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Dangerous Liaisons: The World Trade Organization and the Environmental Agenda

by

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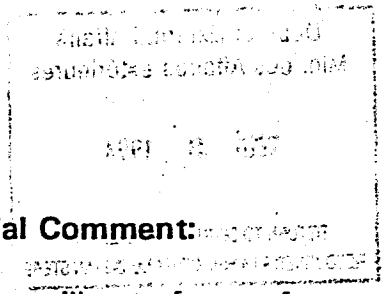

Editorial Comment:

Readers will note from reference to the list included herein that this Policy Staff Paper is the first written by an officer currently serving at one of Canada's Posts abroad. We welcome other timely, well-researched and topical trade and economic policy proposals for inclusion in one of Policy Staff's publication series.

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Executive Summary

Many of those concerned about the environment are growing restless. The importance of achieving improved environmental protection and conservation around the world is widely acknowledged, yet progress is slow. The problems are complex, the science is often uncertain and different countries have different priorities and capacities to address competing demands. Indeed, some developing countries have virtually no capacity to respond to the environmental agenda being pressed upon them by developed countries. And the latter have not come to grips with many of their own environmental responsibilities. The costs can be high and most taxpayers are reluctant to face them.

Under these circumstances, the GATT and its soon-to-be successor, the World Trade Organization (WTO), have come under the gaze of environmental groups and others. In particular, there is growing interest in, and demands for, the use of trade restrictions to advance environmental goals at the international level. Trade restrictions, especially those intended to exert pressure on countries considered to have inadequate environmental policies and standards, are seen as fast and effective tools for achieving change. They also have appeal for some governments as a high profile way to respond to political pressures when solutions to the underlying environmental problem are considered too difficult or costly domestically in the short-term. Accompanying the proposals for trade restrictions are calls for amendments to the international trade rules under the GATT and WTO to provide greater latitude for trade action. Dissatisfied with the state of affairs on the environmental front, a new liaison is sought.

This Paper, prepared against the background of discussions on the trade and environment issue that are already well underway in the GATT, addresses the proposals for change, attempting to boil them down to their basics, considers their implications and suggests a way forward in the process that will be unfolding in Geneva. In essence, the paper makes the case that the liaison between the WTO and the environmental agenda contemplated in many of the proposals would be a dangerous one indeed.

As a start, it is maintained that the type of change suggested fails to recognize, and could actually interfere with, the important contribution the trading system already makes to improved environmental protection and resource conservation. First and foremost, trade is one of the central forces driving international economic growth, which in turn is a critical factor in advancing the goal of environmental protection. The evidence is clear that an open, predictable and non-discriminatory trade regime is a prerequisite for increased wealth and that increased wealth is a prerequisite for

a better environment. At the same time, and contrary to common perceptions, broad scope already exists under the GATT/WTO rules to employ a wide range of trade measures in support of environmental programmes and standards. Just about anything can be done in relation to environmental and conservation matters within a country's jurisdiction as long as the basic GATT principles on non-discrimination and least-trade-restrictiveness are met (exceptions to the non-discrimination requirement are even possible). In fact, the business community in many countries is expressing increasing concern that there is not enough discipline on the use of certain trade-related environmental measures, which are threatening to disrupt international markets seriously.

While the existing scope for action is broad, what the GATT/WTO do not provide for, however, is the use of trade restrictions, including discriminatory ones, to press an environmental agenda extraterritorially. There are a number of variations on the theme, but this is essentially what some observers are proposing: authorizing trade restrictions under the GATT/WTO as a means to apply environmental or conservation standards outside a country's jurisdiction, including with respect to foreign process or production methods (PPMs), or to force acceptance of international environmental agreements. The result of this approach is that a country's trade rights could become conditional on adopting others' environmental policies and programmes. This effectively would cast the GATT/WTO in the role of an environmental interventionist. The basic question is whether this should be done.

The Paper argues that, for both trade and environmental reasons, it should not. Changing the rules to allow for easier use of discriminatory and extraterritorial trade restrictions may have short-term appeal for some, but would be counterproductive in the long-run. Denying export opportunities, especially to developing countries, would simply eliminate a source of the income necessary to deal with an environmental problem. It also would undermine the international trust and cooperation that will be equally necessary for long-term success - intrusions into a country's domestic jurisdiction through the use of trade penalties by others will only create dissent. And the danger of protectionist abuse would be high. Environmental groups may have only environmental objectives in mind, but, once on the books, provisions permitting such trade restrictions could well attract other interests.

These and other problems discussed in the Paper that arise with the use of trade penalties to force environmental programmes on others are particularly relevant when such actions are taken unilaterally. Since only a few players on the international scene have sufficiently large markets to attempt this approach in any consistent or credible way, the implication is that international environmental issues would be determined by those few on the basis of international might. This would be the case

even if the solution imposed had more to do with politics, as sometimes occurs, than with what is best for the environment and the situations and needs of other countries. Of course, there is little doubt that unilateral measures will be used in some instances. The issue is not whether this will happen, however, but whether it should be provided for, and thus encouraged, under the trade rules. It is argued here that this course would be neither desirable nor negotiable.

This does not mean to say that nothing needs to be done in the GATT/WTO on the trade and environment issue. In response to the valid concerns of the environmental community and others, more openness in the system and a better exchange of information are needed. It is also true that improvements could be made to provide more clear and predictable access to GATT exceptions for international environmental agreements (IEAs) that reflect broad international consensus on an environmental programme that includes otherwise GATT-inconsistent trade restrictions. This Paper addresses this issue in detail and suggests options for change. In addition, changes are also called for in the GATT/WTO to ensure that certain types of trade-related environmental measures do not unnecessarily disrupt trade, as is feared by the business community. There would be nothing to gain by a loss of trade due to avoidable impacts of such environmental measures, but quite a bit to be gained if trade is facilitated.

There will be much debate over these issues. But, at the end of the day, one thing is clear - the GATT/WTO should not become further entangled in environmental affairs. The international trading system cannot be used to arbitrate environmental policy decisions. Nor should it be called upon to enforce or police environmental standards or programmes that have not been accepted internationally. After all, the WTO will be nothing more than an organization bringing together for trade purposes the same governments that gather in other fora for environmental purposes. Those that are not in a position to move in a certain direction on environmental issues in those fora are unlikely to accept provisions under the WTO allowing the use of trade penalties aimed at forcing them to do so.

The role should, therefore, be support and non-interference, not environmental interventionism; fine-tuning the interface between environmental programmes and the trade rules, not creating blunt instruments. Ultimately, the WTO should be left to do what it is mandated to do and, in fact, does best - liberalize and safeguard the international trading system which, over time, will be its most important contribution to future generations.

Résumé

Beaucoup de ceux qui se préoccupent de l'environnement commencent à perdre patience. L'importance d'accroître les efforts de protection de l'environnement et de conservation à l'échelle mondiale est généralement reconnue, mais malgré tout la situation progresse lentement. Les problèmes sont complexes, la science ne répond pas encore à toutes les questions et chaque pays a son propre ordre de priorité et sa propre façon d'envisager des besoins qui rivalisent d'importance. De fait, certains pays en développement n'ont pratiquement pas les moyens de mettre en pratique les programmes environnementaux qui leur sont imposés par les pays avancés, lesquels ne se sont pas acquittés de bon nombre de leurs propres responsabilités à l'égard de l'environnement. Les mesures envisagées peuvent être coûteuses et la plupart des contribuables ne sont pas prêts à assumer ce coût.

Dans ces circonstances, le GATT et l'Organisation mondiale du commerce (OMC), qui est appelée à le remplacer bientôt, sont devenus le point de mire des groupes préoccupés par l'environnement et d'autres groupes, qui manifestent notamment un intérêt accru pour le recours à des restrictions commerciales comme moyen de promouvoir la protection de l'environnement à l'échelle internationale et qui insistent de plus en plus sur leur utilisation. Les restrictions commerciales, surtout celles qui ont pour objet d'exercer des pressions sur les pays dont la politique et les normes environnementales sont jugées trop faibles, sont considérées comme des moyens rapides et efficaces de stimuler le changement. Ces restrictions sont aussi, pour certains gouvernements, une façon très visible de faire face à des pressions politiques, lorsqu'il serait trop difficile ou trop coûteux pour le pays à court terme de régler les problèmes environnementaux sous-jacents. Aux propositions de recours à des restrictions commerciales s'ajoutent des demandes de modification des règles de commerce international sous le GATT et l'OMC, de manière à avoir plus de latitude pour la prise de mesures commerciales. L'état de la situation étant jugé insatisfaisant sur le plan de l'environnement, une nouveau rapprochement est recherché.

Ce document, rédigé dans l'optique des discussions sur le commerce et l'environnement déjà bien amorcées dans le cadre du GATT, présente un examen des changements proposés, afin d'en dégager les éléments fondamentaux, d'analyser leurs répercussions possibles et de proposer des moyens de faire progresser le processus qui se déroulera à Genève. On y dit, en substance, qu'il serait fort dangereux d'effectuer le rapprochement, envisagé dans de nombreuses mesures proposées, entre le commerce, incarné par l'OMC, et les préoccupations environnementales.

En premier lieu, il est soutenu que les changements proposés ne tiennent pas compte de la manière dont le système des échanges commerciaux concourt déjà à une

plus grande protection de l'environnement et à une meilleure conservation des ressources, et que ces changements pourraient même nuire à ce rôle. Le commerce est d'abord et avant tout une des principales forces motrices de la croissance économique dans le monde, croissance qui est essentielle à la promotion de la protection de l'environnement. Les faits montrent clairement qu'un régime d'échanges commerciaux ouvert, prévisible et non discriminatoire est un facteur nécessaire à l'augmentation de la richesse, condition préalable de l'amélioration de l'environnement. Parallèlement, et contrairement aux perceptions courantes, les règles appliquées dans le cadre du GATT/OMC offrent déjà la possibilité d'une vaste gamme de mesures commerciales à l'appui des programmes et des normes ayant rapport à l'environnement. Presque tout est permis à un pays, sur son territoire, pour assurer la protection de l'environnement et la conservation, dans la mesure où ce qui est fait est conforme aux principes du GATT, c'est-à-dire que les mesures prises sont non discriminatoires et qu'elles entravent le moins possible le commerce (l'exigence visant la non-discrimination pouvant même être écartée parfois). En fait, dans le milieu des affaires de nombreux pays, on s'inquiète de plus en plus du trop peu de discipline dans le recours à certaines mesures relatives à l'environnement qui ont des répercussions commerciales et qui menacent de perturber sérieusement les marchés internationaux.

Si la marge de manoeuvre est déjà grande, ce que les règles du GATT/OMC ne permettent pas, toutefois, c'est l'utilisation de restrictions commerciales, notamment de nature discriminatoire, pour promouvoir des mesures environnementales à l'étranger. Voici essentiellement ce que certains proposent, avec quelques variantes : autoriser le recours à des restrictions commerciales dans le cadre du GATT/OMC pour faire appliquer des normes de protection de l'environnement ou de conservation à l'étranger, notamment en ce qui concerne les méthodes de production ou de transformation d'un pays étranger, ou pour obliger un pays à accepter les ententes internationales sur la protection de l'environnement (EIPE). Partant, le droit d'un pays de se livrer à des échanges commerciaux pourrait dépendre de l'adoption de la politique et des programmes environnementaux d'un autre pays, ce qui signifie que le GATT/OMC serait effectivement appelé à jouer le rôle d'un organisme d'intervention dans le domaine environnemental. La question importante est de savoir si un tel rôle est approprié.

Dans le document, il est soutenu, pour des raisons ayant rapport à la fois au commerce et à l'environnement, que ce rôle n'est pas approprié. La modification des règles pour faciliter l'utilisation de mesures commerciales discriminatoires à l'étranger peut paraître à certains avantageuse à court terme, mais elle serait à long terme contre-productive. La perte de possibilités d'exportation, surtout pour les pays en développement, entraînerait simplement la disparition d'une source de revenu

nécessaire pour régler les problèmes environnementaux. Il en résulterait aussi une diminution de la confiance et de la coopération internationales, qui sont aussi nécessaires à la prospérité à long terme; en effet, l'ingérence dans les affaires intérieures d'un pays sous forme de sanctions commerciales imposées par d'autres pays aura uniquement pour effet de créer des dissensions. De plus, il y aurait un grand danger de protectionnisme abusif. Les visées des groupes environnementaux se rapportent sans doute uniquement à l'environnement, mais, une fois en vigueur, les nouvelles règles permettant le recours à des restrictions commerciales pourraient bien intéresser d'autres groupes aux visées plus douteuses.

Ces problèmes, ainsi que d'autres mentionnés dans le document, qui résultent du recours à des sanctions commerciales pour obliger des pays à adopter des programmes environnementaux, deviennent particulièrement importants lorsqu'il s'agit de mesures unilatérales. Étant donné qu'un petit nombre seulement d'intervenants sur la scène internationale ont des marchés suffisamment grands pour être capables de recourir à de telles mesures de manière cohérente et crédible, on suppose que les objectifs environnementaux internationaux seront déterminés par ces quelques pays en raison de leur puissance mondiale. Il en serait ainsi même si les solutions imposées étaient des mesures plutôt de nature politique, comme c'est parfois le cas, que des solutions qui conviennent le mieux à l'environnement, aux problèmes et aux besoins des autres pays. Il est évidement fort probable que des mesures unilatérales seront prises dans certains cas. La question n'est pas de savoir si de telles mesures seront prises, mais s'il faut prévoir la possibilité de ces mesures dans les règles du commerce international et, partant, les favoriser. Dans le document, il est affirmé que cette possibilité n'est ni souhaitable, ni acceptable.

Cela ne veut pas dire que ne s'imposent pas, dans le cadre du GATT/OMC, certaines mesures ayant rapport au commerce et à l'environnement. Pour dissiper les inquiétudes fondées des groupes environnementaux et d'autres groupes, le dialogue doit être plus ouvert et il doit y avoir un meilleur échange d'information. Il y aurait également lieu d'apporter des améliorations pour rendre plus clair et prévisible le recours aux exceptions prévues dans le GATT pour les ententes internationales sur la protection de l'environnement (EIPE), lorsqu'il y a consensus international général au sujet d'un programme environnemental comportant des restrictions commerciales par ailleurs incompatibles avec le GATT. Cette question est analysée en détail dans ce document, et des solutions et des changements y sont proposés. Il faudrait aussi apporter au GATT/OMC des changements pour faire en sorte que certains types de mesures environnementales ayant des répercussions commerciales ne perturbent pas outre mesure les échanges commerciaux, comme le craignent les gens d'affaires. Il n'y aurait rien à gagner si de telles mesures environnementales entraînaient

nécessairement une diminution des échanges commerciaux, mais il y aurait beaucoup à gagner si ces échanges étaient facilités.

Ces questions seront sans doute vivement débattues. En dernière analyse, toutefois, une chose est claire : le GATT/OMC ne doit pas être mêlé davantage aux questions environnementales. Le système d'échanges commerciaux internationaux ne peut servir de terrain à l'arbitrage des décisions dans le domaine des politiques environnementales. Il ne doit pas non plus être le mécanisme par lequel est imposée ou surveillée la mise en application des normes ou des programmes de protection de l'environnement qui n'ont pas été acceptés à l'échelle internationale. Après tout, l'OMC ne sera rien d'autre qu'un organisme réunissant à des fins commerciales les mêmes États que ceux qui se regroupent dans le cadre d'autres organismes pour discuter des questions environnementales. Les pays incapables d'adopter une certaine orientation pour la protection de l'environnement dans le cadre des rencontres de ces derniers organismes trouveront probablement inacceptables les dispositions prévues par l'OMC pour permettre le recours à des sanctions commerciales ayant pour objet de les obliger à adopter une orientation donnée.

Ainsi, l'OMC doit avoir un rôle d'appui neutre et non pas d'intervention environnementale; il s'agit de raffiner l'interface entre les programmes environnementaux et les règles des échanges commerciaux plutôt que de recourir à la coercition. En définitive, il faut laisser l'OMC s'acquitter de son mandat et, de fait, faire ce qu'il fait le mieux : libéraliser et sauvegarder le système des échanges commerciaux internationaux. Ce sera le plus important héritage à transmettre aux générations futures.

1. Introduction

There is little debate these days about the need to address environmental problems in a timely and effective way. In developed and developing countries alike, concerns about pollution, depletion of resources, the threatened extinction of plant and animal species, atmospheric change and problems associated with the disposal of wastes are contributing to a sense of urgency about the environment. As this sense of urgency grows, political pressure is increasing.

Dealing with the root causes of many environmental issues continues to be difficult, however, often due to the still widespread reluctance or inability of both developed and developing countries to face the costs involved. There are no easy answers and progress can be slow. As environmental groups and others grow impatient with the pace of progress, attention is being directed to the use of trade restrictions to pursue environmental goals. Trade restrictions, especially those intended to exert pressure on countries considered to have inadequate environmental programmes and standards, are often seen as fast and effective tools for achieving change. They also have appeal for some governments as a high-profile way to respond to political pressures when other solutions to the underlying environmental problem are considered to be too difficult or costly in the short-term. Accompanying the proposals for trade restrictions are calls for amendments to the international trade rules under the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO - scheduled to come into effect in 1995), aimed at providing greater flexibility for trade action.

Discussions on trade and environment have been underway in the GATT for over two years. Considerable progress has been made in clarifying the issues and identifying some of their implications. Taking account of those discussions, an expanded programme of work was agreed to at the April 1994 Ministerial Conference held in Marrakesh to conclude the Uruguay Round trade negotiations. A new Trade and Environment Committee also was established at Marrakesh to pursue the expanded work programme. The Committee will report to the first Ministerial Conference following WTO implementation, at which time the work programme and status of the Committee will be reviewed.

Although no conclusions have been reached about the merit of proposals for change to the GATT/WTO and whether the process should at some point lead to a negotiating phase, a number of themes have emerged in the GATT discussions so far. Three points of consensus are worth mentioning at the outset.

First, there is no question about the importance of working towards improved environmental protection. All governments participating in the GATT discussions, which, of course, are the same governments meeting in other fora to address environmental issues, accept as a given the need to deal appropriately with these issues. It is clear, then, that the debate is not about environmental ends - it is about the *means* to those ends. It is about the means for action at the national and international levels, the means for international decision making and, specifically, what role the use of trade restrictions and the WTO should or should not play.

Second, it is widely agreed that there is already broad scope for using trade measures for environmental purposes under the existing GATT rules and that there exist confusion and misinformation on that score that are creating unnecessary concern. Governments have recognized that efforts should be made to clarify and better explain the relevant provisions and that this should be an important aspect of the work of the Trade and Environment Committee.

Third, all but the United States and Austria have rejected the unilateral use of trade restrictions as a means of imposing an environnmental programme on others.

Against this background, this Paper is intended to contribute to the on-going debate on the trade and environment question by providing an analysis of the main issues arising from proposals for change to the GATT/WTO and the key factors that will affect the process we will be engaged in over the next few years. On this basis, some objectives for Canada will be suggested, along with possible options for change to meet those objectives.

It should be noted that this Paper focuses on the proposals to loosen the trade rules for environmental purposes that have driven the debate so far. The Paper also identifies, however, emerging concerns in the business community in many countries about the trade distorting effects of certain environmental measures increasingly in use at the national level. The key issues and possible need for improved disciplines on some of these measures are flagged, but more detailed analysis remains to be done. Further work is planned to address this dimension of the trade and environment debate in greater depth.

2. Issues and Factors

To set the context, it is useful to begin with an indication of the scope under current GATT rules for using trade restrictions for environmental purposes and the nature of the proposals for change.

2.1 Current Scope for Using Trade Measures

As mentioned above, and contrary to a widespread perception among environmental groups, there is in fact broad scope in the GATT for using trade measures in support of environmental policies, programmes and standards. Essentially, the GATT provides under Article III, Article XX and elsewhere for the use of any type of trade restriction, including import and export quotas and prohibitions, or the imposition of taxes or other charges at the border, for the purpose of environmental protection or resource conservation within a country's jurisdiction, as long as basic requirements relating to non-discrimination and least-trade-restrictiveness are met (exceptions to the non-discrimination requirements are also possible). Of course, GATT/WTO member countries also could agree to the use of measures inconsistent with the trade rules amongst themselves in the context of a multilateral environmental programme.

Also contrary to the concerns of some, the GATT, and in particular the Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) Agreements, do not limit the ability of national governments to establish domestic standards of health and environmental protection and do not exert downward pressure on such standards. If based on international standards, there is a presumption that related trade measures taken at the national level do not conflict with the obligations in those Agreements. Standards higher than international norms also do not risk successful challenge, if they have a scientific basis (required under the SPS Agreement only) and are not more trade restrictive than necessary. This latter criterion seems to cause particular concern for some environmental groups, perhaps unnecessarily. The least-trade-restrictive requirement does not impose constraints on governments in setting the level of protection they consider appropriate; it simply indicates that trade should be disrupted as little as possible in the implementation of any related trade measures. It is not clear why this should be considered an unreasonable condition. Indeed, it is difficult to understand why it should be permissable to apply measures that are more trade restrictive than necessary.

In any event, there is no evidence that the requirements of the TBT and SPS Agreements present practical impediments to environmental protection. Some 360 environment-related measures were notified under the TBT Agreement between 1980 and 1993, with not one being challenged. The same can be said more generally of other GATT provisions. There has not been one single case where a trade restriction taken for legitimate environmental purposes has been successfully challenged in the GATT. The few cases usually cited as involving "environmental" issues, including the U.S. "tuna-dolphin" case, reveal clear protectionist features upon closer examination.

Yet many environmentalists nevertheless express concern that the GATT and the WTO do not adequately address environmental issues or are even "anti-environment". When looked at more closely, however, it emerges that those claims all relate to one area of action that is indeed not authorized under the current rules: the use of trade penalties to press an environmental agenda extraterritorially. The objective is to use trade restrictions as a means to apply environmental or conservation standards outside a country's jurisdiction, including with respect to foreign process or production methods (PPMs), or to force participation in international environmental agreements (IEAs). It is true to say that the GATT does not provide for these types of measures.

This should not be considered surprising or an "oversight" in GATT negotiations, as is sometimes suggested. The fundamental raison d'être of the GATT has always been to discourage and ideally remove trade restrictions and to work to ensure that the international trading system is non-discriminatory, impartial and predictable. Successive rounds of multilateral trade negotiations have been aimed primarily at bringing down trade barriers and establishing rules to prevent the erection of new barriers to replace the old. In addition, the use of discriminatory or extraterritorial trade restrictions as a political tool to pursue other policy agendas has never been an objective of the multilateral trading rules. Indeed, there has been a long-standing consensus that the GATT should not serve as a forum for such political decision-making. This is reflected in the special exception provided under Article XXI, which clearly leaves political decisions on the use of trade sanctions to the United Nations, while ensuring that the GATT rules will not interfere when such decisions are taken. Proposals to introduce this type of political decision making into the GATT/WTO are, therefore, controversial, especially given their potential to create loopholes in the trade rules for a new generation of non-tariff protectionist measures that could quickly undermine the improved disciplines negotiated in the Uruguay Round.

There is in fact growing concern in the business community that there is already too much scope for the use of trade restrictions for environmental purposes. In particular, the GATT does not always provide clear and comprehensive disciplines with respect to trade-related environmental measures, such as eco-labelling, packaging, recycling and disposal requirements, eco-taxes and other types of economic instruments. It is becoming increasingly apparent that the use of such measures at the national level, often with different approaches being taken from one country to another and often with extraterritorial and PPM-based measures involved, can lead to significant and perhaps unwarranted impacts on trade. For example, important Canadian exports in the forest products sector are already under threat as a result of the use or proposed use of such measures, particularly within the U.S. and

EU. And there is often no environmental justification for applying these measures to imports.

2.2 Proposals for Change and Implications

• The Environmental Agenda

The pressure for change has so far come mainly from environmental NGOs. The basic agenda for many NGOs and some developed countries, particularly the U.S., is in fact to obtain authority in the GATT for the use of the types of trade restrictions or sanctions mentioned above. Although proposals to date have not provided much detail, they basically call for authorization of:

- the use of trade restrictions to apply environmental and conservation standards extraterritorially, i.e., with respect to matters under the jurisdiction of another country or in the global commons (as in Austria's attempt to regulate forest management practices in tropical timber producing countries and the U.S. tuna/dolphin case);

- the use of trade restrictions on goods based on concerns about the environmental effects of the foreign PPM (also an element in the tropical timber and tuna/dolphin cases, as well as potentially in the Montreal Protocol on Ozone Depleting Substances);

- the imposition of duties on imported goods to "adjust" for differences in environmental standards or enforcement in other countries or to "internalize" costs, i.e., so-called "eco-dumping" or "green countervail" (as it is an alleged failure of government to require the full assumption of environmental costs that is at issue here, the term "green countervail" will be used in this Paper); and

- the use of discriminatory trade restrictions or sanctions to force participation in IEAs (e.g., the Montreal Protocol).

In addition, environmental NGOs seek direct participation in GATT/WTO proceedings as a central element of their agenda.

The proposals of most NGOs and the U.S. include unilateral use of the above types of trade restrictions. Other governments active in the GATT discussions, including Canada, have focused on multilateral approaches. The implications of unilateralism as opposed to the multilateral approach are, in fact, central to the trade

and environment debate and need to be considered in some detail. The key issues regarding unilateralism are on what basis a country could seek to impose its standards on others and the implications of endorsing this approach. For Canada, there are important NAFTA overtones, given our rejection of the use of trade sanctions in the trilateral environmental side agreement as a tool for ensuring the enforcement of each country's domestic standards (let alone to empower one NAFTA Party to extend its standards to others). On the multilateral approach, it will be seen that, to the extent trade restrictions are needed at all, much can be done through the use of GATT-consistent measures. Furthermore, even the two types of GATT-inconsistent measures most at issue - PPMs and trade sanctions against non-parties to IEAs - might be acceptable if there were international consensus on their use.

a) Unilateralism Versus the Multilateral Approach

Proposals for the unilateral use of the types of trade restrictions identified above raise two key issues. First, what would be the justification for one country to use trade penalties to impose its standards on others whose circumstances, including environmental endowments, scientific assessments, environmental priorities, capacities to address competing objectives, societal values, and so on, might legitimately lead to a different approach? In fact, what might be appropriate for one country will not necessarily be appropriate or viable for another, a fundamental point that was agreed at UNCED and has been endorsed by all except the U.S. in the GATT discussions.

In the case of PPMs and "green countervail", a concern about competitiveness is sometimes offered as the rationale. It is argued that industries in countries with higher or more consistently enforced environmental standards face an unfair competitive disadvantage against those in countries with lower or less strictly enforced standards and that imposing a charge on imports is justified to "equalize" the resulting differences in production costs. The need to ensure cost "internalization" is a related, although separate argument that is also often made.

The competitiveness issue raises a number of significant questions. To begin with, there is very little evidence that the costs associated with higher environmental standards (estimated to average only 1-2% of total production costs in most sectors) are significant enough when compared to other cost elements to be singled out as the factor critically affecting competitiveness. The GATT does not, in fact, provide for adjusting other types of cost differences at the border, such as those relating to labour, health or safety standards, other social programmes, energy costs, tax regimes, and so on, most if not all of which are likely more significant factors than environmental standards. Why, then, should environmental standards be treated

differently from a competitiveness perspective and what would the implications be of setting a precedent in this area (note in particular the views of the U.S. and some members of the EU regarding the need to "adjust" for differences in labour standards, social programmes and so on)?

And how would such trade measures be designed and administered? How would comparisons between different countries' standards, enforcement, production methods and their environmental impacts and costs be performed and by whom? How could such measures, particularly on PPMs which often cannot be detected in a finished product, be administered at the border? This difficulty has been recognized in a recent review by parties to the Montreal Protocol of the provision in the Protocol requiring consideration of the use of PPM-based import restrictions. It was concluded that, among other things, it would not, in fact, be feasible to administer such measures even though only a few countries would have been targets. The feasibility problem would be even more pronounced if imports from many countries were involved.

At the same time, measures that would penalize failures to enforce standards could have the environmentally counterproductive effect of dissuading countries from trying to raise those standards progressively (which they might not always be able to enforce fully).

Similar sorts of difficulties arise with the notion of regulating cost internalization through the trade rules. Of course, the key problem is that agreement would first be required on what the costs are and modalities for their fair and equitable reflection in the prices of goods, something that would probably need to be done on a sector-by-sector basis. Failing agreement on the underlying cost calculations, it is difficult to see how agreement could be reached in the GATT/WTO on the use of the trade rules as an enforcement mechanism. Moreover, the focus on current standards is somewhat misleading. If the principle of cost internalization were applied properly as part of the overall equation, countries that might otherwise push this approach would be exposed (e.g., water costing in California agriculture, energy consumption/emissions in the North, etc.). It is fair to enquire whether those countries pushing the environmental standards agenda are prepared to address such matters.

A second key issue regarding unilateralism is that the unilateral denial of market access is a tool that can only be used to any consistent effect by large countries, indeed probably only by the U.S. and EU. If unilateral actions were authorized, economic might would be used more easily and frequently to dictate the environmental policies and programmes of other countries. Moreover, the design and

implementation of such measures would be based on unilateral judgements about the circumstances in other countries. It is clear that this approach would disadvantage smaller, export dependent countries not only in terms of their trade interests but also with regard to their ability to decide domestic environmental policy and priorities.

All these factors argue strongly that the unilateral approach is not in Canada's interest. Although there might be some scope for using access to our market to apply pressure on some smaller countries, Canada does not have a large enough market to employ this tactic in any consistent or meaningful way. Certainly, Canada is not in a position to impose standards or resource conservation programmes on our major trading partners, most notably the U.S. and EU.

At the same time, however, we easily could find ourselves on the receiving end, with the added danger that protectionist objectives might underlie stated environmental purposes. Indeed, there is a clear need to guard against the hijacking of environmental purposes by protectionists. As Sir Leon Brittan of the Eurpean Commission has warned, there is a serious risk of protectionist interests donning the "fashionable cloak of environmentalism". For example, as the U.S. exhausts the traditional countervailing duty procedure as a means of imposing restrictions on Canadian softwood lumber exports, it is not difficult to imagine what could be done if authority existed to unilaterally impose levies at the border to "adjust" for alleged differences in environmental standards or programmes. As mentioned, it was made clear in the NAFTA context that Canada would not wish to be subject to trade penalties by the U.S., even in the case of findings that our own standards are not being fully enforced.[1] This position is even more valid in a GATT context, particularly since the proposals being made are aimed at allowing the imposition of another country's standards. We cannot risk losing what we preserved in NAFTA through changes in the GATT.

Of course, the above points do not mean that unilateral measures will never be used. The U.S., EU and others have already taken such actions and undoubtedly will do so again if the circumstances, including political, suggest it. There always will be some degree of exposure for Canada. There may even be cases (e.g., in the fisheries area) in which the Canadian government also will be under pressure to take unilateral steps. The issue, however, is not whether unilateral action will ever be taken, but whether to provide authority in the GATT/WTO to allow for, and thus encourage, this approach. The bottom line is that this would lead to a weakening of the law of the rules-based trading system we have worked hard to develop in favour of the law of

[1] Canada agreed to have a fine levied in such circumstances made enforceable through the domestic courts.

the jungle. On balance, this is clearly not in Canada's interest, either from a trade or an environmental point of view.

It has been widely agreed internationally (e.g., at UNCED, in the OECD and in the GATT discussions to date) that trade restrictions, even if used on a multilateral basis, are not the best or most appropriate means to achieve environmental objectives. Measures that deal directly with the root cause of the environmental problem and incentives that enable countries to cooperate, such as financial and technical assistance, will be more effective and efficient. There are, nevertheless, instances in which trade measures are used or may be proposed, either to accompany measures to control production, use or disposal of environmentally hazardous goods or for other reasons.

If use of the market access tool is considered on a multilateral basis, the issues that arise are somewhat different from those discussed above regarding the unilateral approach. To begin with, the issue of justification is minimized. To the extent that there is international consensus on an environmental programme or standard, there is no longer a question of one country or a group of countries imposing a solution on others - a common programme or standard will have been adopted by the international community. If the programme is properly developed, the problems identified above relating to extraterritoriality, PPMs, competitiveness concerns and administrative arbitrariness disappear or become much less pronounced. In addition, the effectiveness of a majority of countries acting together clearly will be greater than that of one or a small number acting alone. There can be no doubt that the multilateral approach is the way to go.

The main issue that then arises is what can be done if one or a few countries not cooperating in the programme threaten to undermine the effort being made by the international community, the concern often voiced by environmental NGOs. Although there may be a valid point here, the problems are perhaps not as unmanageable as sometimes feared. Even a brief examination of the dynamics of a well-designed multilateral programme negotiated through an IEA helps to put the issue into perspective.

First, if it is decided that trade measures will be used amongst participating countries as part of the environmental programme (which could be the case when controls on internationally traded goods or substances are involved), there is considerable scope to extend those measures to non-participating countries in a GATT-consistent manner, i.e., controlling or banning imports or exports from all sources on a national treatment, MFN basis. If the majority of countries applied trade restrictions in this way, the effect would be to constrain or eliminate world markets

for participants and non-participants alike. In other words, if most of the countries involved in the production or consumption of a traded good or substance decided to control or eliminate their production and consumption, non-participants would face the disappearance of any meaningful sources of supply or export markets.[2]

To be most effective, of course, it would be necessary to have clear, enforceable commitments amongst parties to the IEA. Most existing IEAs are inadequate in this regard. The extent to which non-parties could continue environmentally hazardous activities or resist conservation efforts would be increased by a lack of clear obligations on, and compliance by, parties. In addition, the justification for and utility of imposing on non-parties requirements that are not being met by parties would be in question.[3]

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[2] This dynamic was in fact present from the inception of the Montreal Protocol and is a key to its success. With OECD countries responsible for over 90% of world production and consumption of the chemicals in question and agreed on a schedule for phasing them out, there was little market scope related to these products for developing countries. With the only meaningful sources of supply or export markets disappearing, developing countries could not continue to produce the controlled chemicals unless production was entirely for domestic consumption. In this case, measures linked to trade in those chemicals or goods containing them would have had no effect in any event. Given the realities of the situation, the positive incentives of longer phase-out periods as well as access to financial and technical assistance to help cope with the changing conditions internationally were probably much more meaningful in encouraging the adherence of non-parties than trade sanctions. As a practical matter, these appear superfluous. The sometimes stated objective of banning trade with non-parties to prevent shifts in production also appears dubious. It is not trade in the chemicals themselves that could lead to relocation of production. On the contrary, cutting off supply would be more likely to lead to new or increased production in countries that decided to continue domestic use of the controlled chemicals. Prohibiting the transfer of technology and equipment would be more relevant, but there is no such requirement in the Protocol. Article 4(5) comes closest: "Each Party undertakes to the fullest practicable extent possible to discourage the export to any State not party to this Protocol of technology for producing and for utilizing controlled substances."

[3] It is worth noting here that parties could agree to the use of GATT-inconsistent measures amongst themselves, although in any such case the measures should be spelled out and clearly understood. In the event of a dispute, parties would have recourse to their GATT rights. As a practical matter, however, if the dispute arose because the provision in the IEA was unclear or there was no understanding on implementation at the national level, that would reflect shortcomings in the IEA itself. It is unlikely that the GATT would be the appropriate forum to address those shortcomings (e.g., a GATT panel would not undertake to interpret the provisions of another treaty). This highlights the need for well-developed dispute settlement provisions applying to parties in the IEA itself. For a more detailed discussion of these issues, see Keith H. Christie, "Stacking the Deck: Compliance and Dispute Settlement in International Environmental Agreements", Department of Foreign Affairs and International Trade, Policy Staff Paper No.93/15 (December 1993).

If an IEA meets these basic tests, however, much can be done in a non-discriminatory, GATT-consistent way to use trade measures to extend the environmental programme to a minority of non-parties. In fact, as has emerged in the GATT discussions so far, there would appear to be only two types of trade measures that have been used or proposed for use that would not be GATT-consistent: restrictions on products from non-parties based on environmental concerns about the PPM as opposed to the product itself; and discriminatory trade restrictions against non-parties intended to pressure them to accept the environmental programme. Other types of GATT-inconsistent measures may be identified as work continues, but none has emerged so far.

The use of PPM measures might be proposed in a case where continued activities by a small number of non-participants could compromise the efforts being made by the rest of the international community to deal with a global environmental problem. Trade sanctions also might be proposed in such cases, particularly where trade restrictions on a national treatment and MFN basis would not be effective in addressing a problem with a non-participant. For example, restrictions on the environmentally damaging goods can effectively extend controls to non-participants only if they are in fact trading in those goods. If their production and consumption is entirely domestic, trade restrictions could only be applied to other products, as sanctions to force acceptance of the IEA.

The main questions that then arise regarding the use of PPM measures and trade sanctions are whether they are necessary and likely to be effective, and whether they are justified. Necessity and effectiveness can only be judged on a case-by-case basis depending on the circumstances involved. The same would be true on the issue of justification. In the type of scenarios just identified, however, an argument could be made that the presence of international consensus would provide grounds for the use of both PPM measures and trade sanctions by the international community against hold-out countries. The issue then becomes how to establish what constitutes an international consensus. We return to this question below.

Before moving on, though, a few points about the types of situations that could arise would be useful to keep the discussion in perspective. In particular, a word about so-called "free riders" is in order. Although this term is often used, it has never been clearly defined.

It is, perhaps, easiest to start with what it generally would not mean. It presumably would not be used to describe countries that for objective reasons do not accept the science and risk assessment behind, or objectives or provisions of the environmental agreement in question. It is a recognized complexity of dealing with

environmental problems that the science can take time to develop and may not always be definitive, resulting in the possibility of legitimate differences of view as to the extent and implications of the problem and the most balanced and effective way to deal with it. The likelihood that such disagreements can and will occur underlines the importance of seeking broad international consensus on new environmental disciplines.

Similarly, we should not describe countries that have different environmental priorities as free riders if they elected or were forced by more limited means to concentrate their resources in other areas of environmental protection. All countries have to make choices in their pursuit of improved environmental protection and their choices may not always be the same. Governments may wish to try to persuade other countries to accept their own priorities and even offer assistance to this end. But we should be cautious about condemning as free riders those who have other serious environmental problems that they consider more pressing or who simply cannot absorb the costs of adaptation or enforcement.

So, what is really meant by "free rider"? The U.S. suggested early on in the GATT discussions that free riders are those who decline to assume the obligations of an environmental agreement in order to avoid the costs that might be involved while still benefitting from the environmental improvements being made by others. This perspective involves the notion of non-parties obtaining commercial, competitive advantage over other countries. But how and by whom would judgements be made about the motivations of countries reluctant to participate? On what basis would it be determined that there might be economic, commercial interests involved when other reasons for not participating were identified?

And what about situations in which the economic concerns of a country, whether developed or developing, constitute a practical or political impediment preventing that country from pursuing an environmental programme more aggressively? No government is immune from this type of reality. For example, the U.S. itself (the main proponent of the use of trade restrictions to force other countries to accept its preferred environmental programmes, standards or agreements) actively opposed the establishment of meaningful targets for the reduction of greenhouse gases under the Climate Change Convention for openly stated economic reasons. It also initially refused to sign the Biodiversity Convention and has now attached its own caveats in order to assert its intention to strictly protect its domestic industry's intellectual property rights. The former head of the U.S. Environmental Protection Agency, James Reilly, stated publicly that the U.S. would not accept any environmental agreement that would adversely affect the U.S. economy. In areas where it might be out of step with the international community or the country most

responsible for slowing down the pace, would the U.S. be prepared to be on the receiving end of trade restrictions aimed at forcing it to agree to programmes being advanced by others?

Perhaps the term free rider is something of a misnomer in relation to environmental agreements. It seems more appropriate to think in terms of non-parties whose actions could undermine the efforts being made by parties to tackle a global problem and what steps could be taken in this type of situation. As mentioned, a range of positive measures, including financial and technological assistance, should be considered first. In certain circumstances, especially if other options have been exhausted, the international community also might decide to employ trade restrictions or sanctions to force compliance by the hold-out country. It seems unlikely, however, that this would be a frequent event. Certainly. there should be no doubt that it would be a complex and difficult situation to address. At the end of the day, the discussion always points back to the critical issue of how to identify whether an international consensus exists that might justify the use of punitive measures against non-parties. We return to this point below.

b) NGO Access to the GATT

Another important element in the environmental NGO agenda is to seek institutional changes that would allow them to participate directly in GATT/WTO consultations, negotiations and dispute settlement proceedings. These proposals were considered in the Uruguay Round. On dispute settlement, clearer provision has been made for the release of non-confidential versions of panel submissions and the possibility of panels requesting information from relevant experts. However, proposals for direct participation by NGOs were not accepted. They can be expected to continue to press their demands. The stated NGO view is that environmental considerations must be taken into account and generally should prevail over trade considerations in the development and implementation of the trade rules.

Part of the environmental community's concern arises from the view that the GATT has been a "closed shop", making it difficult to know how the system works and how issues are being dealt with. Traditionally, there in fact has been little attention paid to the GATT except by industries whose interests are directly affected by, for example, tariff or other negotiations that establish the terms of market access (it is important to note that even those groups with a longstanding stake do not have direct access - they pursue their concerns at the national level). The GATT, therefore, has not been accustomed to demands for direct involvement by private interests. There also are real constraints on the extent to which NGOs in any field can participate, not the least of which is that only governments have responsibility and

accountability for negotiating on behalf of all their national interests. Other critical mandate considerations are discussed further below.

While there are certain clear limitations, there is also a need to respond to the "closed shop" concern, recognizing the appropriate roles and responsibilities of governments, NGOs and the GATT/WTO itself. It is in everyone's interest to provide for a good exchange of information and better transparency on how the system works, what the rules are, what the appropriate interface with other policy areas is, and so on. It also will be important to bring together the full range of interested parties - business and labour groups, development NGOs, and a range of UN Agencies, to name just a few. This would allow for a direct exchange of views amongst all interested parties.

A number of possible consultative mechanisms could be considered. For example, the GATT Secretariat has already met on several occasions with NGOs and business groups and will be using more comprehensive symposia to bring together a wide range of interests. This type of mechanism could be continued on a regular basis. The key would be to focus the process on issues appropriate to the GATT's role and mandate and to ensure openness to all interested participants.

The proposals that call for direct participation of environmental NGOs in GATT/WTO consultations, negotiations and dispute settlement cases, however, raise fundamental questions about the role, mandate and functioning of the trade organization. There is considerable confusion and contradiction in the trade and environment debate in this regard. On one hand, the environmental community believes strongly that the GATT should not make judgements about or interfere with the environmental policies and priorities of member countries. This view is entirely valid and has been endorsed by governments in the GATT discussions. At the same time, however, the objective of NGOs in seeking to participate directly is in fact to introduce environmental policy arguments in what is envisaged as a process of weighing environmental values against trade values in GATT negotiations and dispute settlement cases. This is what some NGOs believe should have occurred in the panels on the U.S. tuna/dolphin measures, the case that in fact gave rise to the proposals for institutional change. The view is that NGOs should have been able to participate directly in the panel in order to present the argument that the objective of protecting dolphins should prevail over the GATT rights of Mexico and others.

The problem is that this approach would indeed cast a panel and the GATT/WTO more generally in the role of making judgements about the relative merits of members' environmental policies and practices. Unless a blank check approach were adopted in which <u>any</u> stated environmental objective would automatically

override GATT rights (which may be what some NGOs have in mind, but which clearly would open the door to abuse and therefore would be unacceptable), cases could arise in which a panel decided that the environmental objective involved should not prevail over GATT rights. Or a panel could find itself having to arbitrate between the environmental policies of two or more governments. This result would run counter to the other stated NGO view that the GATT must not judge or interfere with any country's environmental policies or priorities.

The proponents of this approach will have to recognize that they cannot have it both ways. The bottom line is that the GATT/WTO is not an environmental organization, has no mandate or competence to judge or make environmental policy and, therefore, should not be used as a forum for debate on environmental policy issues.

The other factor is that direct participation by environmental NGOs would open the door to participation by many other lobbyists: business groups, labour unions, development NGOs, consumer groups, and so on. The practical effect of this would be to create a two-tier system - one process allowing participation by a variety of non-governmental groups and a second private process for actual government-to-government negotiations or panel deliberations. The basic nature of the system would not change, it simply would become less efficient and considerably more time consuming.

The appropriate channel for consultation with interest groups is at the national level in the preparation of government positions.[4] It is governments that are the accountable and, in most cases, the democratically elected representatives of all domestic interests, not just of one set of non-governmental players.

A balance, therefore, needs to be struck - more openness and better exchange of information will be important, but the line must be drawn at direct participation in GATT/WTO consultations, negotiations and dispute settlement proceedings for both mandate and process reasons. This approach is comparable to the arrangements that are in place in other fora, including the OECD and UN.

[4] For Canada, the ITAC/SAGIT structure provides the basis for such consultation. The new International Trade Advisory Committee (ITAC) Task Force on trade and environment will be a critical element in the domestic consultative process.

• The Trading Agenda

The preceding section sets out the environmental agenda, which was the source and so far has been the focus of the trade and environment debate. Although less active to date than the environmental NGOs, the business community in many countries, both developed and developing, is beginning to express increasing concern about the adverse trade impacts of environmental measures used at the national level such as those mentioned earlier relating to "environmentally friendly" packaging and disposal requirements, eco-labelling, eco-taxes and other types of economic instruments. Proposals for a tightening of GATT disciplines in this regard can be expected.

Although more dimensions may emerge as work in this area progresses, two basic issues have been a focus of attention so far. First, there is the case in which the environmental objectives underlying the measure may be valid and very similar, but countries are adopting widely different approaches for pursuing those objectives. This results in a situation in which exporters must adapt their products to a growing variety of conflicting requirements in order to maintain access to foreign markets. Of course, it usually is the case that national authorities take closer account of the circumstances and needs of domestic producers than those of foreign competitors, which builds a bias against imports into most systems. The resulting situation can impose a burden on exporters that is arguably unjustifiable and also avoidable through international cooperation and coordination. There also is once again the clear need to guard against protectionist abuse. This is a serious potential problem with any use of trade restrictions for environmental purposes, but is perhaps particularly relevant to these types of national measures. The development of international programmes and standards or mutual recognition schemes in the appropriate fora (e.g., the International Standards Association (ISO), the Food and Agriculture Organization (FAO), the International Tropical Timber Organization (ITTO), through bilateral or plurilateral consultations, etc.) and the inclusion of related disciplines in the GATT/WTO will need to be examined.

Second, there are a number of situations in which the environmental justification for applying certain requirements to imported goods is questionable. For example, should PPM criteria aimed at addressing a purely local environmental objective be applied equally to imported products from countries where that objective is either not relevant or where there is no basis for the importing country to dictate a standard? This issue has already arisen for Canada with respect to the application to Canadian exports of requirements in the U.S. for recycled content in paper products and various criteria for eco-labels and eco-taxes in the EU. The potential for other such situations is great. It would be helpful to undertake more detailed studies of

areas where Canadian exports could be particularly vulnerable to these types of measures, especially in the U.S. and EU. At the same time, we will need to have detailed information on what is being done in Canada, including at the provincial and industry levels.

For all the above types of measures, the need to provide clear environmental justification for the application of domestic requirements to imports, the issues of PPMs and extraterritoriality, and the relevance of the national treatment principle will have to be addressed.

Another important issue that is central to the work in GATT is whether there is adequate provision for notification of and consultation on such measures, or what is referred to as transparency. It is widely recognized that there are problems of compliance with existing requirements and gaps in transparency provisions for certain types of measures. It will be necessary to identify all such gaps and then consider what changes might be appropriate to close them and work toward improved compliance.

2.3 Negotiability

A critical factor in developing the Canadian position on all the above issues and proposals is an assessment of their negotiability, not only "the art of the possible", but how they fit into wider foreign policy issues. Although the GATT process is still in an analytical phase, with no agreement on whether or when a prescriptive phase might be engaged, it is already possible to identify some basic negotiability factors. In particular, the general approach and agenda of developing countries is already quite clear (although the most active and prominent developing countries in the process so far have been India, Brazil, Mexico and the ASEAN countries, their views appear to be broadly representative of other developing countries and the economies in transition as well). The concerns and objectives of this group of players will have to be reflected before any negotiation, as demanded by some developed countries, could begin.

In many respects, the concerns and objectives of developing and smaller developed countries are the same. With respect to the environmental agenda described above as well as the growing concern about the impact on exports of various types of environmental measures at the national level, the issues do not fall along North/South lines, but rather reflect a big/small split. Beyond these issues, however, there are a number of points unique to the developing country agenda, such as transfer of technology, special market access, the need for financial transfers, and

so on. As will be seen, many of these developing country interests will be difficult to meet, which in turn will limit what some developed countries can expect to obtain.

- **Developing Countries**

First and foremost, developing countries, along with many developed countries, are highly suspicious of the protectionist potential just beneath the surface of proposals to loosen GATT disciplines for stated environmental purposes. At the same time, they are alarmed and offended by the environmental agenda of using trade restrictions or sanctions to force acceptance of environmental programmes and standards. They are well aware that they would be the most vulnerable targets of such sanctions, and they reject their use on both trade and environmental grounds. They argue that trade penalties would actually interfere with their ability to address environmental problems by disrupting the economic development necessary to give them the means to pursue better environmental protection. Moreover, they see the preoccupation with the use of trade restrictions as further evidence of the limited willingness of developed countries to provide positive assistance to help developing countries respond to the North's environmental priorities. The perception is that instead of being offered carrots, developing countries are being asked under the GATT to arm developed countries with the sticks.

We need to recognize that these developing country concerns are valid and unlikely to change. Essentially, any proposal or formula that could provide GATT cover for the use of trade restrictions and sanctions by the economically strong against the economically weak or open the door for new variations on the protectionist theme will be fundamentally non-negotiable. This is true for both the unilateral use of such measures, including those described earlier with respect to PPMs and "green countervail", as well as for IEAs that provide for sanctions to force participation or the application of PPM-based restrictions, but do not meet a substantial threshold of broadly-based multilateral membership or support.

Having said this, developing countries may be prepared to consider ways to establish more clearly that the GATT rules should not impede the use of such measures in IEAs that do reflect the will of the international community. The threshold for recognizing broadly-based agreements obviously does not have to include all potentially concerned countries. To be negotiable, however, any formula for addressing IEAs could not be skewed against developing countries (as several proposed to date are). Canada also would do well to seek a substantial threshold.

In addition, developed countries will have to come to grips with the developing country agenda, a factor that has received little attention to date but will emerge more

strongly in the post-Uruguay Round process. An important developing country objective will be to obtain improved disciplines on the use of environmental measures of the eco-labelling and packaging type identified above. There has been strong consensus in the GATT discussions so far that there are in fact problems in this area that need to be addressed. Indeed, while a key element in the developing country agenda, this is by no means only a developing country concern. Canadian concerns are very similar on this issue and others as well. Proposals for tight controls on such measures can be expected, but it remains to be seen how far the U.S. and EU in particular, who presumably will face resistance from their domestic environmental NGOs, will be prepared to go.

Developing countries also will insist on resolving the long-outstanding issue of trade in domestically prohibited goods. An earlier GATT Working Party prepared a decision calling for the use of a Prior Informed Consent (PIC) system with respect to exports of domestically prohibited goods so that governments, particularly in developing countries, would have the opportunity to control or refuse proposed shipments of such goods. The issue is the use of developing countries as "dumping grounds" for trade in hazardous goods no longer permitted for sale in the developed country of origin.[5] The decision was blocked by the U.S., however, in light of opposition from domestic industries that do not wish to risk losing developing country export markets. Any continued U.S. resistance to resolving this issue will not only be a practical stumbling block to engaging developing countries, but also will be held up as an example of the hypocrisy that developing countries see in much of the trade and environment debate (e.g., developed countries advocate the use of trade restrictions to advance the environmental agenda, except in cases where their own economic interests could be affected).

Finally, developing countries will use the GATT process to press for further action to address their economic development goals through improved market access and technology transfer. The protection of intellectual property rights in the new TRIPS Agreement will be brought into the picture (e.g., developing countries may seek agreed interpretations of TRIPS to allow compulsory licensing of technologies that would help meet the objective of environmentally sound development and also may pursue concerns about the ownership of and benefits from biological resources). Since the post-Uruguay Round work programme will include the development and technology transfer issues in the mainstream debate, developed countries will have to respond. However, there will be little, if anything, that can be offered on these fronts. Following the long and bruising Uruguay Round negotiations, the prospects

[5] Beyond those goods covered by a recent decision of the Parties to the Basel Convention on the Transboundary Movement of Hazardous Wastes.

for making more market access concessions or weakening the protection just agreed in TRIPS (where the U.S. and EU were the main demandeurs) are remote. As mentioned, an unwillingness to respond on these issues will further constrain what certain developed countries will be able to obtain on their agenda.

- **The U.S. and EU**

In terms of the other key players, both the U.S. and EU have so far been driven primarily by concerns about responding to their environmental lobbies. The U.S. would appear to have the most ambitious objectives, although there have been conflicts within the Administration and no clear position has emerged. The main focus, however, seems to be on finding cover for trade restrictions to extend U.S. standards to others on both a unilateral and multilateral basis. The U.S. is isolated on the question of unilateralism and eventually will have to face that fact. But for the time being, all options seem to be on their agenda.

When forced to retreat on seeking authority for unilateral trade restrictions of the tuna-dolphin variety, the U.S. is likely to continue to pursue a unilateral agenda under the guise of multilateralism. For example, the U.S. may argue for authority to take measures (unilaterally) in connection with an IEA or perhaps a UN resolution, even though they do not contain agreed provisions for, or definitions of, such measures. Unilateralism under the guise of multilateralism will bear close watching.

The main EU focus so far has been on seeking what amounts to a "blank check" exemption from GATT rules for IEAs, including "regional agreements", and to seek accommodation for the use of PPM-based measures under such IEAs (the section below on options for accommodating IEAs describes the EU proposal). The EU has stated its opposition to unilateral actions and the use of trade sanctions to force participation in IEAs, although it supports the trade sanctions in the Montreal Protocol and often points to this Agreement as the type it wants to exempt from GATT rules. It also has opposed the "green countervail" concept. In its interest in accommodating vaguely defined IEAs and regional agreements in the GATT, we will need to watch for an effort to establish a basis for using import restrictions for the extraterritorial application of standards on PPMs agreed by the EU member states and perhaps some of their neighbours. European Commission officials indicate publicly that this is not their intention, but there are contradictions in certain specific cases and apparent differences of view between the member states (e.g., during the recent renegotiation of the International Tropical Timber Agreement, some member states, initially supported by the Commission, sought unsuccessfully to use the Agreement to gain cover for trade restrictions based on PPMs and taken on a multilateral basis, meaning by the EU).

The EU position is, therefore, not entirely clear and also may shift with respect to sanctions and other issues. Environmental NGO pressures are mounting and the U.S. will be working with the EU to develop a common approach. Either of these players alone has a proven ability to use political force against other countries when driven by domestic lobbies. If they team up, the pressures will be very significant.

2.4 Summary

As this overview suggests, common ground for developed and developing countries may be found on the issues of accommodating the use of otherwise GATT-inconsistent trade measures in IEAs that represent international consensus (if an appropriate formula can be found) , improving disciplines on and transparency in the use of trade-related environmental measures at the national level, and resolving the question of domestically prohibited goods. If the process could focus on this balance of issues, we may be able to move to a prescriptive phase that would address interests on all sides. If there is an insistence on pursuing proposals for amendments to authorize unilateral/ extraterritorial actions, including on PPMs and "green countervail" measures, and the use of sanctions in IEAs in the absence of international consensus, an indefinite standoff can be expected to develop.

3. Proposed Objectives for Canada

Overall, Canada has an interest in moving the process forward in order to respond meaningfully to the valid concerns of the environmental community and others, to deal expeditiously with the misconceptions about the GATT/environment interface that are a continuing source of unnecessary conflict and to address the increasingly valid concerns of Canadian exporters whose positions in foreign markets are under threat. Since the least negotiable proposals are not in the Canadian interest in any event, we should consider efforts to focus the discussion on the common ground issues identified above, concentrating in particular on the accommodation of the multilateral approach and better cooperation in and disciplines on the use of trade related environmental measures at the national level.

Against this background, appropriate objectives could comprise the following:

- **To encourage greater openness and exchanges of information on the trade rules and the interface between the GATT/WTO and other policy areas through the use of consultative mechanisms such as regular symposia.**

  - There clearly is a need to respond to the "closed shop" concern, while at the same time recognizing the appropriate roles and responsibilities of governments, NGOs and the GATT/WTO itself. More openness and a better exchange of information is important, but, in my view, the line must be drawn at direct participation in GATT/WTO consultations, negotiations and dispute settlement proceedings for both mandate and process reasons.

- **To clarify the extent to which the GATT rules provide scope for the use of trade measures for environmental purposes.**

  - The inaccurate perception in some quarters that the GATT constitutes a significant barrier to the pursuit of legitimate national and international environmental policies and programmes needs to be corrected. At the same time, there are valid questions about the interpretation of the rules that should be addressed to the extent possible (bearing in mind that only a panel can judge consistency with the rules in a specific case).

  - In addition, what role the GATT can and should play regarding environmental matters requires clarification. The appropriate limits of the GATT mandate should be better explained, including with respect to how

account would be taken of an environmental programme or standard in a dispute settlement case involving a trade measure used in connection with that programme or standard (i.e., not making value judgements about the merits of the environmental programme, but taking it as a given and focusing instead on how the trade measure relates to it).

- **To promote analysis of the types of trade measures proposed for environmental purposes that would fall outside the scope of GATT/WTO authorities, with a focus on the necessity and effectiveness of using such measures.**

  ▸ This is the approach that has been taken so far by Canada and most other participants in the process. It is necessary to be clear on what is being proposed for accommodation in the GATT/WTO in order to establish the basis for negotiating an appropriate formula for change. It also will be important to have grounds for not acting on proposals that are undesirable and non-negotiable.

- **To contribute to making the case against changes to the GATT rules to allow for unilateral trade restrictions aimed at applying environmental standards to or forcing their adoption by other countries.**

  ▸ This includes the unilateral use of PPM-based measures and "green countervail" duties. Measures aimed at imposing one country's standards on others are unjustifiable, administratively unfeasible and would not be in Canada's trade or environmental interest.

- **In the case of the possible use of GATT-inconsistent trade measures on a multilateral basis, to ensure that the GATT rules do not interfere with a decision by the international community to include such measures in a broadly-based IEA.**

  ▸ The challenge is to find an approach geared to IEAs that represent international consensus and meet basic criteria in terms of the specificity of the obligations involved, the trade measures to be used and the dispute settlement system for ensuring compliance. Proposals to exempt GATT-inconsistent trade provisions, i.e., discriminatory restrictions or sanctions against non-parties or PPM-based measures, in IEAs that do not meet a reasonable threshold of participation or support would be undesirable and non-negotiable.

- The otherwise GATT-inconsistent trade restrictions that could be accommodated would include PPM-based measures.

- **With respect to the use of trade-related environmental measures such as eco-labelling and packaging requirements, eco-taxes and so forth, to find a means to ensure that they do not lead to an unnecessary disruption of trade, including the negotiation of appropriate safeguards in the WTO.**

- Canadian exports risk being adversely affected by the use of such measures at the national level, although their justification is not always evident. It is in Canada's interest to join other countries, including developing ones, to minimize the trade effects of such measures through the development of common standards in appropriate fora such as the ISO, providing for consultation and cooperation in their implementation, establishing mutual recognition systems where appropriate, and so on. Improved disciplines in the GATT based on such approaches need to be developed.

- We also should work towards agreement, which will need to be reflected in all the relevant WTO Agreements, that requirements and criteria relating to local environmental circumstances should not be applied extraterritorially through their imposition on imported products.

4. Options

This section focuses on the last two of the above objectives, since they are the ones that would require actual changes to the trade rules. The objective of clarifying how the existing rules apply is also an important task and should be pursued as an element in the on-going work of the Trade and Environment Committee. There would be a number of possibilities for confirming and conveying agreed clarifications or interpretations of existing provisions, including reports and/or decisions by the relevant bodies in the WTO system. Member countries could consider the options as work progresses.

The following are basic options for addressing the questions of how to make clearer provision for widely-supported IEAs and to provide for improved disciplines on certain trade-related environmental measures.

4.1 Accommodating IEAs, Including Those That Might Use PPM-based Measures

As background to any discussion of options for accommodating IEAs, it is necessary to flag a number of horizontal themes or considerations that have emerged in the GATT discussions, which generally reflect presentational or perceptual concerns that need to be resolved. In particular, there is a strong view in the environmental community that the GATT/WTO must not be seen to sit in judgement of the work of environmental negotiators or to be approving or rejecting IEAs. Although the environmental community acknowledges that IEAs should not have a "blank check" exemption from the trade rules, given the potential for abuse, many are uncomfortable with any possibility of what is seen as a GATT/WTO review of IEAs in a dispute settlement case or otherwise. Similarly, industry groups and trade experts are uncomfortable with the suggestion that IEAs should be allowed to breach GATT rules, which embody carefully balanced contractual rights, with no effective recourse against possible abuse.

Before any progress can be made, it will be necessary to get past such presentational sensitivities and, once again, place the role of the GATT/WTO into proper perspective. Clearly, the blank check approach is neither advisable nor negotiable. This means that there will need to be a channel for checking trade measures in IEAs against the trade rules to guard against abuse, while at the same time ensuring that the GATT could not be used to impede international consensus on an IEA in the same way that the GATT does not constitute a road block to, for example, the use of trade sanctions pursuant to a UN Security Council decision.

Three key points need to be made clear. First, under no circumstance should the environmental objectives or provisions of an IEA be judged in the GATT. The GATT rules would enter the picture only if trade measures actually taken pursuant to an IEA were challenged as a violation of a country's GATT rights or if parties to an IEA themselves wished to preclude such a challenge by seeking an exemption from their obligations. Either way, the GATT/WTO should not judge the environmental issue or programme involved, let alone approve or reject the IEA itself.

Second, there are legal realities governing the relationship between treaties that must be recognized. Over 100 governments have negotiated the trade rules over the years in pursuit of their national interests, acquiring rights and accepting obligations in the process. Parties to an IEA could decide to set aside their own GATT rights for the purpose of that IEA, but they would have no power under the IEA to set aside the GATT rights of others. Any limitation of non-parties' GATT rights could only be achieved under the GATT itself.

Third, the environmental community's concern that the GATT/WTO not be involved in or sit in judgement of an IEA underlines the importance of focusing on the accommodation of broadly-based IEAs representing international consensus. If exceptions from GATT obligations were sought in cases where such consensus had not been reached, the GATT could indeed be thrust into the debate or disagreement on the underlying environmental issue. This would be in no-one's interest.

Partly in light of the presentational questions, the discussion of possible options is sometimes expressed in terms of the relative advantages or disadvantages of a "positive testing"/"ex-ante" approach (obtaining exceptions for trade provisions in IEAs in advance) versus a "negative testing"/"ex-post" approach (defending measures that have been challenged). The various approaches are not mutually exclusive. Clarifying existing rules to the extent possible is relevant to both approaches. Providing exceptions to prevent challenges points towards positive testing/ex-ante solutions.

Against this background, there would appear to be three basic options for consideration:

- clarifying/expanding the application of the existing criteria of GATT Article XX to provide greater scope regarding the type of measures that could be used in IEAs and defended under that Article;

- providing a general exception for IEAs in Article XX, through either an agreed interpretation of the existing Article or an amendment to it; or

- providing for a case-by-case exception or waiver from GATT rules specially tailored to IEAs under Article XX or the new GATT/WTO waiver provisions.

The first two options are reflected in informal proposals already made in the GATT discussions by the Nordics and EU respectively. The relevance of the waiver approach also has been discussed in general terms, although based on the current provisions of GATT Article XXV which clearly are inadequate for this purpose. Given the basic considerations that follow, in my view the best approach, and probably the most negotiable option, would be the specially-tailored case-by-case exception or waiver. This does not mean to suggest that a negotiation will be easy to engage or that the outcome will be guaranteed. Amending the GATT/WTO is an ambitious undertaking, requiring broad agreement amongst a large number of participants with widely-varying interests and concerns. Nothing should be taken for granted. In particular, it must be recognized that developing countries likely will not be prepared

to consider a negotiation until it is clear that their needs, including on increased disciplines on environmental measures, will be covered. Canada should take the same approach.

- **Clarifying/Expanding the Application of the Article XX Criteria to IEAs.**

A clarification of the existing rules is already an objective in the process and could be helpful in providing guidance on the use of certain types of measures in IEAs, or even purely national measures. For instance, it may be possible to develop indicative examples of various types of GATT-inconsistent restrictions that could be covered by Article XX (e.g., in the case of standards relating to product characteristics where imports from countries meeting and certifying the standards would be allowed, while imports from countries not doing so would be prohibited - a discriminatory import ban).

It is difficult, however, to envisage a basis for agreeing on an expanded application of the existing criteria to allow for the types of trade restrictions that currently fall outside Article XX and are, therefore, the ones most at issue, i.e., trade sanctions against non-parties and PPMs. Essentially, this would involve addressing directly and in a "boiler plate" way the question of when trade restrictions could be used, indeed would be "necessary", to force participation in IEAs or apply PPM standards to countries that do not agree with them. A number of questions arise:

- How would criteria be defined in generally applicable terms to cover fully what likely would be widely-varying circumstances regarding future IEAs? How would the Article XX requirement that such measures not constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" be defined? What would "the same conditions" mean with respect to environmental matters where domestic circumstances and policies might be legitimately different? How could all these elements be defined to ensure relevance to any possible future IEA?

- For example, it has been suggested that "the same conditions" could be taken to prevail with respect to a non-party to an IEA only if that country had the same environmental policies or programmes as those required under the IEA. This would mean, however, that non-participation would, by definition, expose a non-party to trade discrimination, even if it had legitimate environmental or other policy reasons to differ on the approach to the environmental issue. Proposing this approach as a general rule

would not only be difficult to defend, it would, in my view, be non-negotiable.

- And how would the Article XX principle of least trade-restrictiveness be applied to the situation where the purpose is in fact to be intentionally trade restrictive in order to exert pressure on another country to force change in its domestic policies? In the context of the highly-charged issue of trade sanctions, there will be fundamentally different views on these questions. It is difficult to see a basis for reaching agreement on making the existing criteria fit.

- Moreover, it is not at all clear that the GATT/WTO is even the right place to address such questions. The use of trade sanctions is first and foremost a matter of international environmental policy making, i.e., what tools does the international community wish to have available to advance and enforce the environmental agenda and under what type of circumstances could those tools be used? If consensus on this question were reached in the appropriate environmental forum, means could be provided to recognize and not interfere with that consensus in the GATT/WTO. But it would be difficult for the GATT/WTO to establish criteria a priori.

- Indeed, developing countries in particular could be expected to simply reject any explicit accommodation of such measures in the trade rules in the absence of a consensus on the underlying environmental issues, generally or in the context of a specific IEA.

While this approach may be pursued by some participants, and we should be prepared to work on clarifying the existing criteria, it seems unlikely that a meaningful answer to the IEA issue could be found with this option.

- **Providing a General Exception for IEAs in Article XX**

The EU has put this option on the table. The basic proposal is to reach agreement on an interpretation of the existing Article XX that would constitute a general exception for IEAs, thus precluding any challenge of GATT-inconsistent measures they might contain (the significant and sweeping nature of such a general exception would go beyond the scope of an interpretation of the rules - a formal amendment would need to be considered). The concept and justification is that, in the case of a broadly-based IEA representing true international consensus, the GATT/WTO should recognize that consensus and provide for the exemption of any

trade restrictions judged necessary. The concept is sound as far as it goes, but a number of difficulties quickly emerge in considering how it could be captured properly with a general exception approach:

- The basic problem is how to define generally and for almost automatic application the type of IEA that would qualify for the exception, covering any possible future case while protecting against abuse. In its proposal, the EU depends on a process approach. Any IEA would qualify as long as it was negotiated in an open process under the auspices of the UN with any country allowed to become a member. One major flaw, however, is that here is nothing to test for actual participation, which would be the only real measure of the degree of international acceptance of the IEA. An IEA with limited membership, and significant opposition, would be covered under the EU proposal. Moreover, if only the process aspects are considered, other critical features (e.g., effective compliance provisions) would be overlooked. In fact, what the EU has suggested is not a general exception in practice, but rather a procedure with only one, very loose criterion to apply to all IEAs.

- In reality, it is, in fact, extremely difficult to define generally, once again in a "boiler plate" fashion, what threshold of participation would constitute international consensus for application to all IEAs. Circumstances will vary with each case. A so-called general exception would amount to a blank check, which is not only undesirable, but non-negotiable as well. The negative reaction in the GATT discussions to date to the substance of the EU proposal demonstrates this clearly. Indeed, if an attempt were made to negotiate a threshold of participation in order to define what IEAs would be eligible for such a loose special exception, it is likely that many participants in that negotiation, recognizing that there might be IEAs they will not join in future, would set the bar for entry impossibly high.

- **A Case-by-Case Exception or Waiver[6]**

As the above suggests, the best, and likely most negotiable, option would appear to be a case-by-case exception approach comprising several criteria. This could be devised under Article XX or as a "Special Environmental Waiver" under the WTO waiver provisions. In Article XX, an exception could be established for the trade provisions of specific IEAs listed in an Annex, along the lines of the NAFTA Article 104 provision. The inclusion of an IEA on the list would require approval through a voting procedure as used for waivers.

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6 See also the discussion in Christie, "Stacking the Deck", including pp.27-30.

With respect to the waiver approach, it is clear that the existing provisions are not well suited to the IEA case (the limited duration of a waiver, the requirement for annual review, and the presentational concern that the traditional waiver is viewed as relating to "exceptional" cases). To address these shortcomings, a procedure specifically tailored to the IEA case could be established. In either approach, the following elements would need to be included.

To qualify for the exception procedure, an IEA would have to meet a number of basic criteria:

- There would need to be a general indication that the request relates to a broadly-based international agreement. As mentioned, it is extremely difficult to define in any dependable and generally applicable way what constitutes a sufficient level of participation to denote consensus. Nevertheless, there would need to be a basic threshold for accessing the exception or waiver procedure, in order to avoid disputed IEAs or those with low levels of participation being brought forward. The net effect of seeking GATT/WTO authority to use PPMs or trade sanctions to force acceptance of IEAs that do not enjoy broad support would be to push the underlying disagreement on the environmental issue into another forum which has neither the mandate nor the expertise to deal with it. The GATT/WTO should not interfere with IEAs representing international consensus on an environmental issue, but it cannot be cast in the role of referee when the issue or IEA is in dispute.

- The basic threshold could be indicated by reference to level of participation, particularly by a substantial majority of countries affected (including users of the goods or substance in question). Developing countries also would insist on reference to participation by countries having different levels of development and geographical location. The basic threshold along these lines (other elements could be proposed) would be <u>indicative</u> that a specific IEA is in the right "ball park", but would not be <u>definitive</u> regarding all future cases. The subsequent test of consensus or vote on the exception or waiver request would be the check in any particular case. The actual level of participation in a specific case could vary depending on the circumstances involved. This avoids the problem with the general exception approach of having to set a very high, general threshold in order to prevent abuse.

- The IEA would have to contain clear and enforceable obligations for parties. This would include an effective compliance/dispute settlement

system. It would not be reasonable to seek to waive the GATT/WTO rights of non-parties in order to enforce an IEA against them (or to confirm, for greater certainty, the waiving of GATT/WTO rights of parties to an IEA), if parties were not prepared to enforce the IEA amongst themselves, under effective terms established in the IEA itself.

- The trade provisions in the IEA also would need to be set out clearly, including with respect to measures to be taken at the national level. In the absence of a reasonable indication of the trade measures involved (e.g., how and when they might apply), it would not be possible to know what was being accommodated.

- In terms of timing, as the above points suggest, the procedure would need to triggered after the development of the substantive provisions of the IEA, but before any challenge of trade measures taken at the national level. It would, therefore, be an ex-ante approach.

For GATT-inconsistent trade restrictions in qualifying IEAs, special exceptions would then be available:

- In the waiver scenario, the basic voting procedure would apply, but a longer time-frame for a waiver could be provided, with less stringent review requirements. These elements could even be determined on a case-by-case basis, once again being tailored to the specific IEA.

- In the Article XX scenario, similar flexibility could be built in. Indeed, it would be open for consideration whether the trade provisions of listed IEAs could enjoy an indefinite exception, perhaps subject to periodic review.

- In either approach, we would need to consider limiting GATT/WTO non-violation dispute settlement rights of a non-party to the IEA in cases where the trade restrictions in question represent sanctions aimed at obtaining their participation (thereby limiting the prospect of compensation for the nullification of trade benefits otherwise accruing to the non-party). Presumably, it would be counterproductive to apply trade restrictions designed to impose economic pressure and then to offset the impact of the restrictions by allowing for compensation. However, developing countries in particular could resist this element.

4.2 Responding to the Trading Agenda

As indicated in previous sections, there is potential for serious trade disruption arising from the use of certain trade-related environmental measures, such as eco-labelling, packaging, recycling and disposal requirements, taxes and so on. These issues need to be urgently addressed. It is still too early to suggest specific options, however. We are still in an analytical phase, identifying the nature and extent of the problem. Considerable homework needs to be done by participants in the GATT/WTO process to flesh out the multilateral picture, as well as domestically to clarify national positions regarding the local use of the measures in question and their impact on exports when used by others. Although there exists a general assessment of where interests lie, with the most serious implications arising on the export side of the equation, more work needs to be done to focus on key problems and the best solutions.

We should bear in mind throughout the analytical work that is underway, and that should be stepped up under the new GATT/WTO work programme, the likely need to improve disciplines, and compliance with those disciplines, through interpretations of and possibly amendments to the relevant GATT/WTO Articles and Agreements. Progress in the GATT/WTO will depend to some extent on progress in the development of common standards or programmes in the relevant fora. Work in the WTO should be coordinated with, and could help to accelerate, these related activities.

5. Conclusions

As was indicated at the beginning of this Paper, the trade and environment debate is ultimately about the best means to pursue improved environmental protection. Those who closely follow environmental issues know better than most that the pace of progress can be frustratingly slow. The problems are often complex and the science uncertain. There are sometimes commercial objectives tangled up in environmental measures. And different countries have different priorities and capacities to address competing demands. Indeed, some developing countries have virtually no capacity to respond to the environmental agenda being pressed upon them. At the end of the day, costs will be high, something that most taxpayers, including in the developed world, are not yet prepared to absorb fully.

There are no magic answers, least of all in the GATT/WTO. The challenge is to look for approaches that are feasible, that will make a lasting contribution to progress and that will not end up doing more harm than good.

The trading system can and does, in fact, play an important supporting role. Trade is one of the central forces driving international economic growth, which in turn is a critical factor in advancing the goal of environmental protection. The evidence is clear that an open, predictable and non-discriminatory trade regime is a prerequisite for increased wealth, which is a prerequisite for a better environment. Changing the rules to allow for easier use of discriminatory and extraterritorial trade restrictions may have short-term appeal for some, but it would be counterproductive for the trading system in the long-run. Denying export opportunities, especially to developing countries, would simply eliminate a source of the income necessary to deal with an environmental problem. It also would undermine the international trust and cooperation that will be necessary for long-term success - few governments would tolerate for long such intrusions into their domestic jurisdiction through the use of trade penalties by others. Such an approach would, moreover, invite protectionist abuse.

There undoubtedly will be much debate over these issues. Nonetheless, one thing is clear - while the GATT/WTO can provide support in a number of ways, including by ensuring that the trade rules do not get in the way of decisions by the international community on environmental policy and programmes, it cannot itself make or arbitrate those decisions. Nor should it be called upon to enforce or police environmental standards or programmes that have not been accepted internationally. This approach is neither desirable not negotiable. After all, the GATT/WTO is nothing more than an organization bringing together for trade purposes the same governments that gather in other organizations for environmental purposes. Those that are not yet in a position to agree on environmental issues in environmental fora are unlikely to agree in the GATT/WTO on the use of trade penalties to force those issues.

The role in the GATT/WTO, therefore, should be support and non-interference, not intervention; fine tuning the interface between environmental programmes and the trade rules, not creating blunt instruments. Ultimately, the WTO should be left to do what it is mandated to do and, in fact, does best - liberalize and regulate trade, which, over time, will be its most important contribution to future generations.

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