion, is not a result of trade deregulation. Rather, as international institutions acquire more active rule-making powers, it is that affirmative authority, not the constraints imposed by trade liberalization, that has the capacity to offset the deregulatory effects of trade liberalization.[58]

For this reason, the WTO and the EU, not to mention a true federal state like the United States, are not analogous entities because of the crucial differences among them. To be fair, many of the authors represented in these books blithely engage in such comparisons with relatively little appreciation of the profound difference in rules governing, for instance, the WTO on the one hand and the EU on the other. A number of the authors — particularly Vogel, but also Runge — survey experiences in the EU, the NAFTA, and the GATT/WTO regime and draw comparisons based on them. An entire section of *Trade and the Environment* is entitled "Trade and the Environment in the European Community Context." Damien Geradin's detailed analysis in this section of the trade-and-environment jurisprudence of the European Court of Justice is most useful on those terms. Alke Schmidt contributes a thorough historical survey of the waste trade under EU law, and John Usher acknowledges the important influence of the EU's external obligations, such as the Basel Convention, on the extension of the European Union's competence over member states in the area of environmental policy. Similarly, Paul Demaret examines the use of trade-related environmental measures in the EU's external relations. While these topics are fascinating and compelling in their own right, the extent to which the lessons learned are replicable in other trade-and-environment contexts is far from clear. To the extent that the editors of and contributors to *Trade and the Environment* believe that the GATT/WTO regime may have a great deal to learn from the EU's experience in settling trade-and-environment disputes, considerably more discussion is needed. Unfortunately, most of the authors leave too many of the potential comparisons unexplored. Analogies are provided that do not transfer well from the

57. *Id.* at 264.

58. *E.g.*, *Single European Act*, 1986 BULL. EUR. COMM. 5, 16–17 (Supp. 2) (adding to the Treaty of Rome arts. 130(r–s), expressly authorizing affirmative action at EU level with respect to environment), *reprinted in* 25 I.L.M. 503, 506 (1986).

GATT/WTO context to the EU and vice versa, and there is an unfortunate tendency to blur institutional and legal distinctions. Petersmann's contribution[59] and Christoph Bail's provocative but all-too-brief piece are the most perceptive exceptions to this general rule.

Perhaps this says more about the inherent differences between the EU and the GATT/WTO regime than it does about the authors' various well-intentioned efforts. The EU is a supranational institution, admittedly with limited subject matter jurisdiction or "competence," but certainly with the capacity to establish affirmative rules. By comparison, the WTO is merely the international equivalent of the "dormant" or "negative" commerce clause, hardly the basis for a constitutional structure comparable to municipal governments or even regional economic integration organizations like the EU. Without taking into account these critical differences, it is very difficult to compare these international institutions so as to draw meaningful conclusions. Moreover, an appropriate analysis suggests that the real problem in the trade-and-environment area is not, as is often argued, loss of national sovereignty, but selective cession of sovereignty.

Like Runge, many of the contributors to *Trade and the Environment*, including Jackson, Esty (in a contribution to the multiple-author volume), and Thomas Schoenbaum, see promising environmental beginnings in NAFTA's treatment of other multilateral environmental agreements that employ trade measures, the potential inclusion of environmental expertise on dispute settlement panels, investment disincentives to discourage the formation of "pollution havens," and the exhortation to harmonize up, not down. Much more acutely than most of the other authors, Runge appreciates the role of and need for affirmative environmental regulation in the context of trade liberalization. Accordingly, he asserts that, in the case of NAFTA, this counterweight was provided by the so-called "side agreement."[60]

Zen Makuch is considerably less impressed with Esty's characterization of NAFTA as the "'greenest' trade agreement ever[.]"[61] Unlike Runge, who regards the integrity of that instrument as crucial, Makuch is highly critical of the NAFTA environmental side agreement. He views the institution it establishes, the Commission on Environmental Cooperation, as unable to mitigate or prevent the environmental effects of the

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59. Petersmann, *supra* note 16, at 150–53.

60. RUNGE ET AL., *supra* note 26, at 95–96; *see generally* North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 (1993).

61. Daniel C. Esty, *Making Trade and Environmental Policies Work Together: Lessons from NAFTA*, *in* 1 TRADE AND THE ENVIRONMENT, *supra* note 10, at 373, 379.

parent trade agreement due to a series of inherent legal and structural weaknesses.[62] The Commission's powers, he asserts, are confined to identifying and drawing attention to environmental problems.[63] Its arduous enforcement mechanisms and dispute settlement provisions are additionally encumbered by several procedural hurdles whereby two-thirds of the NAFTA parties must concur before the process may continue. Public participation, he believes, is limited and all of the Commission's actions are overseen by the national governments of the NAFTA parties.[64] Significantly, in light of the emphasis both Runge and Esty place upon effective decisionmaking procedures in a WEO or GEO, "[a]ll decisions and recommendations of the Council [of the Commission, comprised of representatives of the three NAFTA parties] shall be taken by consensus[.]"[65] The Commission may very well be a useful forum for the NAFTA parties to address environmental challenges of mutual concern. But as Makuch pointedly emphasizes, the NAFTA side agreement, from a structural point of view, is very unlikely to represent the sort of institutional progress sufficient to match the rigor of the trade disciplines set out in the NAFTA proper. The side agreement assigns to the Commission a large number of highly desirable tasks, such as "pollution prevention techniques and strategies," "transboundary and border environmental issues, such as the long-range transport of air and marine pollutants," and "the environmental implications of goods throughout their life cycles."[66] These mandates, however, are quite open-ended and there is no guarantee that concrete progress will be achieved in any of these areas. By comparison with the NAFTA proper, which is an edifice of binding, enforceable obligations, the side agreement at the time of its adoption was, and remains, merely a preliminary blueprint for a structure on which construction has yet to commence.

Of all the authors, Runge perhaps best appreciates the horse trading, deal-making nature of the trade agreement negotiation process and its implications for the environment. The ultimate trade-and-environment linkage is environmental performance as a price of market access. Accordingly, he advocates "offering access to markets in lieu of direct

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62. Zen Makuch, *The Environmental Implications of the NAFTA Environmental Side Agreement: A Canadian Perspective*, *in* 1 TRADE AND THE ENVIRONMENT, *supra* note 10, at 387.

63. *Id.* at 405.

64. *Id.* at 427.

65. North American Agreement on Environmental Cooperation, *supra* note 60, art. 9, para. 6, 32 I.L.M. at 1482, 1485.

66. *Id.* art. 10, paras. 2(b), 2(g), 2(m).

aid"[67] and "market access . . . tied to specific attention in the South to environmental protection and improvements, a kind of 'environmental conditionality.'"[68] These notions are iconoclastic, perhaps particularly so for an economist. There is, however, a strong precedent. Precisely this kind of linkage was a centerpiece of the Uruguay Round, in which market access was provided in return for improved performance in the recognition of intellectual property rights. This "deal" produced for the first time a trade agreement, adopted as part of the Uruguay Round, containing affirmative requirements for intellectual property protection.[69] While environmental regulation is not precisely analogous to intellectual property rights, a potentially replicable precedent has now been established that could, at least in principle, provide a basis for, as Esty advocates, affirmatively "greening the GATT."

The various contributors to *Trade and the Environment* similarly view questions of linkage on a variety of planes. As John Jackson writes, "The only questions [sic] is how long the various political pressures for this type of reform will tolerate lack of concrete progress."[70] Despite their enthusiasm for improving the ties between the two regimes, many of the authors in this collection urge caution in the development of links between environment and trade. For instance, Jackson promotes a definitive "interpretation" endorsed by WTO members to preserve the environmental protection goals in multilateral environmental agreements that utilize trade measures. Simultaneously, he is wary of eroding the benefits of environmental guidelines such as the polluter-pays principle by allowing a potential GATT/WTO exemption for envi-

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67. RUNGE ET AL., *supra* note 26, at 26.

68. *Id.* at 27. The references to foreign aid and conditionality invite analysis of a different sort of linkage that has been little appreciated. In recent years, the World Bank and other multilateral and bilateral aid donors have increasingly emphasized environment as a component of development assistance. To the extent that this "green conditionality" applies to exports from the recipient country, the prohibition on process standards in the GATT/WTO regime may very well send a conflicting message to recipient countries. Although development assistance is increasingly tied to environmental performance, market access is not. Indeed, GATT/WTO rules would affirmatively impede any efforts to coordinate incentives by such international institutions as the World Bank and the WTO. As Runge implicitly recognizes, rules governing trade flows are likely to be far more powerful agents of change in encouraging improvements in environmental quality than direct aid will ever be. As one of his multiplicity of recommendations, Esty proposes a "Green Fund" financed by a 1/100 of one percent tax on trade and capital flows. ESTY, *supra* note 8, at 239. The performance of the Global Environment Facility (GEF), the extant international institution most closely related to this proposal, has been sufficiently uneven that it would probably be premature to replicate that model on the scale envisaged by Esty.

69. *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, GATT Doc. MTN/FA II-A1C (Dec. 15, 1993), *reprinted in* 33 I.L.M. 1, 4 (1994).

70. Jackson, *supra* note 36, at 50.

ronmental subsidies.[71] No fewer than four of the contributions — those by Pearce, Jackson, Petersmann, and Cameron and Makuch — recommend clarifying the environmental exceptions contained in Article XX of the GATT.

Institutional issues are treated with a similarly high profile. Writing prior to the adoption of the Uruguay Round, Cameron and Halina Ward recommend a variety of institutional reforms including increased public participation, voting restructuring, and changes to the dispute settlement system, few of which were in fact accepted. In particular, their suggestion for the establishment of an Environmental Impact Committee, under the auspices of the GATT/WTO, to assist in the development of a methodology to assess the environmental effects of liberalized trade[72] deserves greater attention in the public policy arena than it appears to have received.

III. THE BIG PICTURE

The task in addressing the trade-and-environment dialectic, according to each of these books, is to reconcile the conflict between international trade and environmental regimes. The touchstone in each work is "balance," a word that appears in the title of two of the four books, and the analytical emphasis is on an accommodation between the two fields. Esty, whose approach is characteristic of the other books, repeatedly announces that he is searching for a "middle ground"[73] or a "middle course."[74] Cameron sees in the activities of a variety of international institutions exploring the trade-and-environment relationship "genuine hope for the achievement of balance."[75] This suggests that what is required is compromise or "trade-offs"[76] to achieve a welfare-optimizing equilibrium between these two public policy goals. Defining the problem in this manner inevitably leads to the sort of difficulties and complexities that bamboozle many of these authors when they try to identify unacceptable environmental regulations, establish tests for unilateral measures, or parse appropriate institutional roles. There is, however, no *a priori* reason to believe that a split-the-difference approach will neces-

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71. *Id.* at 49.

72. James Cameron & Halina Ward, *The Multilateral Trade Organisation: A Revised Perspective, in* 1 TRADE AND THE ENVIRONMENT, *supra* note 10, at 96.

73. ESTY, *supra* note 8, at 41.

74. *Id.* at 55.

75. James Cameron, *Introduction* to 1 TRADE AND THE ENVIRONMENT, *supra* note 10, at 14, 14.

76. RUNGE ET AL., *supra* note 26, at 12.

sarily reach a larger truth. More fundamentally, a perspective that treats this area merely as a clash of regimes may very well overlook the deeper dynamics that gave rise to this conflict in the first place. A single earthquake may very well be evidence of great shifts in tectonic plates.

An alternative approach might avoid asking the question, which each of these books does either explicitly or implicitly, whether international trade is consistent with environmental protection or vice versa. Instead, one might consider the role of both international trade and environmental protection as embedded in the larger public policy goal of encouraging sustainable development. "Sustainable development" was the central theme of the United Nations Conference on Environment and Development (UNCED), the so-called "Earth Summit" held in Rio de Janeiro in June 1992 and attended by more than 100 heads of state and government. It was also the theme in the report of the earlier World Commission on Environment and Development, a group of twenty-one eminent individuals appointed in their personal capacities and chaired by Norwegian Prime Minister Gro Harlem Brundtland. Defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs,[77] the content of "sustainable development" as a concept is somewhat indeterminate. If anything is clear, it is that the term is plainly intended as an overarching construct that encompasses international trade and environmental protection, as well as other compartmentalized public policy goals such as development assistance. Although all four of these books mention the Rio Conference, none, with the possible exception of Cameron and Ward in their essay in *Trade and the Environment*, ascribe to it a central role in the trade environment colloquy. Indeed, Vogel treats the event in a scant paragraph.[78]

From this point of view, one might ask whether certain environmental protection measures are so inappropriately burdensome that they unreasonably interfere with the capacity of present generations to meet their own needs. This is one way of interpreting the non-tariff barrier problem discussed in Part II above. Similarly, one might identify the notion of "sustainable trade" as trade that facilitates the efforts of present generations to satisfy their needs while preserving the capacity of future generations to meet their own needs. Without further elaboration, the concept of "sustainable trade" thus defined is probably not capable

77. *See* EXPERTS GROUP ON ENVIRONMENTAL LAW: WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS 43–45 (1987).

78. VOGEL, *supra* note 4, at 140–41.

of precise application as a legal test. It does, however, accommodate the relatively elementary notion that some types of trade can encourage sustainability, while other kinds of trade might undermine that goal.

The Agreement Establishing the World Trade Organization, one of the principal products of the Uruguay Round, refers to "optimal use of the world's resources in accordance with the objective of sustainable development[.]"[79] Despite this recitation and the encouragement of Cameron and Ward to make the international trading system truly supportive of sustainable development,[80] the structure of the Uruguay Round in larger form and composition is basically the same as the GATT and other free trade agreements. That is, the GATT/WTO rules are designed to encourage deregulated markets through the removal of national measures that impede trade: first tariffs, and then other non-tariff barriers such as environmental regulations that restrict market access for beef and gasoline, to choose two recent examples. The GATT/WTO system is a regime consisting of primarily "negative" obligations in which states agree to refrain from taking actions, such as imposing certain tariffs, that could impede market access. For this reason, the international trade regime can define sustainability in only the most simplistic syllogism: deregulated markets promote trade, trade generates wealth, and wealthier countries have more resources to deploy for realizing environmental protection and other public welfare goals. Runge, the economist, rejects this chain of reasoning, arguing instead that "trade rules alone are inadequate to the task: environmental rules are also required."[81]

Runge's statement is self-evident if one interprets "trade rules" strictly as "rules that promote deregulation." Likewise, Vogel states that "[t]he greater the commitment to economic integration, the more trade agreements will intrude upon domestic policies."[82] This too is only true to the extent that "economic integration" is equated with "deregulated trade." As a consequence of these and similar outlooks, all of these books in essence are confined to discussions of limits to deregulation because of concern for environmental and public health values.

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79. Agreement Establishing the Multilateral Trade Organization, Dec. 15, 1993, pmbl. para. 1, 33 I.L.M. 13, 15 (1994). The name given to the organization during negotiations, Multilateral Trade Organization (MTO), was changed to World Trade Organization (WTO) at the time the agreement was signed. *Id.* at 13 n.1.

80. Cameron & Ward, *supra* note 72, at 103.

81. RUNGE ET AL., *supra* note 26, at 95; *cf.* Kenneth Arrow et al., *Economic Growth, Carrying Capacity, and the Environment*, 268 SCIENCE 520 (1995).

82. VOGEL, *supra* note 4, at 9.

It may be heresy from the point of view of trade policy, but from the perspective of sustainability the GATT/WTO's one-size-fits-all deregulatory approach may not be appropriate for all trade. It is entirely reasonable to ask *what kind* of trade, *on what terms*, will minimize adverse environmental impacts and encourage environmental conservation and sustainable development. Runge, for example, compellingly argues that protectionist elements in the EU's Common Agricultural Policy have exacerbated environmental degradation,[83] and that trade liberalization in the traditional, deregulatory sense might very well be an appropriate policy response. This may be a situation in which trade liberalization can improve environmental quality, maximize social utility, and contribute to the imperative for sustainable development by discouraging overexploitation or inefficient use of natural resources, particularly through the removal of environmentally inappropriate subsidies.

At the same time, it is by no means apparent that a deregulated or unregulated market is sustainable for all forms of international trade. As Runge among these authors most clearly recognizes, such a view is nothing short of Panglossian. Such international agreements as those governing trade in hazardous wastes[84] and endangered species[85] are most certainly trade agreements and arguably "sustainable trade" agreements, although clearly not "free trade" agreements as that term is ordinarily used. Through this lens, the treatment of multilateral environmental agreements, which causes each of the authors to go through complex analytical contortions, becomes much simpler. Presumably, these agreements were motivated by a recognition that unrestricted trade in these sectors is presumptively unsustainable, that trade presents unusual environmental, public health, *and trade* problems, and that affirmative regulation of such trade is therefore required.

Similarly, the very notion of "sustainable development" raises the question whether certain forms of environmental regulation should be encouraged by the international trade regime, as opposed to merely tolerated. One could imagine a variety of incentives and disincentives — taxes, subsidies, border fees, standards for imports and exports, consumer information, foreign aid, and expanded market access in return for improved environmental performance — crafted so as to encourage more environmentally sustainable development. Instead, one of the more pressing problems currently in the trade-and-environment area,

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83. RUNGE ET AL., *supra* note 26, at 41.

84. Basel Convention, *supra* note 50.

85. CITES, *supra* note 49.

"ecolabelling" to alert consumers to products manufactured in a more environmentally sensitive manner, is emblematic of the manner in which international trade rules currently operate. Some of the schemes that have caused concern are voluntary as opposed to mandatory, and labelling in general, by addressing only the transmission of information, is already one of the least burdensome forms of regulation. None of this has prevented ecolabelling schemes from becoming a major flash point in the current debate.[86]

The conventional wisdom is that well-meaning attempts to interfere with the free flow of goods in such environmentally sensitive sectors as tropical timber will only backfire, exacerbating inefficiencies in the allocation of resources. A number of the authors disapprovingly refer to Austrian legislation addressing imports of tropical timber.[87] This example is particularly noteworthy, because the weakness may have been an excessively narrow focus on one aspect of the problem of deforestation, namely market access, by one country acting unilaterally. A more comprehensive, multilateral undertaking that identified the needs of tropical countries and responded with an appropriate mix of rules and incentives, as advocated by the economist Edward Barbier in *Trade and the Environment*,[88] might have been more successful. Such an initiative could also be a vehicle for addressing overconsumption in industrialized countries, a constant refrain voiced by representatives of developing country governments as a precondition to their acceptance of additional international environmental obligations. But as currently structured, the international trade regime also encourages overdependence of the South countries on the North's export markets, a phenomenon which tends to dampen any serious multilateral effort to address this problem. Tellingly, there have been few if any serious attempts to grapple with these questions in a meaningful way.

In short, deregulation, the natural endpoint of free trade agreements, is not necessarily a vehicle for promoting environmentally sustainable development. To the contrary, unregulated markets have generally been rejected as a mechanism for pursuing environmental quality improvements. This is the point that Runge makes clearly and forcefully, although in somewhat different words. It is hardly a shocking proposition,

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86. *See, e.g., WTO Trade and Environment Committee Agrees on Work Programme in Preparation for the Singapore Ministerial Meeting*, at 6, WTO Doc. PRESS/TE 006 (Dec. 8, 1995).

87. ESTY, *supra* note 8, at 189; VOGEL, *supra* note 4, at 129–30.

88. Edward B. Barbier, *The Role of Trade Interventions in the Sustainable Management of Key Resources: The Cases of African Elephant Ivory and Tropical Timber*, *in* 1 TRADE AND THE ENVIRONMENT, *supra* note 10, at 436, 450.

as the need for regulatory interventions to respond to market failures has been well recognized on the international level for some time. For example, a 1972 recommendation of the OECD plainly states that:

> Environmental resources are in general limited and their use in production and consumption activities may lead to their deterioration. When the cost of this deterioration is not adequately taken into account in the price system, the market fails to reflect the scarcity of such resources both at the national and international levels. Public measures are thus necessary to reduce pollution and to reach a better allocation of resources by ensuring that prices of goods depending on the quality and/or quantity of environmental resources reflect more closely their relative scarcity and that economic agents concerned react accordingly.[89]

"Ensuring that prices of goods depending on the quality and/or quantity of environmental resources reflect more closely their relative scarcity"[90] is the exhortation, contained in the polluter-pays principle, that encourages cost internalization as at least a first step toward assuring environmental quality.

Not coincidentally, Esty repeatedly identifies cost internalization as one, if not the only, requirement of sufficient generality in the environmental field to act as a counterweight to the basic trade rules specifying the most-favored-nation treatment, the requirements for national treatment, and the prohibition on quantitative restrictions.[91] Unfortunately, Esty does not carry the insight to its logical conclusion. Cost internalization and the polluter-pays principle are not only entirely consistent with the goals of liberalized trade, but are affirmative mechanisms to "avoid distortions in international trade and investment[.]"[92] Current GATT/WTO rules allow application of the polluter-pays principle as well as implementation of requirements for cost internalization as domestic environmental measures,[93] but they do not seem to authorize the

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89. *Guiding Principles Concerning International Economic Aspects of Environmental Policies*, Annex ¶ 2, OECD Doc. C(72)128 (May 26, 1972), *reprinted in* ORGANIZATION FOR ECON. COOPERATION & DEV., OECD AND THE ENVIRONMENT 23, 24 (1986).

90. *Id.*

91. ESTY, *supra* note 8, at 38, 176–78, 226–27.

92. *Guiding Principles Concerning International Economic Aspects of Environmental Policies*, *supra* note 89, Annex ¶ 4; *see generally* David A. Wirth, *The International Trade Regime and the Municipal Law of Federal States: How Close a Fit?*, 49 WASH. & LEE L. REV. 1389, 1398–401 (1992).

93. United States — Taxes on Petroleum and Certain Imported Substances, GATT Doc. L/6175, paras. 5.2.3–5.2.7 (June 17, 1987) (discussing polluter-pays principle), *in* BISD 136 (34th Supp. 1988), *reprinted in* 27 I.L.M. 1601, 1613–14 (1988).

enforcement of such standards with respect to environmental effects in the country of export. If cost internalization should be a condition precedent to entry into commerce on the national level, the same considerations counsel the adoption of a similar standard for access to the international marketplace created by the WTO instruments and other free trade agreements. With an affirmative requirement for cost internalization contained in WTO instruments, for example, the international trade regime could truly promote sustainable trade and environmental protection simultaneously. The practical impediments to realizing such a goal should not be understated. But as noted above, the door has already been opened to the inclusion of affirmative obligations into trade agreements in the form of intellectual property rights in the Uruguay Round. To paraphrase Vogel's ultimate conclusion, what would appear to be lacking is political will.

As noted in the foreword to the Runge book, "The final chapters of the ongoing trade-environment debate have not been written."[94] In its way, each of these works adds another chapter to that public policy discussion by fully engaging the reader, both intellectually and analytically, in a challenging area where there is much more work still to be done. The field is so rich that it is probably unrealistic to expect a fully rounded treatment in any one work. As demonstrated by the wide variety of backgrounds of these writers, the trade-and-environment area can be approached from any number of fields and benefits particularly from a multidisciplinary approach. To appreciate the many facets of this gem, one should not rely on any one discipline or, indeed, any one author.

94. RUNGE ET AL., *supra* note 26, at viii.