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Developing Countries in the International Trade Order

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We cannot continue with a majority of the world’s people excluded from participation in global economic management. For instance, the G-7 self-evidently excludes most of the world’s population and a large number of the world’s substantial and fast-growing economies. The fact is that the countries which will increasingly provide our best hope for economic growth and new markets are simply not represented where it most counts.

—Peter Sutherland

INTRODUCTION

Recent debates concerning the North American Free Trade Agreement (NAFTA) and the Uruguay Round of multilateral trade negotiations raise many basic questions regarding the economic and social order in which we live, both nationally and internationally. The likely

effect of the Uruguay Round upon French farmers has been much discussed, as has the possible effect of NAFTA upon the environment, and upon low wage workers and other disadvantaged groups in the United States and Canada. The focus here will be upon another aspect of the controversy over trade, i.e. the failure of the present international trade regime to protect the legitimate interests of developing countries. More broadly, the nature of the economic and social relationship between the industrialized democracies and the developing countries is an underlying theme. This article is not a call for an international redistribution of wealth, however it does argue that in today's interdependent international community, progress towards environmentally sustainable prosperity can best be achieved through international economic institutions and principles which protect the interests of all states, irrespective of wealth, and not solely those of the dominant group of states.

In the past, developing countries have challenged the legitimacy of the international trade order dominated by the industrialized democracies, but with the successful conclusion of the Uruguay Round of multilateral trade negotiations, developing countries are now to be brought into the mainstream of international trade to a greater extent than ever before. Their willingness to accept trade liberalization in areas such as services, investments and intellectual property rights demonstrates their strong commitment to strengthening the principles and institutions of the international trade regime.

Despite the new spirit of compromise and cooperation from developing countries, a number of North-South trade tensions remain. The linking of the international trade regime to the international environmental regime has recently emerged as a key area of contention.

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When the GATT was founded issues of the environment and
development were not viewed as central to the functioning of the
international trade regime. Today, these matters are recognized to be
of great importance, just as the norms and institutions of the inter-
national trade order are being updated by the agreements reached in
the Uruguay Round. The new agreements go very far in broadening
the GATT system's range of application, and they also provide a good
basic framework for incorporating the environmental imperative into
the GATT regime. But the vital goal of "greening the GATT" cannot
be effectively achieved unless the principles and decision-making pro-
cedures of the international trade order come to accommodate the
legitimate interests of developing countries more fully than they have
in the past. While the power-oriented voting structures within the
World Bank and the International Monetary Fund have not prevented
these institutions from responding to environmental concerns, the
integration of these concerns into the international trade regime will
require sacrifice by all states, and thus cannot be imposed by the rich
countries upon the poor.

Part I of this article briefly reviews the principles and institutions
of the existing international trade order in a historical context. Part II
focuses upon some long-standing international trade issues of special
concern to developing countries and upon the international trade
regime's response to these issues. Part III considers the impact of the
environmental revolution upon the trade interests of developing coun-
tries, while Part IV reflects upon the future of developing countries in
the international trade order and under the new World Trade Orga-
nization.

I. PRINCIPLES AND INSTITUTIONS OF THE POST WORLD WAR II
INTERNATIONAL ECONOMIC ORDER IN HISTORICAL CONTEXT

A. INTERNATIONAL ORGANIZATIONS AND THE WORLD ECONOMIC
ORDER

World War II was preceded by the great depression, the most
devastating global economic collapse in recorded history. Many of the
factors contributing to that collapse were linked to international trade
and exchange policies. The Smoot-Hawley Tariff Act\(^7\) passed into law
by the United States in 1930 was intended to protect American jobs
from foreign competition, but instead provoked protectionist measures
by other countries and ultimately choked off international trade to the

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This problem was exacerbated when countries also manipulated exchange rates by devaluing their currencies in an effort to gain an advantage in trade. The monumental failure which resulted from these short-sighted policies of economic nationalism inspired the architects of the post World War II economic order to fashion international institutions which would prevent a recurrence of this behavior. The system of multilateral economic institutions originally proposed has sometimes been likened to a three legged stool, each leg corresponding to a separate, specialized agency affiliated with the United Nations (UN).

One leg of the stool was to be a strong International Trade Organization (ITO) based on a treaty (the Havana Charter) which would have mandated the elimination of most barriers to trade. Even though the proposed ITO was largely an American initiative, the Havana Charter was never sent to the United States Senate for approval. Since the United States was indisputably the preeminent economic power in the world at the time, the dream of an ITO could not survive without American support. The less ambitious framework of the General Agreement on Tariffs and Trade (GATT) was all that could be agreed to at the time. Although the GATT had originally been created as an interim arrangement, the failure of the Havana

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10. The ITO Charter's formal title was Charter for an International Trade Organization, but it is often referred to as the Havana Charter for an International Trade Organization, or the "Havana Charter." Charter for an International Trade Organization, U.N. Doc. E/CONF.2/78 (1948) [hereinafter Havana Charter].

11. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. 1, 55 U.N.T.S. 187 [hereinafter GATT]. See also GATT Basic Instruments and Selected Documents 1-78 (1969). The Uruguay Round resulted in agreement to create a new and more powerful World Trade Organization (WTO) to take the place of the weaker GATT mechanism. If and when this new WTO comes into being the original dream of three strong institutional pillars of the international economic order may finally be realized. For a discussion of the new WTO, see infra notes 238-51 and accompanying text.
Charter left the GATT to take on an expanded role as a permanent multilateral trade mechanism.

The other two legs of the stool were completed more or less as planned, pursuant to agreements reached at the Bretton Woods Monetary and Financial Conference of 1944. Two key international economic institutions were negotiated at that Conference, the International Monetary Fund (IMF)\textsuperscript{12} and the International Bank for Reconstruction and Development (IBRD).\textsuperscript{13} Each institution plays an important role in today's international economic order. The IMF was created to promote international monetary cooperation. Its primary tasks were to maintain exchange rate stability, help members to deal with short term balance of payments disequilibria and in general to establish a reliable international payments system.\textsuperscript{14} Since its inception, the task of the IMF has evolved considerably, and today it plays an especially important role helping developing countries and their creditors to manage the international debt crisis.\textsuperscript{15} The IMF allows debtor countries to draw upon its financial resources only if they comply with IMF "conditionality."\textsuperscript{16} In practice, this means that it makes financing available to debtors only if they promise to comply with conditions concerning their national economic policies and performance. After initial approval, it continues to act as an international financial policeman monitoring compliance with the promises exacted from debtor countries, and giving a creditworthiness green light to the international financial community.\textsuperscript{17}

\begin{itemize}
\item 14. Articles of Agreement of the International Monetary Fund, \textit{supra} note 12, art. 1.
\item 15. For a more in-depth discussion on the IMF role in dealing with the international debt crisis, see E. Walter Robichek, \textit{The International Monetary Fund: An Arbiter in the Debt Restructuring Process}, 23 \textit{COLUM. J. TRANSNAT'L.} L. 143, 143-54 (1984).
\item 17. \textit{See Robichek, supra} note 15, at 150.
\end{itemize}
The IBRD, the central institution in what is commonly referred to as the World Bank Group, was established in 1945 in order to finance the reconstruction of countries devastated by World War II as well as to finance the development of more traditionally impoverished areas of the world. The Marshall Plan, introduced in June of 1947, eventually assumed the burden of financing reconstruction in Europe leaving the Bank free to devote its resources to the development task.

The Bank's role goes beyond providing development financing, since it has always provided borrowers with advice on development as well. There is a fine line indeed between giving advice on development and giving general advice on economic policy, and in practice, the Bank now shares with the IMF responsibility for inducing debtor countries to make much needed macroeconomic reforms. Continuing problems with international debt have made the Bank and the IMF

18. The purposes of the IBRD are set out in article 1 of the Articles of Agreement of the IBRD. Examples of these purposes are to “assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes,” (art. 1(i)); to “promote private foreign investment,” (art. 1(ii)); and to “promote long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories,” (art. 1(iii)). see Articles of Agreement of the IBRD, supra note 13.

19. See GARDNER, supra note 9, at 302-04 (discussing how the operations of both the IMF and the World Bank in Europe yielded priority to the Marshall Plan during the late 1940s).

20. See Articles of Agreement of the IBRD, supra note 13, art. 1(iv) (enjoining the Bank “to arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first.” In order to do this, the Bank identifies what it considers to be the highest development priorities of each of its borrowers and through advice and lending it supports these priorities).

21. Some resist the idea that the World Bank can impose structural adjustment conditionality on its borrowers as well as the IMF can. In September of 1988, the Bank agreed to make a large loan to Argentina in exchange for a “Letter of Development Policy” in which that country pledged to undertake major macroeconomic reforms. The IMF had been negotiating with Argentina for over six months concerning many of the same policies, and some IMF officials were skeptical that the Bank would be able to enforce the reforms. Such enforcement has traditionally been left to the IMF, but Argentina preferred to deal with the Bank, probably because the reforms requested by the Bank were somewhat less stringent than those of the IMF. See Robert J. McCartney & Hobart Rowen, World Bank Agrees to $1.25 Billion in Loans to Argentina; Country to Make Major Economic Reforms, The Wash. Post, Sept. 26, 1988, at A12. Since this incident, the Bank has been more careful in attempting to avoid encroaching upon the Fund's role as international financial policeman.
more important that ever to the functioning of the international economic order.

While the Bank and the IMF fulfill an indispensable role in enforcing a certain order within the international regimes governing international monetary affairs and development, the enforcement power they wield is not exercised in a symmetrical way since not every country is equally policed by these institutions. A basic problem of asymmetry emerged as it became evident that it was principally the developing countries which would have to accept the "conditionality" of the World Bank and IMF. The obligation of the borrower is inherent in the concept of banking, but the sovereign borrower can be sensitive to any perceived derogation from sovereign equality. From the perspective of these countries, it seems unfair that the United States, now sometimes said to be the world's largest debtor country, is not required to follow an IMF austerity program. The decision-making structure within the Bretton Woods institutions, as discussed below, reinforces the problem of asymmetrical enforcement.

B. DECISION-MAKING IN THE BRETTON WOODS INSTITUTIONS

The World Bank and the IMF possess similar organizational characteristics. All powers are vested in a Board of Governors, comprised of one governor and one alternate appointed by each member. The actual voting power of each member country is proportionally related to its financial contribution to the institution. In the IMF, for example, each country has 250 votes and one additional vote for each part of its IMF financial quota equivalent to 100,000 special drawing rights. The voting formula in the World Bank follows the same principle of "weighting" the vote of each member state to correspond with the financial contribution made to the organization.

This weighted voting formula has been very unpopular with the developing countries since, in effect, it institutionalizes within the Fund and the Bank the inequality between the economically strong countries and the economically weak ones. The desire of these latter countries

22. See Well Would you Debit It, THE ECONOMIST, Aug. 1, 1987, at 73 (observing that "[e]conomic reporters love to refer to America as the world's biggest debtor," but that "if America's external assets and liabilities were added up properly, it would quite possibly be found that it is . . . [instead], the world's biggest creditor.").

23. Articles of Agreement of the IMF, supra note 12, art. XII, § 2; Articles of Agreement of the IBRD, supra note 13, art. V, § 2.

24. Articles of Agreement of the IMF, supra note 12, art. XII, § 5. These quotas reflect the size and strength of each country's economy.

25. Articles of Agreement of the IBRD, supra note 13, art. V, § 3.
for greater equality has led to the adoption, by the United Nations Conference on Trade and Development (UNCTAD) and the UN General Assembly, of resolutions calling for the reform of the decision-making procedures in international economic and financial institutions.26

The weighted voting procedure may seem to conflict with notions of "sovereign equality,"27 but it has the virtue of being a practical solution to a very real problem. The major contributors to the Bank and the Fund are naturally concerned about how the funds they contribute are used. In the case of the Bank, contributors are also concerned about potential liability should the Bank ever face losses due to defaulting borrowers. Weighted voting answers these concerns and thereby assures the participation of donor countries. This system may not actually violate the principle of sovereign equality, but it does recognize the economic inequality between member states, something which cannot realistically be ignored.

As noted above, the problem posed by this inequality is compounded by the fact that, with few exceptions, only developing countries (and the new economies in transition from the former Soviet bloc) need to draw upon the resources of the Bretton Woods twins. An asymmetrical regime results from the fact that only these countries are required to accept the terms and conditions commonly imposed by these institutions upon borrowing countries which draw heavily upon their resources. In practice, this means that while industrialized countries wield predominant power in the decision to lend or not to lend, the bitter but often needed medicine of economic austerity is disproportionately imposed upon developing countries. We will see below that similar problems of asymmetry have emerged with regard to the new and emerging international environmental regime.

C. INTERNATIONAL TRADE THEORY

Prior to 1800, the prevailing "mercantilist" view of international trade assumed that the prosperity of a country could be maximized by policies which ensured a surplus of exports over imports.28 Since precious metals were used to settle international accounts, this balance would generate a net inflow of gold and silver from the rest of the


27. Article 2, ¶ 1 of the UN Charter states that "[t]he Organization is based on the principle of the sovereign equality of all its Members." U.N. CHARTER art. 2, ¶ 1.

world. The implicit assumption was that the world’s economic pie was of constant size, and therefore any gains experienced by one nation from trade had to come at the expense of its trading partners. In short, international trade was viewed as a zero-sum game.

In 1776, Adam Smith published his now classic work, Wealth of Nations, which explained that nations could engage in mutually beneficial trade. This analysis was taken one step further with the formulation of the principle of comparative advantage in the 19th century by David Ricardo and John Stuart Mill. As this theory shows, a nation can benefit from international trade even if it cannot produce any one good more efficiently than its trading partners. If each nation specializes in the production of those products which it can produce with the greatest relative efficiency, and can then trade freely with other nations for the other products it needs; the greater overall efficiency which results from this process increases the size of the world’s economic pie, providing a higher standard of living for all. In short, international trade can be a positive-sum interaction.

This economic theory has a great deal of appeal. Not only does it offer the prospect of greater efficiency and greater wealth, it also implies that as far as international trade is concerned, there is a fundamental community of economic interests among states. So it was that at the end of World War II, the Havana Charter’s stillborn ITO, and to a lesser extent its less ambitious counterpart the GATT, were designed to put this theory into effect by promoting a liberalized trade regime.

II. INTERNATIONAL TRADE PRINCIPLES AND THE DEVELOPING COUNTRIES

Although we are familiar today with the economic division between the industrialized countries of the North and the developing countries of the South, the situation was quite different in the

29. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).
31. Id.
33. By now, any attempt to divide the world into simple North and South camps according to economic criteria is necessarily a vast oversimplification. Countries
immediate Post World War II era. Many countries we know as developing countries today, and most of those in Africa and Asia, had not yet achieved independence from colonial domination in the 1940s. As a result, the voice of developing countries at Bretton Woods and Havana was somewhat muted. Few negotiators at these conferences could have fully anticipated the extent of the future division between developed and developing countries. Ultimately, the Bretton Woods institutions were created by and for the industrialized countries.

From the beginning, many in the developing world viewed proposals for a free trade system as a threat to their hopes of rapid industrialization as well as to their independence and sovereignty. They feared an open trading system would make it impossible for the non-industrialized countries of the South to achieve industrialization because any new “infant industries” they might try to create would be unable to compete with the established foreign competition.

The history of relations between North and South has left many in the developing areas of the world with some palpable resentment about international economic relations, and developing countries have tried, with varying degrees of success, to maintain “Third World” political unity within the United Nations system. The nineteenth century “colonial” pattern of trade relations had been typified by a division of labor which prevented the industrial development of the South. The largely industrialized colonial powers had no interest in developing competing industries in their colonial possessions, thus they tapped their colonies as a source of primary commodities. This, in

traditionally considered to be part of the South include relatively wealthy and newly industrialized states (NICs) such as Singapore, impoverished “fourth world” states such as Ethiopia, oil rich OPEC states such as Saudi Arabia, and countries in many other distinct economic categories. Nonetheless, at times debate over certain economic and political issues still seems to break down along the lines of North and South, industrialized countries versus developing countries, rich countries versus poor countries. When the term developing country is used in this article, in no way is this intended to imply that there is a solid homogenous bloc of “Third World” states which agree on every issue, or even on most issues.

34. CLAIR WILCOX, A CHARTER FOR WORLD TRADE 30-31 (1949).
36. See P.T. BAUER, DISSERT ON DEVELOPMENT 147 (1976).
37. See Bernard D. Nossiter, At the U.N., the ‘So-called Third World’ Turns Real, N.Y. TIMES, May 3, 1981, § 4, at 5 (noting that Alexander Haig, then U.S. Secretary of State had disparaged what he referred to as the “so-called Third World—a misleading term if there ever was one,” and also reporting that while U.S. American Chief Delegate to the U.N. Jeanne Kirkpatrick did not find the Third World to be a useful concept, she conceded that “the third world has reality, inside the U.N.”).
effect, relegated these developing areas to a peripheral role in the economies of their colonizing powers. The economy of the colonial "periphery" was used as a subordinate appendage of the industrial economy of the colonial "center" or "metropolis," supplying commodities to the metropolitan power and also serving as a market for industrialized goods. Those developing areas that achieved political independence sought to sever the economic dependency by establishing their own industries, and they were suspicious that free trade would serve only to perpetuate their underdevelopment. Although many parts of the world were still under colonial domination when the nations of the world met in Havana, quite a few representatives were there from what were then referred to as "underdeveloped countries," and they were able to make their case in Havana.

The Havana Charter included a number of important provisions reflecting the special interests of developing countries. In fact, an entire chapter of that instrument was devoted to economic development and reconstruction. Unlike the GATT, which has never been development oriented, the Charter provided that the ITO would be obligated to cooperate with the UN and other appropriate international organizations on all phases of industrial and general development "especially of those countries that are still relatively underdeveloped."

The Charter explicitly recognized a potential need for special governmental assistance to promote the establishment or development of particular industries. It then set out very detailed and complicated formulations on the eligibility of underdeveloped countries for a release
from certain trade commitments to the extent necessary to allow them to establish new industries.\textsuperscript{43} While these "industrialization escapes" were not considered to be adequate by the developing country representatives at Havana, they did establish the principle that under the proposed regime, infant industries might be developed through devices such as import quotas and trade preferences, but only with international sanction according to the Charter.\textsuperscript{44} The Charter also contained provisions concerning special treatment for what are now recognized as two traditional concerns of developing countries: primary commodities\textsuperscript{45} and economic cooperation among developing countries.\textsuperscript{46}

Unfortunately for the developing countries, none of these provisions of special interest to developing countries survived the failure of the Havana Charter. The GATT is a simplified trade agreement and a much less ambitious project than the Havana Charter. The principle of nondiscrimination in trade between parties is the foundation of the GATT legal order.\textsuperscript{47} While one article of the GATT did provide for the use of nondiscriminatory quantitative restrictions to further economic development or reconstruction,\textsuperscript{48} a number of onerous conditions, including a requirement for the prior approval of the contracting parties, deprived this device of any true utility.\textsuperscript{49} In short, the GATT did not initially provide developing countries with the special arrangements incorporated for their benefit into the defunct Havana Charter.\textsuperscript{50}

A. STRUCTURAL CRITIQUE OF THE THEORY

As countries with little industrial base who were principally importers of manufactures and exporters of primary commodities, especially in the immediate post World War II period, developing countries expected little short term benefit from the GATT's approach to trade

\textsuperscript{43} Havana Charter, supra note 10, arts. 13-14.
\textsuperscript{44} Havana Charter, supra note 10, art. 13(1).
\textsuperscript{45} Havana Charter, supra note 10, arts. 55-65.
\textsuperscript{46} Havana Charter, supra note 10, arts. 15, 16(3).
\textsuperscript{47} GATT, supra note 11, arts. 1, 13.
\textsuperscript{48} Havana Charter, supra note 10, art. 18.
\textsuperscript{49} GATT, supra note 11, art. 18.
\textsuperscript{50} As Joan Edelman Spero notes:
The original GATT agreement was designed only as an interim measure and included none of the provisions for development which the South had fought to include in the Havana Charter. There were no provisions for development cooperation, for commodity agreements, for preferential trading systems for the South, or for the use of restrictions to further development.

liberalization. Indeed, it seemed to offer them the prospect of failing in international industrial competition and then being locked into the familiar pattern of dependence upon and dominance by the industrialized world—a pattern which they associated with the colonial domination from which many of them had only recently emerged. The developing countries feared that the promised benefits of an open trade regime might not materialize for some time, and that even then they would not necessarily be distributed to those in the developing world. The dissatisfaction of developing countries with the GATT and the Bretton Woods institutions eventually led to the creation of a new international institution, the United Nations Conference on Trade and Development (UNCTAD).\textsuperscript{51} In the context of UNCTAD, founded in 1964, developing countries mobilized in support of fundamental changes in the international trade order.

In 1950, Raúl Prebisch, a Venezuelan economist with the United Nations Economic Commission for Latin America, completed an analysis of the historical trade relationship between industrialized countries and developing countries between 1876 and 1938.\textsuperscript{52} He concluded that international trade relations between the North and the South were structurally biased against the interests of the South.\textsuperscript{53} He argued that since the South tended to export primary commodities to the North while the North tended to export industrialized goods to the South, changes in the relative prices of these two types of goods suggested a disturbing trend.\textsuperscript{54} His research suggested that the prices of developing country exports would tend to decline relative to the

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\textsuperscript{53} Prebisch notes:
Speaking generally, technical progress seems to have been greater in industry than in the primary production of peripheral countries \ldots. Consequently, if prices had been reduced in proportion to increasing productivity, the reduction should have been less in the case of primary products than in that of manufactures, so that as the disparity between productivities increased, the price relationship should have shown a steady improvement in favour of the countries of the periphery \ldots. Had this happened \ldots the benefits of technical progress would thus have been distributed alike throughout the world \ldots. [Instead] the price relation turned steadily against primary production from the 1870's until the Second World War \ldots. With the same amount of primary products, only 63 per cent of the finished manufactures which could be bought in the 1860's were to be had in the 1930s.
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\textit{Id.} at 8.
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\textsuperscript{54} \textit{Id.}
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prices of their imports from industrialized countries leading to deteriorating terms of trade.\textsuperscript{55} He concluded that this phenomenon would make it difficult, if not impossible, for the developing countries to achieve acceptable rates of economic growth without some fundamental changes in trade policy.\textsuperscript{56}

Within UNCTAD, the developing countries began to push for changes in the international trade and development regimes.\textsuperscript{57} In 1974, the developing countries formulated their demands for change in the form of resolutions passed by the United Nations General Assembly which together incorporate the call for a New International Economic Order (NIEO). The Declaration on the Establishment of a New International Economic Order was accepted by consensus in the General Assembly\textsuperscript{58} and articulated the principal demands of the developing countries for change and outlined the principles upon which the proposed new order would be based. The Charter of Economic Rights and Duties of States (CERDS), passed on the same day, was an attempt to affirm and strengthen the legal principles intended to form the basis of the NIEO.\textsuperscript{59}

Each of these documents incorporated principles which constituted a radical challenge to the existing international institutional structures, and in particular to the GATT. The CERDS called for an expanded


\textsuperscript{56} As Prebisch put it:
The imposing code of rules and principles drawn up at Havana and partially embodied in the General Agreement on Tariffs and Trade (GATT), does not reflect a positive conception of economic policy in the sense of a rational and deliberate design for influencing economic forces so as to change their spontaneous course of evolution and attain clear objectives. On the contrary, it seems to be inspired by a conception of policy which implies that the expansion of trade to the mutual advantage of all merely requires the removal of the obstacles which impede the free play of these forces in the world economy. These rules and principles are also based on an abstract notion of economic homogeneity which conceals the great structural differences between industrial centers and peripheral countries with all their important implications. Hence, GATT has not served the developing countries as it has the developed ones. In short, GATT has not helped to create the new order which must meet the needs of development, nor has it been able to fulfill the impossible task of restoring the old order.

\textit{Id.} at 6.

\textsuperscript{57} Hudec, \textit{supra} note 51, at 72.

\textsuperscript{58} \textit{Declaration on the Establishment of a New International Economic Order}, \textit{supra} note 2.

\textsuperscript{59} \textit{Charter of Economic Rights and Duties of States}, \textit{supra} note 26.
system of trade preferences, going far beyond the tentative steps of the GATT regime taken a few years earlier with the authorization of the Generalized System of Preferences.\textsuperscript{60}

B. ATTEMPTS AT ADAPTATION OF THE TRADE REGIME

While the radical program of the NIEO was never implemented, the traditional institutions of the post-war international economic order did make at least one important concession in principle to the developing countries. A rather mild but real derogation from the GATT principle of non-discrimination was adopted by the GATT’s members in 1971, after several years of discussion within UNCTAD and other fora. The GATT decision on the Generalized System of Preferences (GSP) allowed developed countries to grant duty-free treatment or other non-reciprocal tariff preferences to products from developing countries for a trial period of ten years,\textsuperscript{61} and a 1979 decision legitimized GSP arrangements indefinitely.\textsuperscript{62} Since UNCTAD I, developing countries have demanded trade preferences as necessary in order to compensate for their disadvantage and permit their industrialization.\textsuperscript{63} The GSP permitted the developed members of the GATT to grant trade preferences to developing countries, but it did not require them to do so.

While most of the industrialized countries have established GSP preference schemes since 1971,\textsuperscript{64} each country’s scheme is different, and many are quite complicated. This situation undermines the GSP’s ostensible goal of a simple, general and systematic preference scheme benefiting developing countries.\textsuperscript{65} In all cases, the scope of the preferences granted is limited, so that many developing country exports are not covered by the GSP. As one might expect, UNCTAD has been less than satisfied with the scope of the preferences granted as well as

\textsuperscript{60} Charter of Economic Rights and Duties of States, supra note 26, at arts. 18-19.


\textsuperscript{62} Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of Nov. 28, 1979, GATT, BISD 26th Supp. 203 (1980).

\textsuperscript{63} Prebisch, supra note 55, at 34-39.


\textsuperscript{65} See Frances Williams, Developing Countries Look for Better Deal on Trade - Why the Generalized System of Preferences is Regarded as only a Qualified Success, Fin. Times, May 21, 1992, at 6.
with the ultimate benefit of the GSP for the developing countries.\textsuperscript{66} Independent analysts have also concluded that the utility and effectiveness of the GSP has been minimal.\textsuperscript{67}

Raúl Prebisch’s analysis of the trade problems of developing countries motivated UNCTAD to call for changes in the regime governing primary commodities as well. If problems with the prices of primary commodities had resulted in unsatisfactory terms of trade for developing countries, the latter would presumably benefit from efforts to stabilize, and even support, the prices of these commodities. Thus the NIEO Declaration called for a:

Just and equitable relationship between the prices of raw materials, primary commodities, manufactured and semi-manufactured goods exported by developing countries and the prices of raw materials, primary commodities, manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and the expansion of the world economy.\textsuperscript{68}

The idea that world commodity prices should be fixed in order to guarantee fair prices to exporters has never been acceptable to the western industrialized countries, and their opposition to this idea, as well as to the NIEO in general, is understandable. Undeniably the concept of the NIEO as articulated in 1974 reflects many elements of a planned economy,\textsuperscript{69} and the call for the regulation of prices of commodities and other goods in world trade is just one example of this.\textsuperscript{70} Price regulation of this type would be a formula for the

\textsuperscript{66} UNCTAD Special Committee on Preferences, Res. 6(IX) (1980) (noting that the objectives of the GSP as set out in Conference Resolution 21(II) had not been achieved, but concluding that the GSP should nonetheless be renewed beyond the initial 10 year period).


\textsuperscript{68} \textit{Declaration on the Establishment of a New International Economic Order}, supra note 2, art. 4(j).


\textsuperscript{70} The NIEO Declaration also calls for measures “improving the competitiveness of natural raw materials facing competition from synthetic substitutes.” \textit{Declaration on the Establishment of a New International World Order}, supra note 2, art. 4(m). Even some economists in the developed countries sympathetic to the poverty of developing countries view this as an unacceptable prescription for interference with both market price mechanisms and technological progress. See WILLIAM LOEHR & JOHN P. POWELSON, \textit{Threat to Development: Pitfalls of the NIEO} 14-23 (1983).
international redistribution of wealth through the manipulation of trade.\textsuperscript{71} But despite certain excesses of the NIEO, the developing countries make a legitimate point when they complain that the volatility of commodity prices makes economic growth and development extremely difficult, if not impossible, for the many developing countries dependent on commodity exports as their principal means of foreign exchange. Commodity prices have been subject to such drastic short-term price fluctuations that even importing countries have recognized the need to help stabilize these prices within realistic ranges reflecting longer term market trends.\textsuperscript{72}

Global negotiations resulted in the 1980 agreement to create a common fund for commodities,\textsuperscript{73} but the results have been disappointing. The fund is based on the idea that a large fund could link the finances of the various commodity agreements which buy and sell a particular primary commodity in an attempt to alleviate the short term fluctuations in market prices. Assuming that some commodities will go up as others go down, the use of a "common fund" to stabilize the full range of key commodities seemed like a good idea. In practice, the collapse of the individual commodity agreements has rendered the already grossly underfunded common fund virtually useless.\textsuperscript{74}

Meanwhile, the terms of trade for primary commodity exports of developing countries have continued to decline. According to the Food and Agriculture Organization (FAO), the "level of real export prices of agricultural, fishery and forestry products in 1992 was estimated to be 26 percent below that at the start of the 1980s."\textsuperscript{75} During this

\begin{thebibliography}{1}
\bibitem{71} See \textsc{Robert L. Rothstein, Global Bargaining: UNCTAD and the Quest for a New International Economic Order} 63 (1979) (noting that "[w]hile UNCTAD officials frequently denied any intention to transfer resources via higher prices (above the trend), even outside analysts who were sympathetic to developing country demands assumed that this was the... real objective.").
\bibitem{72} \textit{Id.} at 124 (summarizing an unpublished paper about caucusing between industrial countries prior to negotiations on the Common Fund for Commodities, and noting that even as a rather "hard line" was being formulated there was widely shared agreement among these countries that commodity price indexation was unworkable and that only price stabilization made sense).
\bibitem{73} \textit{See Agreement Establishing the Common Fund for Commodities, June 27, 1980, 19 I.L.M. 896 (1980).}
\bibitem{74} \textit{See Frances Williams, Millions of Dollars and Nothing to Spend it on-A United Nations Fund in Crisis, \textit{Fin. Times}, Apr. 6, 1993, at 26.}
\bibitem{75} \textsc{Food and Agriculture Organization, Commodity Review and Outlook 1992-1993 8 (1993).}
\end{thebibliography}
period, the real price of coffee and cocoa was down 70 percent, sugar was down nearly 60 percent, and cotton and rubber were down nearly 50 percent. The failure of economic clauses of international commodity agreements covering coffee, cocoa and sugar was cited as one of the key explanations for this decline.

The GSP and the Common Fund Agreement both represent departures from a totally free market approach to international trade, each designed to benefit the interests of developing countries. But the Common Fund was never intended to prop up commodity prices against the long term trend of the international market, and thus it represents only an attempt to moderate the effect of that market and not an effort to deny it.

One could argue in a similar fashion that while the GSP does derogate from free trade principles of non-discrimination, in essence, it represents an effort to maintain trade liberalization where practicable, while leaving open the possibility of some relief for the impossible level of economic hardship which such trade liberalization can place upon the economies and the people of the developing countries. Unfortunately, neither the Common Fund nor the GSP has lived up to the expectations of developing countries.

C. THE MULTIFIBER ARRANGEMENTS: DEROGATING FROM PRINCIPLE TO THE DETRIMENT OF DEVELOPING COUNTRIES

While developing countries have been disappointed at the limited success of the GSP, the Common Fund for Commodities and other efforts to compensate for their structural disadvantage in the international system, they have been even more concerned about the special trade disadvantages they have suffered as a result of the trade policies of the industrialized countries. The most glaring example of this is the Multifiber Arrangement (MFA).

76. Id. at 8.
77. Id. at 11.
78. Part IV (on Trade and Development) was also added to the GATT in recognition of the need to accommodate the special trade problems of developing countries. See GATT Doc., L/2281 (Oct. 26, 1964); GATT Doc., L/2297 (Nov. 17, 1964); GATT, 13th Supp. BISD (1965). This part, composed of articles 36, 37 and 38, speaks of making the trade interests of developing countries a priority, but because it has little substantive content it has been characterized as “hortatory” and without legal implications. See JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1143 (1986).
As early as the 1950s, it became apparent that industrialized countries were reluctant to accept much growth in their imports from the developing countries, even if this might be the result of applying free market principles. For example, in 1958, the GATT released a report by liberal Harvard economist Gottfried Haberler, which blamed the declining Third World trade share upon Northern trade policies which created barriers to imports from developing countries by exploiting the many exceptions to the GATT free trade system.\textsuperscript{80} Early UNCTAD studies established that Northern trade barriers prevented imports of what were often the only goods which developing countries had to export, i.e. primary commodities.\textsuperscript{81} This restricted developing country access to one of their most important sources of foreign exchange, the very source which should be freely available to them according to free trade theory.

International trade in textiles has long been a delicate issue in relations between developed and developing countries. Since textile fibers such as cotton and wool are primary commodities, they are readily available in many developing countries, as is the relatively unskilled labor necessary for transforming the fibers into garments. But while many developing countries have a comparative advantage in the production of these fibers and fiber products, the production of fiber based garments is a traditional source of low wage and low skill employment in industrialized countries. This creates political pressures in the latter to resist imports of fibers from developing areas. In response to these pressures, international trade in textiles has been managed for over 30 years by a series of special arrangements outside of the GATT framework.\textsuperscript{82} The most recent of these is the 1973 Multifiber Arrangement.


\textsuperscript{81} A 1968 UNCTAD report concluded that "the industrial centers are progressively excluding from their markets various commodities in which the peripheral countries are fully competitive and for which the production costs of the latter countries are much lower than those for similar products in the centers." Towards a Global Strategy for Development: Report of the Secretary-General of the United Nations Conference on Trade and Development to the Second Session of the Conference, U.N. Commission on Trade and Development, at 16 U.N. Doc. TD/3/Rev.1, (1968).

One stated purpose of the MFA was to achieve an expansion in international trade in textile products and the progressive liberalization of that trade. Another principal objective was "to further the economic and social development of developing countries and secure a substantial increase in their export earnings from textile products and to provide scope for a greater share for them in world trade in these products." Although the industrialized countries promised to allow a 6 percent annual increase in the level of imports agreed to in the associated bilateral agreements, they failed to keep that promise. Thus, by 1982, the developing countries participating in the arrangement had already come to the conclusion that it was steadily less meeting its fundamental objectives of expanding trade and more and more becoming an instrument restricting it. Developing country textile exporters reluctantly agreed to renew the MFA in order to avoid more strongly protectionist legislation from the United States Congress.

It has proven to be difficult, and indeed so far impossible, to wean the United States textile industry from the protection of the MFA. Former Congressman Bill Franzel described the textile industry's appetite for protection by remarking that "[w]e've given them a crutch and now they want a wheelchair and an iron lung . . . ." In the United States domestic debate on textile imports, the effect of the MFA and other textile import restrictions upon the developing countries is rarely mentioned.

Protection of the textile industry does not come without a cost to other sectors of the United States economy. In addition to the MFA's quotas limiting Third World textile imports, the United States also

83. MFA, supra note 79, art. 1(2).
84. MFA, supra note 79, art. 1(3).
85. MFA, supra note 79, Annex B, para. 3 (requiring at least a six percent increase in allowable imports unless there is new evidence demonstrating that such a rate of growth would "exacerbate the situation of a market disruption.").
86. See Inter-American Economic and Social Council Report, 7 Int'l Trade Rep. 133 (Oct. 27, 1982).
maintains high tariffs on textile imports, tariffs which burden United States textile imports from Europe as well as those from developing countries. Through higher prices, United States consumers pay the costs of these tariffs as well as for the MFA’s protection. At global trade talks in Tokyo in June of 1993, the European Community demanded deeper cuts in United States textiles and apparel tariffs in exchange for EC agreement to lower European tariffs on computers, chips and other electronics products. United States trade Representative Mickey Kantor rejected that trade-off, even though it could have provided a tremendous boost to the United States computer industry and other high-tech industries in this country which provide high-wage, high-skill jobs; exactly the kinds of jobs which the Clinton administration has said it wants to create. The powerful alliance of the United States textile industry, labor groups representing textile workers, and lawmakers from key states were able to use its formidable political clout to prevent that trade-off. Nonetheless, some trade-offs between sectors of the United States economy are inevitable if global trade negotiations are to be successful. Those sectors of the economy which are weakest in global markets will naturally demand continued protection, while the most dynamic and profitable sectors of the United States economy will favor the removal of trade barriers. Economists agree that the Multifiber Agreement costs the United States economy millions of dollars each year, but this information has not yet had that much influence upon the political process in Washington. This may be attributable to the fact that “the high-tech sector is still in its political adolescence.” Ultimately, the Uruguay Round did result in

92. Exact estimates of this cost vary. See Jim Ostroff, Mills Blast New GATT Accord; But Importers, Stores Back It; General Agreement on Tariffs and Trade, Daily News Rec., Dec. 16, 1993, Vol. 23, at 2 (quoting Tracy Mullin, the National Retail Federation president as saying that the MFA adds $46 billion annually to consumers’ costs for buying apparel); Brittan Speech on Openness in World Trade Body, The Reuter European Community Report, Sept. 15, 1993, available in LEXIS, Nexis Library, Wires File (Sir Leon Brittan, Trade Commissioner of the European Union stating that “the interests of consumers must be taken much more seriously in future trade policy” and that according to GATT figures the cost of the MFA in the United States could be as much as $27 billion, or around $200-400 per year for a 4 person household in current 1993 dollars).
93. Behr, supra note 91, at C1 (paraphrasing Jim Johnson, Director of Government Affairs for Apple Computer).
an agreement to phase out the MFA over a period of 10 years.\textsuperscript{94}

D. AID AND TRADE

The issues of international trade and foreign aid are closely linked, especially from the perspective of the developing countries. Raúl Prebisch, has argued that developing countries have a right to foreign aid due to the structural bias of the international trade order. After noting that the terms of trade have deteriorated to the detriment of the developing countries, Prebisch considers the ways in which the effects of this phenomenon can be mitigated:

There are various ways in which this can be done: by means of commodity agreements, which not only improve prices but also facilitate access to the markets of the industrial countries, or by compensatory financing. These are in fact convergent measures, the nature of which will be analyzed in the appropriate part of this report. Suffice it to say here that there are difficulties but that they can be solved. However for this technical discussion to be profitable, it must be preceded by a political decision of the first importance, namely, a decision to transfer, in one way or another, to the countries exporting primary commodities the extra income accruing to the industrial countries as a result of the deterioration of the terms of trade.

From a pragmatic point of view this means recognizing that countries experiencing a deterioration of the terms of trade have a prima facie claim upon additional resources—resources over and above those which they would have received in the normal course of events.\textsuperscript{95}

Even for those who do not accept this entitlement argument, the fact remains that adjustment of the trade relationship between North and South could in principle obviate any need for foreign aid. Former Secretary of State George Shultz, speaking in Rio de Janeiro at a conference sponsored by Brazilian business groups, explained that in his view it has become evident that the solution to developing country problems does not lie in financial transfers from rich countries to poor countries. Developing countries must learn to produce and develop for themselves. Shultz stressed that this can only be accomplished if the developed countries trade more with developing countries even if this

\textsuperscript{94} Textile Agreement, \textit{supra} note 88, arts. 2(8), 9.

\textsuperscript{95} Prebisch, \textit{supra} note 55, at 16.
does result in some loss of jobs and loss of some industries in the former (rich) countries.\textsuperscript{96}

1. \textit{Tied Aid}

Foreign aid to developing countries comes in many forms, but the most desirable type of aid for the recipient country is what is known as Official Development Assistance (ODA).\textsuperscript{97} Unlike other types of aid such as commercial bank loans and export credits, ODA is supposed to be granted on concessional terms and thus should not in principle be linked to the recipient’s trade policies. In practice, however, it frequently is. A 1992 report by the Organization for Economic Cooperation and Development (OECD), which groups together the industrialized democracies, concluded that so called “mixed credits” linking ODA and export credit financing should be banned. These mixed credits make the ODA conditional on the export credits, and their object is to assure that all or part of the aid funds sent abroad will be spent to purchase exports from the granting state. The OECD report notes that since the prices of the exports financed by these credits average about 20 percent more than world prices for the same products, they clearly have trade distorting effects.\textsuperscript{98}

Of course, ODA is not the only source of development finance. Commercial bank loans were an important alternative source, especially during the 1970s, but there has been little net flow of commercial bank lending to Latin America since shortly after Mexico first ceased servicing the principal of its debt in 1982.\textsuperscript{99} As a result, large scale publicly financed projects must increasingly be replaced by private sector financing, and equity financing is expected to become more prevalent than debt financing.\textsuperscript{100} Meanwhile, the IMF’s role in man-

\textsuperscript{96} Shultz Warns that Failure of GATT Will Set Back Trade, Harm Developing Nations, 10 Int’l Trade Rep. 203 (Feb. 3, 1993).
\textsuperscript{97} Official Development Assistance (ODA) consists of net disbursements of loans and grants made on concessional financial terms by official agencies of the members of the Development Assistance Committee (DAC) of the Organization for Economic Cooperation and Development (OECD) and members of the Organization of Petroleum Exporting Countries (OPEC), to promote economic development and welfare. World Bank, World Development Report 253 (1990).
\textsuperscript{98} OECD Calls for Tighter Rules on Export Credit and Aid, 16 Int’l Trade Rep. 1638 (Sept. 23, 1992).
\textsuperscript{100} ABA Program Stresses Changes in Financing for Latin American Projects in the 1990s, 9 Int’l Trade Rep. 1872 (Oct. 28, 1992).
aging the international debt crisis has increased that organization's influence over the developing countries. 101

2. Structural Adjustment

The term structural adjustment refers to the process by which economic factors such as land, labor and capital are reallocated within a country as it adapts in order to function more efficiently as part of the global economy. Structural adjustment is required by the liberalization of international trade as each country moves to specialize in the production of those goods which it can produce most efficiently, and abandons the production of those goods which it cannot produce as efficiently. Because the process usually entails unemployment, the closing of inefficient industries, and other such dislocations in the short run, this adjustment tends to be politically sensitive in all countries.

Inefficient industries which have benefitted from protection in the past and labor unions representing workers in those industries may object that structural adjustment saddles them with an undue burden. Labor, in particular, tends to turn inward and demand protection from foreign competition and foreign workers. Because the internationalization of capital permits investment abroad as well as at home, business interests are generally in favor of a more open trade system. 102

Except for those industries directly affected, the burden of structural adjustment is not borne by business. As a result, trade policy debates have sometimes become class based. 103

101. See Robichek, supra note 15, at 143-54.
102. Consumer activist Ralph Nader has criticized the Uruguay Round’s result in the following terms:

It's an old game: when fifty years ago the textile workers of Massachusetts demanded higher wages and safer worker conditions, the industry moves its factories to the Carolinas and Georgia. If California considers enacting environmental standards in order to make it safer for people to breathe, business threatens to shut down and move to another state.

The Uruguay Round is crafted to enable corporations to play this game at the global level, to pit country against country in a race to see who can set the lowest wage levels, the lowest environmental standards, the lowest consumer safety standards. It is a game that has its winners and losers determined before it even gets underway: workers, consumers and communities lose; big business wins.

103. Id.
But more open trading cannot be achieved without some short term dislocations as less competitive producers are forced to close by market forces and foreign competition. International financial institutions have tried to help developing countries to deal with this painful process, in particular by helping poor and displaced workers to obtain new employment. The World Bank, for example, which traditionally prefers to finance specific economic development projects such as roads and hydroelectric dams, also makes structural and sectoral adjustment loans intended to ease the transition towards forms of economic activity which will be competitive in more open international markets. Within a relatively wealthy industrialized country such as the United States, the national government will often feel a responsibility for acting to cushion the effects of structural adjustment upon the poorer segments of society. Limited trade adjustment assistance of this type is still available to United States workers under the 1974 Trade Act, and President Clinton (as he signed NAFTA into law) promised to work with Congress to create the world's best worker training and retraining system. Workers, however, are understandably skeptical about such promises.

E. THE ROLE OF THE NEWLY INDUSTRIALIZED COUNTRIES (NICs)

1. The Graduation Issue

Among the most sensitive issues raised by the GSP preference scheme is the distribution of the benefits among developing countries;

104. The World Bank observed that:
the effect of economic crisis and consequent adjustment on the poor—
depression of output, employment, and consumption; falling terms of trade
for those who previously benefitted from subsidies and other forms of
protection from market forces. These transitional costs are—at least in
the aggregate—largely unavoidable. For well planned and timely ad-
justment, what outweighs the inevitable costs are the long term benefits of
the more rapid and viable growth that results. To mitigate the immediate
pain, social expenditures should be refocused, to the extent possible, towards
the poor, and cost effective compensatory programs can be introduced,
particularly in the areas of nutrition and employment.


105. See id. at 65-67 (noting that the World Bank has been increasingly concen-
trating its adjustment lending on sector-adjustment loans which focus on restructuring
of investment programs, policies, and institutions for a specific sector of the borrower's
economy).

106. 19 U.S.C. §§ 210-2495 (1988 & Supp. IV). See also Richard Carbaugh,

107. NAFTA Signing Ceremony, CNN Transcript No. 473-11, Dec. 8, 1993,
available in LEXIS, News Library, CNN File. See also infra note 235.
closely related is the question of how to determine when a particular
developing country no longer needs these preferences. Underlying both
is the fact that the developing countries are a very diverse group
including desperately poor fourth world states such as Chad (GNP per
capita $160), oil rich OPEC states such as Kuwait ($13,400), more
typical non-oil developing states such as Paraguay ($1,180) and Newly
Industrialized Countries (NICs) such as Singapore ($9,070). 108

In 1987, the "Four Tigers" of Asia, South Korea, Taiwan, Hong
Kong and Singapore received almost 60 percent of the benefits from
the United States GSP scheme leaving only 40 percent for the other
136 eligible countries, 109 most of which are considerably less affluent.
This remarkable concentration of the benefits of the GSP raised serious
questions of equity. 110 Moreover, since each of these countries had
already been lauded by the United States as a success story of free
enterprise economic development, preferences in their favor became
difficult to justify. 111 In theory, former developing countries that
achieve a certain level of development, as have these NICs, should
"graduate" into the GATT's ordinary regime of non-discriminatory
trade relations. Accordingly, the Reagan Administration decided in
1988 to graduate the four tigers from the United States GSP scheme. 112
The Trade Minister of Singapore, Mr. Lee Hsien Loong called the
move a foul blow, and others suggested that the tigers were being
unfairly penalized for their success. 113

Few would dispute that the successful completion of development
should in principle eliminate the need for these trade preferences, but
some observers suspected that the tigers were graduated not so much
because of their newly achieved levels of development as because of
the level of their trade surpluses with the United States. Together they
were responsible for 22 percent of the United States trade deficit

108. See World Development Report 178 (1990) (setting out GNP of various
countries in 1988 dollars).
15, 1988, at 46.
110. "The various GSP schemes may have helped some poor people in the
middle-income countries to the extent that the expanded exports were labor-intensive
in production, but the poor in low-income countries cannot have gained much at all.
The clear tendency to exclude agricultural products from the schemes strengthens this
111. See Yang, supra note 109, at 46.
15.
113. See Yang, supra note 109, at 46.
during the first 11 months of 1987, and protectionist sentiment in the United States Congress was undoubtedly a factor in their removal from the GSP.

2. The New Developing Country Trend Towards Trade Liberalization

According to the theory of hegemonic stability, a liberal trading order can only be maintained for as long as there is a dominant economic power or "economic hegemon," willing to pay the costs of that open order by permitting large amounts of imports into its own open markets as an incentive to the other states to open theirs. If this theory is correct, and if it turns out that the United States is no longer willing to accept large trade deficits as the price of opening international markets, the prospect of further liberalization of international trade is greatly diminished. It is possible, however, that the bloc of Newly Industrialized Countries (NICs) which strongly favor liberal trade may add a new and important element to the equation.

All developing countries seek to avoid the type of discriminatory treatment to which they are sometimes subject as exemplified by the MFA, discussed above. The NICs in particular have a clear long term interest in the reduction of trade barriers between all countries. This is true not only because they have graduated from the GSP trade preference scheme, but more generally because they have achieved a new status as major exporting countries.

Recently, there has been a broad movement among developing countries and the new economies in transition (e.g. Poland) towards trade liberalization, but ironically this is occurring just as the commitment of the developed market-economy countries to liberal trade has been called into question by the many difficulties encountered during the completion of the Uruguay Round of GATT negotiations.

114. Yang, supra note 109, at 46.
116. NICs are sometimes referred to as Newly Industrialized Economies (NIEs). China prefers this term and points out that not all NIEs are countries, since two key NICs, Hong Kong and Taiwan, are technically part of China. See Karl Schoenberger, The Pacific Summit; Buzzwords; Talkin' Pacific Rim: Guide to the Groups and Lingo, L.A. TIMES, Nov. 16, 1993, at 10.
117. See notes 79-94 and accompanying text.
118. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, TRADE AND DEVELOPMENT REPORT 59 (1991).
In 1992, the GATT reported that 51 of the 63 countries which had announced trade liberalization measures since 1986 were either developing or transition economies.120

According to a report prepared by the Common Fund for Commodities, “protectionism . . . is a plague on both consumers and producers alike, and remains the single major threat to commodity development strategy implementation.”121 The report then concluded that “[r]educing tariffs, and completing the Uruguay [R]ound, is therefore, a first and key priority, not only for the United States and Europe, but foremost for Africa.”122

III. THE ENVIRONMENTAL REVOLUTION

A. THE CONCEPT

The experience gained with environmental problems has necessitated a redefinition of many basic economic concepts. An industry or development project which appears at first glance to be profitable or desirable may in fact have enormous hidden costs in terms of damage to the environment. A revised economic analysis is required at both the national and the international level to internalize the costs of environmental damage. The procedures of international economic institutional structures such as the World Bank and the GATT must increasingly be reworked to reflect what is learned about effects upon the environment in the planning and implementation of policies and projects. But this evolution has been resisted by some as inconsistent with the narrowly conceived technical mandates of the organizations concerned, and has at times even been dismissed as an inappropriate form of politicization.123

At the international level, efforts to achieve cooperation for the protection of the global environment have built upon the notion of


122. Id.

123. See Bartram S. Brown, *The United States and the Politicization of the World Bank: Issues of International Law and Policy* 207, 237-40 (1992) (concluding that the World Bank’s functional utility as a cooperative international organization has been improved by environmental reforms even though those reforms began largely as a result of U.S. legislation which exerted strong unilateral pressure upon that institution).
what may be referred to as the “global environmental commons.””124

The essence of this notion is expressed in Principle 2 of the Stockholm Declaration adopted by the U.N. Conference on the Human Environment in 1972, which states that “[t]he natural resources of the earth, including the air, water, land, flora, fauna, and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.”125 This concept has developed quite naturally as part of a succession of related notions endorsed by the international community such as the idea that outer space, the moon and celestial bodies “shall be the province of all mankind,”126 and that the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction “are the common heritage of mankind.”127

The notion of the “global commons” is relatively new and is still to some extent an “aspirational” normative concept. It is not yet well established as part of positive international law.128 But as the treaties and declarations referred to above clearly indicate, this notion is gaining status as a principle or at least as a set of generally recognized values. The more specific concept of the global environmental commons differs from many other aspirational concepts in international law in that it has recently been invoked largely by industrialized countries against developing countries.129 This has occurred because most of the world’s rain forests, most of the world’s biodiversity, and therefore much of the terrestrial global environmental commons, is to

124. The term “global commons” is used more frequently than is “global environmental commons,” but the latter and more specific term is more apposite here.


129. The opposite was true, for example, of the aspirational norms asserted as part of the call for a NIEO. See supra notes 68-70 and accompanying text.
be found within the territory of developing states. It is not surprising then, that some leaders of these states feel threatened by the notion that protecting these resources should be seen as a matter of global concern which is subject to international law.

Opposed to the thesis of a global environmental commons is the antithesis of state sovereignty. This term clearly has varied usages, meaning many things to many people. For developing countries, "sovereignty" is a rallying cry that appeals to popular resentment of a perceived domination by the United States or another industrialized economic power. Expressions of concern from these latter countries about the need to preserve the environment within the territory of developing states are frequently perceived as yet another attempt by the North to intervene in the South and to impose unfair restrictions upon its path to development. Some Western economists apparently agree. Former World Bank Chief Economist Lawrence Summers once suggested that protection of the environment may be a luxury only high-income countries can afford.

The international community has attempted to resolve the clash on a theoretical level by invoking the concept of "sustainable development." Sustainable development can be viewed as a sort of "synthesis" concept which attempts to reconcile the thesis of the global environmental commons with the anti-thesis of state sovereignty. In principle it refers to an evolved concept of development, which presumably must be in the interest of developing countries, but which also takes into account environmental concerns.

This concept was the central focus of the 1987 report of the World Commission on Environment and Development (WCED). The chairperson of the WCED was Prime Minister Gro Harlem Brundtland of Norway, and it is generally referred to as the "Brundt-

133. See Let Them Eat Pollution, THE ECONOMIST, Feb. 8, 1992, at 66 (reproducing the text of a memo circulated by Lawrence at the World Bank in which he argues that "the demand for a clean environment for aesthetic and health reasons is likely to have a very high income elasticity.").
134. See infra notes 135-40 and accompanying text.
135. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987).
land Commission." The Secretary-General of the United Nations asked that Commission "to propose long-term environmental strategies for achieving sustainable development by the year 2000 and beyond." The WCED defined "sustainable development" as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."136 As Lothar Gundling points out "[t]his definition clearly shows that the debate on "sustainable development" is, in fact, a discourse on our responsibility to future generations."137 Other formulations of sustainable development are generally to the same effect.138 Underlying each definition is the growing trend toward recognition of what Edith Brown Weiss refers to as temporal rights related to intergenerational equity.139

The WCED proposed a set of legal principles for "sustainable development,"140 and suggested that a global convention on "environment and development" be prepared on the basis of those principles. This led to the United Nations Conference on the Environment and Development held in Rio during the summer of 1992, at which a number of international environmental agreements were endorsed.

B. IMPLEMENTING THE NEW ENVIRONMENTAL ANALYSIS

1. Aversion of States to International Regulation

Even after environmental concepts have in principle been accepted as relevant to the broader economic issues faced by states and addressed by international institutions such as the World Bank and the GATT, many disagreements may persist concerning their practical

136. Id. at 43.
138. John Atcheson, The Department Of Risk Reduction Or Risky Business, 21 ENVTL. L. 1375, 1395-96 (1991) ("EPA counted some sixty-five definitions of sustainable development. But while economists and purists argue the fine points, there is a remarkable consistency on the key ideas. Sustainable development, at its simplest, involves two concepts. First the ‘burn rate’ of renewable and nonrenewable resources must be managed to assure a steady state, or to assure that future generations will have an equivalent resource base. Second, the assimilative capacity of the commons must be managed so that their quality is not compromised.").
application. One of the largest obstacles to effective international action on the environment is the general aversion which states have towards international regulation of any kind.

Protection of the “global environmental commons” requires international cooperation at the expense of national freedom of action, and many states are reluctant to accept the necessary limitations. This is especially true of developing states which are often concerned about maintaining their freedom of action in today’s world as much as they are about achieving economic development. The notion that certain minimal international environmental standards should apply to the development process is frequently seen as threatening.

2. Issues of Decision-Making and the Asymmetrical Application of Environmental Norms

The World Bank and regional development banks such as the Inter-American Development Bank do not make loans to economically developed countries, and thus any environmental policies they adopt will apply only within developing areas. Since the mid 1980s these banks have undergone a “greening” process which has led them to re-evaluate their lending operations in light of environmental considerations. This process of transformation was long overdue, but the

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It became apparent that the Bank’s response did not match the changing realities either in the degree of effort devoted to environmental matters or in the approaches actually used. This, combined with a few well-publicized cases in which Bank projects actually had negative environmental consequences—such as contributing to the destruction of tropical rain forests and posing threats to wildlife, indigenous people, and established human settlements—prompted the institution to rethink and adjust its policies toward environmental management. In particular, Bank management decided to bring environmental concerns more systematically into the mainstream of its operations . . .

Since it is now recognized that sound environmental management is fundamental to the development process, the Bank’s new policy emphasizes the need to make environmental issues an integral part of all its activities. In practice, environmental considerations are now being addressed through a
change in policy has met with resistance both within those institutions and among their borrowers.\textsuperscript{144} While this greening process is far from complete, it has already resulted in the application of "environmental conditionality," i.e. lending is now conditioned on the satisfaction of certain environmental criteria by the borrowers as well as upon the satisfaction of more traditional economic criteria.\textsuperscript{145} The result is a special environmental regime applicable to borrowers from the MDBs which is more strict than the incipient environmental regime applicable to all states under general international law. The asymmetrical regime\textsuperscript{146} created by the application of environmental conditionality parallels the asymmetrical application of economic conditionality by the MDBs and by the IMF, as discussed above.

This asymmetry is mitigated, to some extent, because developed states are increasingly being called upon to accept a share of financial responsibility for sustainable development. In practice, sustainable development requires both financial and technical assistance for developing countries, and thus the acceptance of this notion by industrialized countries is an implicit acknowledgment of their responsibility to help.\textsuperscript{147}

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continuum of activities that range from a series of country studies of environmental strategy—including country environmental action plans and regional studies—to country economic and sector work, project and adjustment lending, and evaluation.

\textit{Id.}

144. See Stephan Schwartzman, \textit{Bankrolling Disasters: International Development Banks and the Global Environment} 4 (1986) (Sierra Club publication criticizing the environmental record of the World Bank and the other Multilateral Development Banks (MDBs), noting that there is evidence that these banks often fail to act on their own formally adopted environmental policies and that as a result some MDB projects cause serious environmental and social problems).

145. See \textit{The World Bank and the Environment: First Annual Report Fiscal 1990}, supra note 143, at 49 (explaining that during fiscal year 1990, 50% of all World Bank projects approved had an environmental component, and that with the increased emphasis on the environment monitoring and evaluation functions have become more important). See also \textit{Multilateral Lending Organizations Insisting on Environmental Impact Studies}, 17 INT’L ENV’T REP. CURRENT REP. 71 (1994).

146. Asymmetrical legal obligations may not always be a bad thing. It has been argued that in negotiating multilateral environmental agreements, it may at times be preferable to set up an asymmetrical regime providing for varying obligations for different states rather than settling for multilateral agreements based on the lowest common denominator of acceptable regulation. See Peter H. Sand, \textit{Lessons Learned in Global Environmental Governance}, 18 B. C. ENVTL. AFF. L. REV. 213, 224-25 (1991).

Thus in a real sense, the environmental obligations of developing states which are guardians of a large part of the terrestrial global environmental commons are conditioned upon the fulfillment by developed states of their own responsibility to help financially. This principle is recognized in the Biodiversity Treaty signed at the Rio Convention which explicitly provides that "[t]he extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology."\textsuperscript{148}

C. INTERNATIONAL TRADE AND THE ENVIRONMENT

Just as the World Bank has been obliged to refine its operations in light of the new environmental consciousness, so too must the international trade order be modified. The environmental issues of sustainability, intergenerational equity, and the global commons are as relevant to international trade as they are to development. Unfortunately, even at the United Nations Conference on the Environment and Development (UNCED), where the environment was the central focus, very little attention was given to the effect of environmental issues upon international trade.\textsuperscript{149} These matters were largely left to the Uruguay Round of multilateral trade negotiations under the GATT.

It is doubtful if environmental concerns could ever have been effectively integrated into the original GATT framework. The objective of GATT negotiations has always been to reduce and eliminate barriers to international trade, but efforts to preserve the environment may require some form of environmentally based trade restrictions. The environmental imperative is so compelling that it would be foolish to insist that trade must be sacrosanct and totally free from environmental restrictions. The task of determining how environmental protection and trade liberalization can best be reconciled will now fall to the new World Trade Organization\textsuperscript{150} and its Committee on Trade and the Environment.\textsuperscript{151}


\textsuperscript{150} The Preamble to the Agreement Establishing the World Trade Organization prominently recognizes the importance of environmental concerns.
1. The Dangers of "Green Protectionism" and "Eco-Imperialism"

Once it is recognized that environmental standards should be applied in some way to international trade, there is an inherent danger that states will use environmental concerns as a pretext for limiting imports. International environmental concerns are real and legitimate, but their invocation as a rationale for limiting imports may in some cases turn out to be a form of "green protectionism." One way to minimize this type of protectionism is to develop and apply clear international standards on the environment which can at least help to assure that a genuine environmental purpose is being served by any such limitations imposed on trade. There is still a long way to go, however, in the development of these standards, as will be discussed below.

Perhaps even more controversial than green protectionism is the matter of "eco-imperialism," i.e. the extension of the jurisdiction of one state to environmental matters occurring on the territory of another state. Because of historically based concerns about their sovereignty, developing countries are particularly sensitive about extraterritorial environmental regulation.152 Nevertheless, there is a policy argument to be made in its favor. Essentially, the argument is that due to the weakness of the international environmental regime and the difficulty of obtaining the adherence of all states to strict environmental standards, extraterritorial regulation by states with strong environmental

Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.


152. See Editors of the Harvard Law Review, Trends in International Environmental Law 146-47 (1992) (noting that extraterritorial regulation refers to both "extraterritorial legislation", i.e., "the application of one state's statutes and regulations to activities occurring within another country's territory" and to "extraterritorial adjudication", i.e., "the use of courts (usually United States courts) to resolve common law disputes, such as private torts, that arise out of activities carried on in foreign territory.").
regimes is in many instances the best hope for effective legal action.\textsuperscript{153} Arguments against extraterritorial environmental regulation focus upon the fact that it can disrupt the economic growth and development of other countries,\textsuperscript{154} and more generally, that it undermines the interests and the sovereignty of the other states involved.\textsuperscript{155} This, of course, is exactly why developing countries feel so threatened by extraterritorial legislative regulation. When the legislation concerned acts as an impediment to international trade, it may arguably be inconsistent with international trade agreements as well as with general principles of jurisdiction under international law.

Until now, international trade agreements themselves have not been used to create environmental laws, rather, they have been invoked to regulate the use of trade measures for environmental purposes. The 1991 GATT Tuna Panel Decision is a case in point, and it demonstrates how unsuited the GATT framework is to deal with environmental issues.

2. \textit{The Marine Mammals Protection Act}

The United States Congress passed the Marine Mammals Protection Act (MMPA) in 1972 to help maintain certain species of mammals as functioning elements of the ecosystem and to prevent them from diminishing below their optimal sustainable population.\textsuperscript{156} The parts of the MMPA governing the incidental taking of marine mammals in the course of commercial fishing have the ambitious stated goal "that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing be reduced to insignificant levels approaching a zero mortality and serious injury rate."\textsuperscript{157} These provisions have generated a great deal of controversy as applied to the imported products of foreign commercial fishing.

Many dolphin perish in the course of commercial tuna fishing. This is especially true in the eastern tropical Pacific Ocean area (ETP), the only part of the world where dolphins and tuna are known to

\textsuperscript{153} See \textit{id.} at 145-46.

\textsuperscript{154} See \textit{id.} at 159-60.

\textsuperscript{155} See Jagdish Bhagwati, \textit{American Rules, Mexican Jobs}, THE N.Y. TIMES, Mar. 24, 1993, § A, at 21 (noting that while it is both reasonable and within United States jurisdictional powers to legislate environmental and labor standards for the activities of United States companies in Mexico, it is unreasonable to expect Mexican regulations to match those of the United States in each industry).


swim so very closely together that commercial fishermen routinely locate schools of tuna by finding and chasing dolphins on the ocean surface. These dolphins are then encircled with purse-seine nets to catch the tuna underneath, and as the nets are drawn in many dolphin are ensnared in them and/or trapped below the surface where they suffocate.

The MMPA and its implementing regulations set strict limits upon the number of dolphins which can be incidentally killed by persons and vessels subject to United States jurisdiction, and provides for various penalties, including forfeiture of cargo, for violations of these regulations.\textsuperscript{158} It also states that "the Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards."\textsuperscript{159} Special sections of the MMPA prohibit the importation of yellowfin tuna from the ETP unless the Secretary of Commerce finds that the harvesting country has a program regulating the taking of mammals comparable to that of the United States.\textsuperscript{160} Amendments to the MMPA passed in 1985 restricted executive discretion and instituted a mandatory ban.\textsuperscript{161} As might have been expected, foreign reaction to this legislation has been quite negative.

Under the MMPA, the burden is on the exporting government to establish the existence of a qualifying program.\textsuperscript{162} Thus, when Mexico was unable to certify that its ETP fleet had complied with the requirements of the MMPA, the United States government banned the importation of Mexican tuna.\textsuperscript{163} After consultations failed to resolve the dispute, Mexico filed a complaint with the GATT, and a GATT dispute resolution panel was formed.\textsuperscript{164}

\textsuperscript{158} The implementing regulations were codified at Part 216 of Title 50 CFR (1990). Regulations on commercial fishing appear at 50 CFR § 216.24 (1990).
\textsuperscript{163} After a suit by environmentalists, a U.S. District Court banned the importation of ETP tuna except where the Secretary of Commerce had made a finding that the exporting country had complied with the MMPA. Earth Island Inst. v. Mosbacher, 746 F. Supp. 964 (N.D. Cal. 1990). After some hesitation by the executive, the import ban was reaffirmed by the Ninth Circuit. Earth Island Inst. v. Mosbacher, 929 F.2d 1449, 1451 (9th Cir. 1991).
\textsuperscript{164} GATT: Dispute Settlement Panel Report on United States Restrictions on
Mexico argued that the MMPA violated several different articles of the GATT, including Article XI prohibiting quantitative restrictions, Article XIII prohibiting trade discrimination against a specific geographic area (in this case the ETP), and Article III requiring national treatment in internal regulation. Mexico suggested that since the MMPA imposed extra burdens against foreign suppliers of tuna and banned imports from those who failed to meet these requirements, the ban was in essence a form of protectionist policy. Additionally, Mexico objected to the extraterritorial application of United States restrictions to the fishing fleets of other GATT parties. Mexico was thus complaining of both “green protectionism” and of “eco-imperialism.”

3. GATT Tuna Panel Decision (1991)

The Panel Report found that the enforcement of the MMPA’s ban on Mexican tuna sales in the United States was indeed a prohibited quantitative restriction as argued by Mexico, and not an internal regulation enforced upon products at the border as argued by the United States. It ruled that the United States could not restrict tuna imports based on the production method used if the product itself was not affected. The Panel reasoned that the enforcement of United States tuna harvesting regulations upon Mexican tuna was based on the process by which the product was created and not on the nature of the product itself.


165. Id. §§ 3.1-3.5.

166. The Panel Report notes Mexico’s complaint that “discrimination applied against countries which fish in the ETP (which under the MMPA included the Mexican coasts and Exclusive Economic Zone) and benefitted the other parts of the world where tuna is also fished and to which the United States fleet had largely moved in recent years. Only after the United States fleet moved to other waters were more restrictive requirements imposed in 1988 for the protection of dolphin in the ETP—but not for the new fishing grounds of the United States fleet.” Id. § 3.14.

167. “Mexico stated that the average rates of incidental taking and other MMPA provisions for tuna caught in the ETP represented a unilateral imposition by the United States of extraterritorial restrictions on fishing by other contracting parties in their own economic zones, under the pretext of protecting natural resources located abroad.” Id. § 3.48.

168. Id. § 5.14.

169. Id.

170. “The Panel noted that the MMPA regulates the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin, but that these regulations
The Panel considered the argument that the ban must be allowed under Article XX of the GATT. This Article appears on its face as though it could accommodate the need for environmental protection.\textsuperscript{171}

The United States had argued that the ban on certain tuna imports from Mexico and the relevant parts of the MMPA were justified by Article XX(b) because they served solely the purpose of protecting dolphin life and health.\textsuperscript{172} Both were said to be “necessary” within the meaning of that provision because there was no alternative measure reasonably available to the United States to protect dolphin life and health outside its jurisdiction.\textsuperscript{173}

Mexico did not consider Article XX(b) to be applicable to measures imposed to protect the life or health of animals outside the jurisdiction of the contracting party taking those measures, and it argued that the measures were not necessary because international cooperation between the countries concerned was available to the United States as an alternative means for protecting dolphin lives or health in a manner consistent with the General Agreement.\textsuperscript{174} In essence, but without actually using the term, Mexico characterized the extraterritorial application of the MMPA as eco-imperialism,\textsuperscript{175} and the GATT

could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product.”

\textit{Id.} § 5.14; \textit{see also id.} § 5.15.

\textsuperscript{171} GATT, \textit{supra} note 11, art. XX. Article XX reads in part as follows:

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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . (b) necessary to protect human, animal or plant life or health; . . .

\textsuperscript{172} \textit{Panel Report, supra} note 164, §§ 3.33 and 3.36.

\textsuperscript{173} \textit{Panel Report, supra} note 164, § 3.33.

\textsuperscript{174} \textit{Panel Report, supra} note 164, §§ 3.34-3.35.

\textsuperscript{175} Mexico had argued as follows:

To accept that one contracting party might impose trade restrictions to conserve the resources of another contracting party would have the consequence of introducing the concept of extraterritoriality into the GATT, which would be extremely dangerous for all contracting parties. In this context, Mexico recalled that, under the MMPA, the United States not only arrogated to itself this right of interference, but also the right of interference in trade between other contracting parties, by providing for an embargo of countries
Panel agreed, noting that unilateral national legislation such as the MMPA threatened to undermine the multilateral trading framework of the GATT, and was inconsistent with its principles. The Panel reached essentially the same conclusion with regard to Article XX(g).

In argument before the GATT Panel in this case, Indonesia argued that the MMPA exploited sympathy for marine mammals in order to protect United States tuna producers, i.e. that it was a classic case of using an environmental issue as a pretext for protectionism. It is to some extent a sign of the times that, in the face of the new environmental challenge, developing countries have been more concerned about preserving GATT rules than many industrialized powers have been. This is attributable not so much to a new developing country attitude towards trade liberalization, but to the fact that developing countries fear that they stand to be the principal victims of both "green protectionism" and "eco-imperialism."

On the other hand, the approach taken in the GATT Tuna Panel Decision is considered by many environmentalists and other scholars in the United States to be troubling. They fear that it gives undue priority to trade issues to the detriment of environmental issues. The narrow reading of the GATT’s limited provisions regarding the environment which was adopted by the Panel suggested that the GATT mechanism had proven to be fundamentally unsuited to the task of greening the international trade order. As one analyst notes, “the question arises: Should countries be pressured by GATT rules to become part of the problem by providing a market for products made in an environmentally harmful way?”

Considered to be “intermediary nations” simply because they continued to buy products which the United States had unilaterally decided should not be imported by itself or by any other country.

Panel Report, supra note 164, § 3.31.


177. Panel Report, supra note 164, § 5.32.

178. The GATT Panel Report summarizes Indonesia’s argument as follows: Indonesia noted the importance of its trade in tuna products with the United States, and further noted that this was the twenty-third time that the United States had embargoed imports of tuna, starting with Spain in 1975. The MMPA had been used as a means to continue this practice and shield United States producers from import competition by exploiting public sympathy for dolphins, which were in any event not a species listed as endangered under CITES.

Panel Report, supra note 164, § 4.15. See also William Keeling, Indonesia Protests at US Tuna Ban, FIN. TIMES, Apr. 9, 1992, at 32.

179. See Von Moltke, supra note 149, at 527.

180. Von Moltke, supra note 149, at 527.

181. Paul Cough, Trade-Environment Tensions; Options Exist For Reconciling
The GATT Tuna Panel Decision has not been adopted by a consensus of the GATT Council, and so it is not technically binding upon the parties.\textsuperscript{182} Mexico has entered into a dolphin conservation program with the United States and nine other nations which provides, among other things, for observers on all tuna fleet operations, and at least for the moment has not asked the Council to adopt the report.\textsuperscript{183} The European Union, after initially pushing for adoption of that decision by the Council, has called for a 2 year moratorium on all GATT Panel decisions concerning the environment.\textsuperscript{184} Meanwhile, the MMPA’s ban on non-conforming tuna imports remains in effect.\textsuperscript{185}

The GATT Panel was careful to state in its report that its task was limited to the examination of this matter in the light of the relevant GATT provisions, and therefore did not call for a finding on the appropriateness of United States or Mexican conservation policies.\textsuperscript{186} The analysis of environmental issues is technically quite complex, and the scientific understanding of these issues continues to evolve rapidly. One reason for the GATT Panels unwillingness to consider the environmental aspects of the Tuna dispute is that the Panel had no scientific environmental expertise to draw upon. The GATT mechanism will not be able to give proper consideration to environmental concerns until this situation is remedied.\textsuperscript{187} Even if the GATT Panel did have access to the necessary environmental expertise, it would face difficult problems in deciding how to prioritize between the benefits of free trade and those of environmental preservation in cases where they proved to be in conflict.\textsuperscript{188}

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\textsuperscript{182} Since the GATT agreement says little about dispute settlement procedures, the latter have evolved through practice. See Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT Doc. L/4907, Supp. No. 26, BISD 210 (1980); WILLIAM DAVEY & JOHN JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 337-46 (1986).


\textsuperscript{186} \textit{Panel Report}, supra note 164, § 6.1.

\textsuperscript{187} See Porter, \textit{supra} note 161, at 111-13 (suggesting that the GATT might refer some environmental issues to the Law of the Sea Tribunal, establish a cooperative dispute resolution mechanism with the United Nations Environment Programme, or establish a standing group of environmental experts within the GATT).

\textsuperscript{188} Porter, \textit{supra} note 161, at 113-16.
The GATT's environmental ignorance is clearly unacceptable in the long run, but for now, the GATT's single-minded fixation upon trade considerations does serve to shield developing countries from the dual threats of green protectionism and eco-imperialism. Ultimately, some type of limited environmental preferences for developing countries might be worthy of consideration as a way to compensate them for the costs of environmentally desirable policies.189

4. "Sustainable Competitiveness" and International Environmental Standards

Environmental controls may have an adverse effect upon competitiveness. The term "environmental dumping" is often used to describe the ability of an unregulated polluting producer to sell goods more cheaply due to savings from a less environmentally stringent manufacturing process and thus drive environmentally regulated producers out of business.190 Fear of this practice was used in the United States as an argument against NAFTA. Many seem to believe that "United States industry is suffering as a result of disparities between relatively stringent United States regulatory standards and those of many . . . United States trading partners."191 This view assumes a conflict between the proper functioning of a liberal trade regime ("thesis") and the need to avoid the irreversible or otherwise unacceptable intergenerational effects of environmental damage ("antithesis").

Whatever view one takes concerning the past effect of environmental regulations upon competitiveness,192 for the future there is definitely a need to develop and implement a new "synthesis" concept of "sustainable competitiveness" which reconciles these two concerns. But as Edith Brown Weiss notes, sustainable competitiveness requires the development and application of international environmental stan-

189. Along somewhat different but similar lines, see Policy Common Ground on Trade, Environment Hard to find at Ministerial Meeting, BNA Int'l Env't Daily, Feb. 23, 1994 (quoting Kenneth Dadzie, Secretary-General of UNCTAD, as suggesting that a special certification scheme should be created for environmentally friendly products produced by developing countries).


192. Edith B. Weiss, Environmentally Sustainable Competitiveness: A Comment, 102 Yale L.J. 2123, 2133 (1993) (noting that there is no empirical evidence to support the view that U.S. industry has suffered from disparities in environmental regulation).
standards (or rather minimum standards) which level the playing field environmentally speaking.\textsuperscript{193}

The acceptability of the minimum standard approach from the developing country viewpoint will depend upon the implementation of these standards. The simple imposition of Western standards upon developing countries will be viewed as thinly veiled eco-imperialism to be resisted. Weiss points out that three forms have emerged for the development of international minimum standards, i.e. "identical standards, mutual recognition of comparable standards, and compatibility of standards based on the underlying objectives."\textsuperscript{194} Others have spoken of "domestic treatment," mutual recognition" and "harmonization."\textsuperscript{195} In each case the international standard is only a minimal baseline standard leaving states free to adopt stricter environmental standards.

The need for environmental standards in international trade is also raised by the transboundary shipment of toxic wastes; usually from industrialized countries to developing countries. The Basel Convention\textsuperscript{196} provides for notification to the receiving state of any intention to transfer such wastes to its territory, and also requires that state's consent before shipment.\textsuperscript{197} This agreement, however, has been

\textsuperscript{193}  Id. at 2123.
\textsuperscript{194}  Id. at 2134.
\textsuperscript{195}  Special Report: The Regulation of Environmental Standards by International Trade Agreements, BNA Int'l Env't Daily, Sept. 15, 1993. NAFTA provides that "without reducing the level of safety or of protection . . . the Parties shall, to the greatest extent practicable, make compatible their respective standards-related measures, so as to facilitate trade in a good or service between the Parties." Canada-Mexico-United States: North American Free Trade Agreement, art. 906, para. 2, reprinted in 32 I.L.M. 289, 387 (1993). According to the NAFTA side agreement on the environment, the Council of a newly created Commission for Environmental Cooperation, is charged with the task of "without reducing levels of environmental protection, establishing a process for developing recommendations on greater compatibility of environmental technical regulations, standards and conformity assessment procedures in a manner consistent with the NAFTA." North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America 1993 Draft, art. 10, para. 3(b), reprinted in North American Free Trade Agreement Draft Side Accord On Environment, BNA Daily Rep. For Executives, Sept. 13, 1993, at M175.

\textsuperscript{197}  Id. art. 6.
criticized for putting a stamp of approval upon the practice of exporting wastes to developing countries.\textsuperscript{198}

IV. DEVELOPING COUNTRIES IN THE FUTURE INTERNATIONAL TRADE ORDER

A. DEVELOPING COUNTRIES AND GENETIC RESOURCES: A NEW ISSUE RAISES OLD QUESTIONS

There are other ways in which the special problems and interests of developing countries link international trade law issues and international environmental law issues. The Biodiversity Treaty which was opened for signature at UNCED is designed to preserve biological diversity for the benefit of future generations.\textsuperscript{199} This treaty’s obligations concerning conservation and monitoring may prove to be quite burdensome, especially for developing countries which have severely limited economic resources. Since developing countries are the “custodians” of such a large part of the world’s biodiversity, funding conservation of that biodiversity is a vitally important issue. While the treaty does express the principle that developing countries should receive some compensation from developed countries for conserving biological diversity,\textsuperscript{200} the specific funding provisions of that treaty are quite weak. All contracting parties, developing and developed, agree to provide financial support for the those nations attempting to implement the treaty.\textsuperscript{201} While developed countries do agree to provide new and additional resources to enable developing country parties to fulfill their obligations under the treaty, there is no provision which mandates any particular level for this funding. Early proposed drafts of the treaty would have required developed countries to provide an “adequate” level of funding.\textsuperscript{202} No such standard of sufficiency is provided for in the final text of the treaty.


\textsuperscript{200} \textit{Id.} art. 20(2).

\textsuperscript{201} \textit{Id.} art. 20(1).

The question of decision-making procedures under that treaty also illustrates how many current issues facing developing countries in the environmental and developmental fields echo those they have faced in the trade and development field since Bretton Woods. When Article 21 of the treaty describes the "Financial Mechanism" to be established under the Treaty, it provides that "the mechanism shall operate within a democratic and transparent system of governance."\(^{203}\) The implication here is that the procedure of the decision-making body is not to be as heavily weighted in favor of the donor states as it is under the World Bank and the IMF, and that the deliberations of that body should be public, again in contradistinction to the secrecy which surrounds the deliberations of the Bretton Woods institutions.

At the same time, however, another part of the Biodiversity Treaty provides that the Global Environmental Programme (GEF) (a cooperative venture of the World Bank, the United Nations Environment Programme (UNEP) and the United Nations Development Programme (UNDP)), is to serve on an interim basis as the institutional structure under the treaty, but only if it has been "fully restructured in accordance with the requirements of Article 21," i.e. made more democratic and open, and only until the details of a new institutional structure have been designated.\(^{204}\) Many doubt that there will be agreement on a new financial structure any time soon, and thus the GEF is likely to provide the treaty's institutional structure for some time.\(^{205}\) Try as they might, the developing countries are finding it difficult to escape from the pervasive influence of the Bretton Woods institutions.

In the past, countries whose biological resources have been used to develop profitable commercial drugs have received little or no compensation in return. One of the better known examples involved the Madagascar rosy periwinkle which is the source of the cancer drug

\(^{203}\) Biodiversity Treaty, supra note 199, art. 21.
\(^{204}\) Biodiversity Treaty, supra note 199, art. 39.
\(^{205}\) Article 39. Financial Interim Arrangements

Provided that it has been fully restructured in accordance with the requirements of Article 21, the Global Environment Facility of the United Nations Development Programme, the United Nations Environment Programme and the International Bank for Reconstruction and Development shall be the institutional structure referred to in Article 21 on an interim basis, for the period between the entry into force of this Convention and the first meeting of the Conference of the Parties or until the Conference of the Parties decides which institutional structure will be designated in accordance with Article 21.

Biodiversity Treaty, supra note 199, art. 39.

\(^{205}\) International Funding, supra note 202, at 322.
vincristine. That drug has earned millions of dollars, but Madagascar has received absolutely no compensation.\textsuperscript{206} One developing country, Costa Rica, has developed a special arrangement with a private drug company in order to facilitate research on the potential value of biological samples from its territory and to ensure that the source country shares in the financial benefits of that research.\textsuperscript{207} The Biodiversity Treaty might have done more to generalize such a system, but its provisions on the distribution of the benefits of biotechnology are general and consequently quite weak.\textsuperscript{208} The treaty has been criticized for failing to better harness the market potential of biodiversity in order to help developing countries finance conservation efforts.\textsuperscript{209}

Providing for a more effective international regime governing the distribution of the benefits of biodiversity would have been difficult and risky. One of the principal reasons cited by then President Bush for his decision not to sign the treaty was the provisions governing the distribution of benefits.\textsuperscript{210} President Clinton has since reversed the United States stand on this treaty, but if the weakened language of this treaty was considered unacceptable by President Bush, it is possible that stronger language would have been too much for any American President. Strong international regimes which operate primarily for the benefit of developing countries are a tough sell in the richer,


\textsuperscript{208} Biodiversity Treaty, supra note 199, art. 19. Article 19(2) provides that: Each Contracting Party shall take all practicable measures to promote and advance priority access on a fair and equitable basis by Contracting Parties, especially developing countries, to the results and benefits arising from biotechnologies based upon genetic resources provided by those Contracting Parties. Such access shall be on mutually agreed terms.

Biodiversity Treaty, supra note 199, art. 19(2).

\textsuperscript{209} \textit{International Funding}, supra note 202, at 341-42.

\textsuperscript{210} Former President Bush noted:

Many governments and many individuals from the U.S. and other nations have pressed us to sign a treaty on what's called biodiversity . . . . But the truth is, it contains provisions that have nothing to do with biodiversity . . . . The treaty includes provisions that discourage technological innovations, treat them as common property though they are developed at great cost by private companies and American workers. We know what will happen. Remove incentives, and we'll see fewer of the technological advances that help us protect our planet.

industrialized countries of the world, especially the United States.

B. DEVELOPING COUNTRIES AND INTERNATIONAL TRADE AGREEMENTS IN THE 1990s

The Uruguay Round of multilateral trade negotiations was successfully concluded in December of 1993, but it will be some time before the effects of the agreements upon the developing countries as a group can be fully appreciated.

Important for developing countries is the fact that the Uruguay Round includes an agreement to phase out the MFA over 10 years, and thereby integrate the textiles and clothing sectors into the broader GATT/WTO regime. Although the 10 year delay is regrettable, this will finally end one of the more egregious forms of trade discrimination against developing countries. Many developing country agricultural exporters will benefit from the agreement to integrate the agricultural sector into the multilateral trade regime.

As part of the overall agreement to phase out the MFA, the United States at the last minute proposed to link access to the United States textile market to the removal by each particular textile exporter of its own barriers to textile and clothing imports. While the United States could not force acceptance of this proposal, as a compromise developing countries did agree to “achieve” improved access to their own markets for textile imports as opposed to merely “promoting” such access. This language was flexible enough to permit both sides to declare victory on this point at the conclusion of the deal.


212. Textile Agreement, supra note 88, arts. 2(8), 9.


214. Jim Ostroff, Mills Blast New GATT Accord; But Importers, Stores Back It; General Agreement on Tariffs and Trade, DAILY NEWS RECORD, Dec. 16, 1993, at 2 (noting that “this proposal was primarily aimed at forcing India and Pakistan to drop their virtual ban on U.S. textile and apparel imports.”).

215. Textile Agreement, supra note 88, art. 7(1).

216. Behr, supra note 88, at A41 (reporting that Deputy U.S. Trade Representative Rufus Yerxa called the WTO a peacemaker in global trade, which would benefit from an enhanced ability to make binding decisions in trade disputes).
One might be tempted to say that in zero-sum terms, the developing countries made significant concessions to the North by agreeing to extend GATT rules into new areas like services, investment and intellectual property rights. Some from the South have complained that they have given up too much, and it does seem likely that the rich industrial nations will reap most of the direct benefits of this round.

But while developing countries may not initially derive as much direct benefit from the Uruguay Round as will the industrialized countries, a simplistic zero-sum view of this situation is not appropriate. The completion of this round constitutes a major step towards a more integrated and efficient global economy, and when implemented, it should yield dynamic benefits for many developing countries such as the NICs. Other developing countries, however, such as those of sub-Saharan Africa, may not be in a position to reap much benefit from the new dynamic in world trade.

The developing countries comprise a very diverse group of countries with a full range of views concerning trade and trade liberalization, and some of them are among those states most committed to trade liberalization today. In one way or another, most developing

217. General Agreement on Trade in Services, supra note 4.
218. Agreement on Trade Related Investment Measures, supra note 5.
220. See Martin Khor, Third World: Enter a New Institutional Trinity, INTER PRESS SERVICE, Feb. 25, 1994, available in LEXIS, News Library, Wires File; Walter Schwarz, Seeds of Discontent, THE GUARDIAN, Mar. 11, 1994, at 16 (reporting a farmers revolt in India against the prospect that enforcement of new Uruguay Round intellectual property rules will require them to buy new hybrid seeds every year from private multinational companies).
221. See Ian Goldin et al., Trade Liberalisation: Global Economic Implications 205 (1983) (projecting that over 60% of the net gains from partial multilateral trade liberalization such as negotiated in the Uruguay Round would go to the OECD (industrialized) Countries). The study also projected that by the year 2002, such an agreement would lead to an increase in real income of 1.9% worldwide 1.9% for the OECD (industrialized) regions, 0.6% in Africa and only 0.1% in Latin America. Id. at 130. Low income regions, however, would experience a 2.9% increase in real income, and “other” developing regions would realize an impressive 4% increase. Id. at 148. See also For Richer or Poorer, THE ECONOMIST, Dec. 18, 1991, at 66.
222. Id.
223. See Taylor, supra note 213, at 12 (quoting Peter Sutherland, the Director General of the GATT as stating that “One of the ironies of the round has been that the greatest commitment to the multilateral trading system has come from the developing world rather than the industrialized states”); Stephanie Nebehay, Devel-
countries aspire to mutually beneficial trade relations with the rest of the world. The chances of successfully achieving such relations during the next decade will depend upon three key factors: the development and broadening of regional trade agreements; attitudes within the industrialized states linking domestic welfare issues and international trade issues; and the dynamics of the move beyond the GATT framework to a new and more effective World Trade Organization.

1. **Regional Trade Agreements**

   In the past, fear of domination by industrialized states has caused developing countries to favor economic cooperation between developing countries (ECDC) as a path to economic independence, development and prosperity. Unfortunately, ECDC arrangements have not been particularly successful due, in part, to a lack of complementarity between developing country economies, and also in part to the generally low level of economic growth which they have experienced recently. The real success story in regional trade arrangements has been the European Union, and this has once again stranded developing countries on the outside looking in. Now more than ever, as they become part of a more integrated international economic order, these countries need for some of the wealth of rich countries to flow in their direction, and since massive additional transfers of foreign aid are unlikely, international trade and investment are indispensable.

   The economic fate of developing countries in the international economic order over the next decade will depend to a large extent upon the general approach to trade chosen by the United States, the European Union, Japan and the other key players in the international economic order. The consolidation of these industrialized countries into regional trade blocs could have a detrimental effect upon the

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225. In Latin America alone there are currently four ECDC trading groups: the Andean Pact (Bolivia, Colombia, Ecuador, Peru and Venezuela), the Central American Common Market (ACM) which includes Costa Rica, El Salvador, Honduras and Nicaragua), the Caribbean Common Market (CARICOM) which includes 12 countries in that area) and the Latin American Integration Association (LAIA), comprising Argentina, Brazil, Chile, Mexico, Paraguay, Uruguay and the Andean Pact members. Although some of these arrangements provide for far more integration than do some others, none of them has been very effective in increasing the share of intra-group trade in recent years. See Trade and Development Report, *supra* note 118, at 67.
interests of those developing countries which are not central to such blocs. Such blocs do not generally link developing countries to a major industrialized economy, but the recently concluded North American Free Trade Agreement (NAFTA) represents both an exception, and perhaps a harbinger of things to come. Mexico, by joining its economic fate to that of the United States and Canada, will be in a position to share in a process of economic growth with two of the world's most powerful economies. Other parts of Latin America may eventually be consolidated into the NAFTA sphere as well.

If the trend towards regional integration continues, the Asian NICs may eventually join with Japan in an Asian trading bloc. If this does come to pass, the least developed "Fourth World" states of Africa and Asia will find themselves more isolated than ever. Regional economic integration into free trade areas is unlikely to improve their lot over the next decade. For these countries, the success of global trade talks was essential because they lacked the power to negotiate access to foreign markets through bilateral or regional arrangements.

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226. The European Union (formerly the European Community) has maintained a special relationship with a group of former colonies know as the ACP States (African, Caribbean, and Pacific) but they have never been part of the EU/EC. In any case, the benefits of the limited trade preferences granted to the ACP states have never lived up to the expectations of the latter. See P. Kenneth Kiplagat, *Fortress Europe and Africa Under the Lomé Convention: From Policies of Paralysis to a Dynamic Response*, 18 N.C. J. INT'L L. & COM. REG. 589, 624-25 (1993).


228. *See* Anthony Rowley, *Does the Shadow of Nafisa Spell Gloom for Gatt?,* BUS. TIMES, Feb. 9, 1994, at 11 (noting that before the Uruguay Round was concluded Malaysian Prime Minister Mahathir Mohamad, reportedly acting with the encouragement of Japan, had suggested that an East Asian Economic Grouping, later referred to as an East Asian Economic Caucus (EAEC), could help protect Asian trade interests if the multilateral round were to fail, and suggesting that even with the successful completion of the Uruguay round the EAEC might still be needed).


ACP countries must recognize that the only forum which presents an opportunity for a forward movement is the GATT forum. ACP and other developing nations should not hope for miracles from the Uruguay Round. In fact, chances are that any agreement that may be worked out in the talks will fall far short of what many developing countries are now seeking. However, there will be significant forward-looking measures that will be incorporated. . . . [D]eveloping countries must yield on the issue of services in order to establish some *quid pro quo* necessary to fashion out an agreement. In doing so, developing countries could acquire leverage with which they could ask for the removal of trade restraints by developing countries.

2. **Links Between Domestic Welfare Issues and International Trade Issues.**

In all of the industrial democracies, there are economic and psychological links between international trade policy and domestic social policy. Nowhere is this linkage more apparent, or more important, than in the United States. The recent debate concerning the ratification of NAFTA is illustrative.

Some opponents of NAFTA in the United States have passionately argued that this agreement, when implemented, will impose an unacceptable cost upon the most vulnerable segments of United States society.\(^{230}\) They point out that unskilled workers, the poor, minorities, and the unemployed will be expected to bear the brunt of the dislocations caused in the United States by NAFTA, and stress that these are the very same people who suffered the most from the domestic economic policies of the 1980s and early 1990s.\(^{231}\)

Conceding readily that these elements of United States society have suffered enough, especially in recent years, does not constitute sufficient reason to oppose NAFTA. Low wage workers, unskilled workers, and the unemployed have suffered in this country for a number of reasons. In part, they have suffered because many of the low wage jobs they have held are indeed disappearing in the transitional restructuring towards a globally integrated economy. Protectionism cannot save these jobs in the long run, but it can delay the process of structural adjustment which is the best hope of creating new jobs and opportunities for this country in the future. Workers have also suffered because national economic policies in the United States have not created a true national community which provides for the fundamental needs of all. The unfortunate hardship affecting the least affluent segments of United States society cannot be attributed retroactively to NAFTA, and rejecting NAFTA would not have provided an effective remedy for their situation.

The decision to link the United States economy with that of Mexico and Canada under NAFTA was an important step towards acceptance of broader hemispheric and even global economic communities. The United States Congress might have decided to reject NAFTA out of economic nationalism but choosing such a course would have repeated the same mistake in international economic and...


\(^{231}\) *Id.*
social policy which has been made in the domestic social policy of this country.

Some labor leaders and many environmentalists in the United States opposed NAFTA because of low wages and other unfavorable working conditions which prevail in Mexico. The human rights of those in Mexico, whether civil, political, economic, or environmental, can best be promoted not by restricting United States trade with Mexico, but by building upon the economic and social ties which bind the two countries. Because of our 2,000 mile long common border, we are already bound together to a very large extent. It makes little sense to attempt to deny that link by retreating ostrich-like into an isolationist mentality.

As we move towards a globally integrated economy the time has come to develop a broader sense of community and shared destiny, both within the United States and in the broader global community. Better and more effective laws and institutions will be essential to building these communities. Unfortunately, both the sense of community and the legal and institutional underpinnings of that community have been slow to develop even within the United States, as the gap between rich and poor has been permitted to widen over the past 13 years.

In spite of the enormous wealth and overall prosperity of the United States, our country failed to protect the economic and social rights of its workers during the 1980s. Even our children have been allowed to suffer more than those in the rest of the industrialized world, and we could learn much from other nations about building a community of citizens, both nationally and internationally. It is ironic that even under these conditions, it is the United States which must provide leadership in global trade negotiations. President Clinton, perhaps aware of this irony, was careful to promise United States workers that despite their fears and suspicions concerning NAFTA, he would ensure that they would share in the economic benefits of that agreement.

234. See Young and Poor, Chi. Trib., Oct. 3, 1993, § 4, at 3 (summarizing parts of a UNICEF report stating that "among children in leading industrial countries...only those in the United States and Britain are poorer today than they were in 1970; in the United States, one child in five lives below the poverty level.")
235. At the signing ceremony for NAFTA, President Clinton acknowledged the
3. Beyond GATT to a New World Trade Organization

In recent years, environmental issues have challenged the principles and institutions of the international trade order. Now that the principle has been accepted that rational economic analysis requires that environmental effects be taken into account, a new issue has been raised. Can the GATT mechanism be properly adapted to respond to environmental concerns? If not, how can the newly recognized environmental imperative be incorporated into the international trade regime?

Doubts about the adequacy of the GATT are not limited to those raised by environmental issues. Much has changed since the GATT was founded. Decolonization has created many new independent states with special trade problems. The Cold War has come and gone, and has left in its wake a number of new “economies in transition” in Eastern Europe. The environmental imperative must increasingly be accommodated as the effects of environmental damage become more apparent.

... linkage between domestic welfare issues and international trade issues, as he promised to pursue legislation to promote retraining of displaced workers. NAFTA Signing Ceremony, supra note 107.

And we must see to it that our citizens have the personal security to confidently participate in this new era. Every worker must receive the education and training he or she needs to reap the rewards of international competition, rather than to bear its burdens... we must seek to reconstruct the broad-based political coalition for expanded trade. For decades, working men and women, and their representatives supported policies that brought us prosperity and security. That was because we recognized that expanded trade benefitted all of us, but that we have an obligation to protect those workers who do bear the brunt of competition by giving them a chance to be retrained and to go on to a new and different and ultimately more secure and more rewarding way of work.

In recent years, this social contract has been sundered. It cannot continue. When I affix my signature to the NAFTA legislation a few moments from now, I do so with this pledge—to the men and women of our country who were afraid of these changes, and found in their opposition to NAFTA an expression of that fear, what I thought was a wrong expression, and what I know was a wrong expression, but nonetheless, represented legitimate fears—the gains from this agreement will be your gains, too. I ask those who oppose NAFTA to work with us to guarantee that the labor and side agreements are enforced, and I call on all of us who believed in NAFTA to join with me to urge the Congress to create the world’s best worker training and retraining system.

NAFTA Signing Ceremony, supra note 107.

236. See supra notes 123-98 and accompanying text.
But as the Tuna Panel Decision shows, the GATT has proven to be quite resistant to the "greening effect" of heightened environmental consciousness which has already had a significant, although limited, effect upon the operations of the World Bank. Developments in environmental science are gradual and continual, and thus any trade regime which truly incorporates environmental factors will have to exhibit some considerable flexibility. This is exactly what the GATT lacks.\textsuperscript{237}

A key part of the agreement reached in the Uruguay Round of GATT negotiations provides for the creation of a new World Trade Organization (WTO)\textsuperscript{238} to implement and administer the rules and regulations governing international trade agreed to in that round and in future global trade negotiations.\textsuperscript{239} The plan for the new WTO was formally endorsed at a recent ministerial meeting in Marrakesh.\textsuperscript{240} The United States government took a very high profile in supporting the creation of a permanent Committee on Trade and the Environment at that meeting,\textsuperscript{241} but no consensus has yet emerged about how that committee will operate.\textsuperscript{242}

Hopefully, the new WTO will be better suited to the task of integrating environmental factors into the international trade regime than was the GATT.\textsuperscript{243} The WTO will supersede the GATT, and in

\begin{footnotes}
\textsuperscript{237} Von Moltke, supra note 149, at 525.
\textsuperscript{239} Id. art. III.
\textsuperscript{240} See Williams, supra note 151, at 7.
\textsuperscript{241} See United States Trade Representative Mickey Kantor Remarks on Trade and the Environment at the Global Legislators Organization for a Balanced Environment, Federal News Service, Feb. 28, 1994, available in LEXIS, News Library, Wires File. U.S. Trade Representative Mickey Kantor stated that a standing committee on trade and the environment must be created at the Marrakesh meeting, and that it should be charged with providing ongoing environmental input to the WTO. In the course of these comments he criticized the closed way in which the GATT had tried to deal with environmental issues in the past, and noted that non-governmental organizations were not even allowed to file amicus briefs. He stressed that the United States wanted open, transparent proceedings providing public access to NGOs, environmental groups, and to business. Id.
\textsuperscript{242} See Williams, supra note 151, at 7 (noting that a wide gulf exists between environmentalists who want to change GATT rules to facilitate the use of trade restrictions for environmental protection, and the developing countries which fear such a change would provide a pretext for protectionism aimed primarily at developing countries).
\textsuperscript{243} See Europe and America Figleaf Hunt, The Economist, Nov. 13, 1993, at
doing so, strengthen the enforcement of the principles of the international trade order. Developing countries have a lot to gain from this development, particularly if the new organization proves to be capable of shielding them from environmentally based trade barriers or "green-protectionism."

One anticipated advantage of the new WTO is that it will bring greater "automaticity" to the resolution of international trade disputes than did the GATT. Under the GATT system a GATT party could take its complaint to an independent panel for a judgment, but that judgment did not become legally binding unless approved by the GATT Council. Under the WTO, panel decisions will automatically be adopted by the WTO Dispute Settlement Body (DSB) after 60 days unless the DSB decides by consensus not to adopt them.\footnote{62} The Clinton Administration has praised the strengthened dispute settlement mechanism agreed to in the Uruguay Round, noting that it will "enable better enforcement of United States rights,"\footnote{244} while at the same time stressing that since the prior GATT practice of decision-making by consensus has been retained. "This will continue to enable the United States to prevent the application to it of a decision that it perceives to be contrary to its interest."\footnote{246} This may sound like a veto, and indeed the United States administration seems to be presenting it as such to the United States public and Congress. Nonetheless, the language of the WTO Agreement leaves open the possibility that a decision can be taken by majority vote if a consensus cannot be achieved.\footnote{247} A prominent member of Congress has stated that while he

\footnote{62} (noting that Sir Leon Brittan, Trade Commissioner of the European Union, had suggested that a WTO might be more effective than the GATT in dealing with a global economy whose financial and ecological aspects could not have been anticipated by the original GATT signatories in 1947).


\footnote{246} Id. at 13.

\footnote{247} See Agreement Establishing World Trade Organization, supra note 238, art. IX(1):

The [WTO] shall continue the practice of decision-making by consensus followed under the GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General
supports the substantive trade liberalization agreements of the Uruguay Round, he is opposed to the WTO because it would transform the consensual GATT mechanism where the U.S. has "real power" into a "Third-World dominated, dictatorship-dominated system, with 117 countries making the decision."248

It remains to be seen whether the WTO will in practice be any more sensitive than was the GATT to the special needs of the developing countries in issues of trade, development and the environment. After their experience in trying to moderate the often rigid principles of the GATT and the Bretton Woods institutions, developing countries could use some assurance that in its operations, the new WTO will reflect their interests and their perspectives, and not just those of the industrialized economic powers.249 The latter states were the architects of the Bretton Woods system, and they have also been its principal beneficiaries.250 Developing countries will want a more active role in both the new WTO and in global management in general, but they

Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their Member States which are Members of the [WTO]. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or the Multilateral Trade Agreements.


249. Luis Fernando Jaramillo, a Colombian diplomat who has chaired the negotiating group of developing countries (the G77), has stated that "The terms of [the WTO]'s creation suggest that this organization will be dominated by the industrialized countries and that its fate will be to align itself with the World Bank and the IMF." Khor, supra note 220.

250. See William N. Eskridge, Jr., International Monetary Collaboration, (book review), 80 Am. J. Int'l LAW 237, 240 (1986) in which he comments upon the structural bias of the Bretton Woods system.

Western industrial countries, of course, devised the Bretton Woods system, and those same countries have in absolute terms been the main beneficiaries of that system. This has been dramatically illustrated in the international debt crisis. Western bankers clamored to make loans of unprecedented size to Latin American countries in the 1970s. In retrospect, those loans were irresponsibly large, especially in light of the higher interest rates that have prevailed in the 1980s (itself a result of undisciplined or irresponsible U.S. policy). Even though most of the misjudgment was that of Western officials and bankers, the burden of the debt crisis has fallen mostly on the Latin American countries themselves, which have forgone needed capital goods imports and local capital formation to pay just the yearly interest charges, and whose people have suffered declines in real wages for most of the 1980s.

Id.
must take a realistic approach. Recalling the failure of the earlier call for a largely unrealistic New International Economic Order should help developing countries to moderate their expectations.

Despite the progress made at the Uruguay Round there is still a need for institutional reform in international economic decision-making. Now that the difficult negotiations of that round have been successfully concluded, GATT Secretary General Peter Sutherland has suggested that a new high-level framework is needed to coordinate international economic policy.251 This new forum would bring together developing countries, transitional economies and the industrialized world; and would supersede western-dominated fora such as the Group of Seven meetings of major industrial powers (G-7) and the Organization of Economic Cooperation and Development (OECD) in trying to coordinate the activities of the IMF, the World Bank and the new WTO.252

**Conclusions**

Although the negotiations at Bretton Woods and Havana were based on an incomplete vision of the future world and its problems, one that did not adequately take into account the situation of developing countries; the dynamic and open aspects of that vision are still valid, and should be applied, *mutatis mutandis*, to the world today. Then, as now, restrictive nationalistic approaches to international economic relations offer no real hope for the future. Nonetheless, many who are concerned about the costs of structural adjustment cling to economic nationalism and protectionism out of despair.

The problem of integrating environmental concerns into the trade order adds a new level of complexity, and raises potential problems of “green protectionism” and of “eco-imperialism” as developed market countries attempt to apply their environmental standards to products from the developing countries. A fair and “sustainable competitiveness” will require the development of appropriate interna-

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252. GATT Director Peter Sutherland noted:

> We cannot continue with a majority of the world’s people excluded from participation in global economic management... For instance, the G-7 self-evidently excludes most of the world’s population and a large number of the world’s substantial and fast-growing economies... The fact is that the countries which will increasingly provide our best hope for economic growth and new markets are simply not represented where it counts.

George, *supra* note 1, at 15.
tional environmental standards which do not call for a disproportionate sacrifice by the ones who can least afford it. This objective can only be achieved if environmental preservation in the developing world is linked to increased financial and technical assistance from developed countries and market access to those countries. The old GATT framework has proven to be inadequate for this broad new task, but given their unpleasant experience with decision-making structures in the IMF and the World Bank, the developing countries must be concerned about the strength of their role in the future WTO.

The institutions of the international economic order must be adapted to deal with today's changed circumstances. Stephen A. Silard has noted, for example, that changes in international finance have not been matched by a corresponding development of international rules. Thus there has been a massive buildup of developing country debt, but "no orderly way seems to exist by which either the sovereign can definitively outgrow its excessive debt or the creditors can cut their losses." It will be impossible for developing countries to repay the debt they owe to the industrialized countries unless the former can obtain access to foreign exchange by exporting goods to the latter. Thus, the failure of the international trade regime to provide developing countries with access to Northern markets exacerbates an international debt problem which threatens prosperity in North and South alike. The lack of progress in resolving international economic problems has a detrimental effect upon international peace and security as well.

In recent years, the world has made remarkable progress in the political sphere. The end of the Cold War has permitted the United Nations to take a record number of peacekeeping and other initiatives to promote international peace and security, democracy and human rights. The unparalleled proliferation of these UN political operations provides evidence of an increasing consciousness of global security interdependence. But at the same time, industrialized countries have been more reluctant than developing countries to accept the full

253. Stephen A. Silard, International Law and the Conditions for Order in International Finance: Lessons of the Debt Crisis, 23 INT'L LAW 963, 965 (1989). He laments the failure of the international law of finance to adapt to changed circumstances, but given the clear link between trade and finance, his point is equally relevant as applied to the international trade regime and its weak and outdated norms. Id.

254. Id.

extent of global economic interdependence.\textsuperscript{256} In the long run, a higher level of global security cannot be assured until the increase in international political cooperation has been accompanied by more effective international economic cooperation. The need to preserve the global environmental commons brings the need for such cooperation into sharp focus. Economic logic requires the integration of the international regimes governing trade, development and the environment; but to be effective this must be done on terms which wealthy states, poor states, newly industrialized states, and states whose economies are in transition can all hope to live with.

States have been able to take certain economic insights gained from experience in national policy and apply them to international problems. Practical lessons have been learned on both the national and the international level, i.e., regarding the benefits of privatization and freer markets. Ultimately, however, it will be necessary to internalize and codify into legal structures the equally important lesson that it is dangerous and ultimately unacceptable for a society to ignore the economic well being of its poorer members. This is true both of the national society within a state and of the relatively fragmented international society of states.

\textsuperscript{256} As Chan Heng Chee, Permanent Representative of Singapore to the United Nations once noted:

There are probably numerous reasons why more progress has been achieved in international political relations than in international economic relations. A possible reason could be that in the global political sphere, many countries understand that they share a commonality of interests in mutual survival, whilst international economic relations is viewed as a zero sum game. Markets, technology, exports, foreign exchange are seen as proprietary and exclusive. Economic competition is viewed as natural, whilst political cooperation is perceived as a necessity.