I. INTRODUCTION

"Hey-Hey! Ho-Ho! The WTO has got to go!" chanted a potpourri of protestors at the third Ministerial Meeting of the World Trade Organization ("WTO"), held in Seattle, Washington, in December 1999. Mainstream U.S. environmental groups formed a core part of the protests, having taken the lead in challenging the legitimacy of WTO decision-making throughout the 1990s. Their central claim is that WTO decisions on trade and environment issues are anti-democratic and thus lack legitimacy. This Article takes their charges seriously, assessing the account-
ability of those participating in WTO negotiations to define a legal framework for addressing the interaction of trade and environmental policies. The basic questions are: who is represented, and how are they represented, in the development of international trade law through the political process?3

This Article examines how the WTO has addressed trade and environment issues through a specialized Committee on Trade and Environment (“CTE”), and treats the CTE as a site to assess central concerns of governance—that is, who governs—in a globalizing economy. Northern environmental interest groups and many northern academics4 criticize the CTE for failing to propose substantive changes to WTO law to give more deference to national environmental policies with extraterritorial effects.5

including “seeking to expand its ability to override environmental laws”); Don Knapp, WTO Rejects U.S. Ban on Shrimp Nets That Harm Sea Turtles (Oct. 12, 1998), at http://www.cnn.com/US/9810/12/world.trade.ruling (last visited Dec. 2, 2000) (on file with the Harvard Environmental Law Review) (noting the statement by the WWF—World Wide Fund for Nature (“WWF”) that “[t]he WTO remains an institution captured by the special interests of multinational corporations and free trade technocrats”). See also Invisible Government, N.Y. Times, Nov. 29, 1999, at A15 (full-page advertisement taken out by a consortium of NGOs, including Friends of the Earth, Sierra Club, Humane Society of the United States, and Greenpeace U.S.A., under the “Turning Point Project,” stating that the “World Trade Organization (WTO) is emerging as the world’s first global government . . . and its mandate is this: To undermine the constitutional rights of sovereign nations”).

3 This Article addresses the issue of representation in the negotiation and creation of WTO rules, and not the interpretation of existing WTO rules by WTO judicial panels, which is the subject of a separate, ongoing study by the author.

4 This Article expressly adopts the term northern—and not western—non-governmental organizations (“NGOs”), academics, and governments in order to emphasize that the division is predominantly North-South, not East-West. These issues divide not only governments, but also their constituencies, reflecting their different interests, values, and priorities. As used in this Article, the term “northern states” refers to developed countries, and the term “northern NGOs” refers to NGOs from developed countries.


For recommendations by U.S. and European academics to modify WTO rules, see Daniel Esty, Greening the GATT: TRADE, ENVIRONMENT, AND THE FUTURE 113–36 (1994) [hereinafter Esty, Greening the GATT] (proposing a three-prong test to address trade-environment issues in a more balanced manner); Jeffrey Danoff, The Death of the Trade Regime, 10 EUR. J. INT’L L. 733 (1999) (proposing new procedural mechanisms
The Article, through its focus on the positions and roles of state and non-state actors, provides a better foundation to assess the democratic accountability of the WTO in handling trade-environment matters. It examines the degree to which national delegates represent their constituencies before the CTE, the impact of a sophisticated WTO international Secretariat in framing debates and shaping information about alternatives, and the role of powerful commercial interests and transnational environmental advocacy groups.

Understanding the CTE is important for three primary reasons. First, for those challenging the correctness and legitimacy of General Agreement on Tariffs and Trade ("GATT")\(^6\) and WTO panel decisions in trade-environment cases, the CTE discussions highlight how most countries (and their constituencies) believe panels should apply GATT and WTO rules. It is simply disingenuous to challenge the legitimacy and democratic accountability of WTO judicial decisions without recognizing how representatives in a WTO political body (such as the CTE) believe that the rules should be interpreted and/or modified. One of this Article’s central aims is to explain how most of the world outside of the United States feels about this issue, and why.\(^7\)

Second, the analysis shows how the WTO works in practice, and, in particular, why trade-environment discussions are often more polarized within the WTO than in other fora. The Article assesses the impact of trade-environment discussions within the CTE on WTO policy and practice with respect to the transparency of WTO deliberations.


\(^7\) Environmental activists became aware of the GATT and WTO when dispute settlement panels held that national laws (with at least a partial environmental purpose) violate WTO rules. Before critiquing these judicial decisions as illegitimate, one needs to understand the political process that determines these rules and how the players involved in that process view them. One of the CTE’s primary purposes was to determine whether relevant GATT and WTO rules should be modified or further guidance should be given for their interpretation. WTO members placed this issue at the top of the CTE’s agenda.
Third, and perhaps most importantly, although this study focuses on a WTO political body, it has significant implications for understanding the law and politics of addressing trade-environment linkages in other international and regional fora. Many environmental groups and trade policymakers, including the outgoing WTO Director-General Renato Ruggiero, call for the creation of a World Environment Organization. This Article assesses the prospects of resolving trade-environment conflicts in these alternative fora and makes some pragmatic recommendations.

The Article’s analysis is based on a sociolegal approach, focusing on the role of the contending players within the WTO’s institutional context and their relationship to domestic policy debates. Its central premise is that larger macro theoretical analyses and normative public policy prescriptions about “legitimacy,” “democracy,” and “accountability” offer little value without a micro understanding of the underlying roles of power, access, and interests in shaping legal outcomes. As the legal realist Karl Llewellyn maintained in the 1930s: “The argument is simply that no judgment of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing.”

Part II provides an overview of three competing theoretical perspectives on the WTO’s treatment of trade-environment matters. The three perspectives are a two-level intergovernmental model, a supranational technocratic model, and a civil society/stakeholder model. The first focuses on national representatives as advocates of national positions; the


10 Karl Llewellyn, Some Realism About Realism, 44 HARV. L. REV. 1222, 1236–37. Llewellyn called for “the temporary divorce of Is and Ought for purposes of study.” Id. at 1236.

11 See infra notes 17–19 and accompanying text.
second on the role of international bureaucrats (the WTO Secretariat) and transgovernmental networks of trade officials in shaping options; and the third on the role of non-governmental actors as intervenors at the international level.

These competing theoretical frames are then applied to the article’s empirical assessments. Parts III, IV, and V respectively address why the CTE was formed, how its agenda was determined, and what accounts for the current status of CTE deliberations. Part V addresses such competing explanations as the roles of state power, intrastate conflicts, a neoliberal-oriented WTO Secretariat, state trade bureaucracies, business interests, and national and transnational environmental and developmental activist groups. It concludes by examining how national “stakeholder” positions are related to their respective states’ positions, finding that divisions between northern and southern states have largely mirrored divisions between northern and southern non-governmental organizations (“NGOs”). In short, the Article concludes that the WTO is not such an anti-democratic institution as its critics, including U.S. academic critics holding predominantly parochial views,13 claim.

Part VI addresses the spillover effects of the CTE process, in particular through its enhancement of the transparency14 of WTO decision-

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The Seattle demonstrators were not articulating any global concern about WTO-driven intrusion into public space. The campaign was almost entirely driven by the interests of local U.S. groups. This was why the demonstrations were making demands on environment and labour standards that seemed to be inimical to the interests of the poor countries, a feature of the street action that many have already commented on . . . . One aspect of the street protests during the recent WTO conference was apparent and disconcerting—the ignorance of Third World issues.).

14 The term “transparency” is a buzzword used to assess public access to deliberations and dispute settlement hearings within the WTO over trade and trade-related policies. This public access could be either direct, through the provision of access of NGOs to WTO negotiating rooms, committee meetings, and dispute settlement hearings, or indirect, by making the minutes of meetings and transcripts of hearings, as well as all position papers, secretariat studies, and legal briefs publicly available, including through the Internet. The existing WTO rules concerning public access to documents are set forth in WTO General Council, Procedures for the Circulation and Derestriction of WTO Documents, WT/L/160/Rev.1 (July 22, 1996) at http://www.wto.org (last visited Dec. 2, 2000). For an overview of these rules prepared for NGOs, see, for example, John Barlow Weiner & L. Brennan Van Dyke, A Handbook for Obtaining Documents from the World Trade Organization (Center for International Environmental Law, n.d.) (on file with the Harvard Environmental Law Review); L. Brennan Van Dyke & John Barlow Weiner, An Introduction to the WTO Decision on Document Restriction (Center for International Environmental Law, n.d.) (on file with the Harvard Environmental Law Review) (both are published by the International Centre for Trade and Sustainable Development).
making, and its facilitation of interstate and intrastate coordination of trade-environment policy. This broader, more diffuse impact—not the failure to agree to legal amendments to WTO rules—will be the primary legacy of the CTE.

Part VII, the Conclusion, assesses the rationale for, prospects of, and constraints on moving beyond the current stalemate within the CTE through the creation of a World Environment Organization. It notes that significant constraints exist because trade-environment tensions reflect differing social values, priorities and interests between and within states, and that their resolution will be determined neither by an "international civil society of stakeholders,"\(^\text{15}\) nor by a technocratic international elite with a particular ideological orientation.

The Article finds that while an intergovernmental model best explains the formation and operation of the CTE, the notion of the state must be disaggregated to assess conflicts within states among interest groups and state agencies. It assesses how powerful WTO members, such as the United States and the European Union ("EU"),\(^\text{16}\) have been both driven and constrained by conflicts among influential political constituencies that work with and through their state representatives, consistent with a two-level intergovernmental approach. The divisiveness within the WTO's two most powerful members has contributed significantly to the stalemate within the CTE, and thus the disaffection of U.S. and EU environmental activist groups, who are more concerned about outcomes than process. This stalemate does not, however, mean that decision-making within the CTE has been anti-democratic, or would be more democratic if an alternative "stakeholder" model were implemented. Rather, the blockage within the CTE has been caused in large part by divisions between and within the very states in which northern NGOs operate.

This Article's findings demonstrate that, despite critics' claims, the WTO is not an autonomous neoliberal-dominated organization that is by nature anti-environment and anti-democratic. Rather, decision-making processes within the WTO are, for the most part, properly based on an "intergovernmental" model that, compared to the "civil society/stakeholder" and "supranational" alternatives, best ensures the relatively unbiased participation of disparate interests around the globe in an international forum. The Article finds that implementation of a "civil soci-

\(^{15}\) See infra notes 37–45 and accompanying text.

\(^{16}\) The EU (or, technically, for WTO purposes, the European Economic Communities) is not a "state," but is, nonetheless, an original member of the WTO, and may be referred to as a "state" for simplicity in the text of this Article. The terms EU and European Community ("EC") are both used in this Article. The name of the European entity has changed over time. The EU was formed pursuant to the Treaty of European Union of 1992. For an overview of the EU's role in trade and economic relations, see Mark A. Pollack & Gregory C. Shaffer, Transatlantic Governance in Historical and Theoretical Perspective, in TRANS- ATLANTIC GOVERNANCE IN A GLOBAL ECONOMY ch.1 (Mark A. Pollack & Gregory C. Shaffer eds., forthcoming 2001) [hereinafter Pollack & Shaffer, Transatlantic Governance].
The "stakeholder" model is fraught with much greater problems of over- and under-representation than the model's advocates admit. This is particularly the case for developing-country constituencies, whose stakeholders are always under-represented internationally from the standpoint of direct participation. While there is certainly continued room for improvement, the CTE has facilitated the coordination of trade and environment policies domestically and internationally, and served as an important laboratory for enhancing the transparency of the WTO as a whole. In the future, domestic constituencies may interact on a somewhat more informed basis with their national representatives to determine state negotiating positions in international fora.

II. THEORETICAL APPROACHES TO THE WTO'S TREATMENT OF TRADE AND ENVIRONMENT MATTERS: THE CONFRONTATION OF EMPIRICS

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

(i) An intergovernmental perspective, which holds that the creation of the CTE represents an attempt by states to take control of the trade and environment debate by bringing it to a state-dominated organization. A two-level intergovernmental model incorporates portions of the next two perspectives by maintaining that national positions are shaped by national political processes as well as competition among governmental actors attempting to respond to and shape constituent demands. 17

(ii) A supranational technocratic perspective, which appraises the WTO's handling of trade and environment matters as a co-optation of policy-making by a technocratic network of trade policymakers with a neoliberal 18 policy orientation. The network is composed of national

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17 The two-level intergovernmental model (in its ideal type) does not incorporate the entirety of the next two models because it does not address the impact of international institutions on national identities and interests. Rather, it maintains that (i) state representatives are the primary determinants of outcomes negotiated in the WTO; (ii) governments ultimately take a single national position on issues of importance, as determined by domestic political processes; and (iii) non-governmental stakeholders do not directly shape outcomes at the international level, but rather indirectly influence them to the extent their views are adopted as national positions.

trade officials working with the WTO Secretariat within the structure of the WTO trade regime. National trade officials, in turn, receive support from large, well-organized private businesses.

(iii) A stakeholder/civil society perspective, which views the creation of the CTE as a response to ongoing systematic pressure from non-governmental advocacy groups before international and domestic fora to change the norms of the world trading system.¹⁹

These three models focus on the roles of different players in determining political outcomes: states (as ultimately represented by chiefs of government), international and national trade bureaucrats (working through a transgovernmental trade policy network), and transnational non-governmental actors. The three ideal types are used as alternative frameworks for analysis because they incorporate the terms and concepts most prevalently used and abused by commentators on the WTO. This Article examines their relative explanatory power as applied to the WTO in assessing (i) why the CTE was formed; (ii) what accounts for its agenda; (iii) what explains the current status of CTE discussions; and (iv) what external developments the CTE internal process has spurred. This evaluation permits us to better assess the democratic accountability of the WTO as a whole and the prospects and limits of forming alternative international fora, such as a World Environment Organization, to address these same issues. By examining what is, the article provides us with the tools to better assess proposals for what ought to be. The three models offer not only positive predictions but also have normative aspirations and implications.²⁰

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¹⁹ In international relations theory, the stakeholder/civil society model can be viewed as a version of transnational relations theory, which focuses on the role of private actors in directly determining policy outcomes. See Pollack & Shaffer, Transatlantic Governance, supra note 16.

²⁰ The three chosen perspectives have been employed to a different extent and from a predominately normative perspective in the important and oft-cited article by G. Richard Shell, Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization, 44 DUKE L.J. 829, 838 (1995), in which Shell advocates a "stakeholder" model as "a blueprint." This Article, however, takes a sociological approach, assessing the foundations (players, power dynamics, and institutional context) on which any normative model (such as a stakeholder model) would be built. In addition, the Article presents each of the models in a slightly different manner than Shell does. While Shell, borrowing from regime theory, refers to a "regime management model" of WTO policy-making, this Article adopts a two-level intergovernmental perspective in its analysis of state-to-state negotiations, thereby incorporating the impact of commercial and other interests on the formation of national positions. As for the stakeholder model, this Article addresses its functional and normative limits in light of the stakes and power positions of stakeholders that would best take advantage of such a model. These stakeholders do not work in a vacuum but may make alliances with representatives from more powerful states, where the wealthiest and best-organized stakeholders are located.
A. A Two-Level Game Intergovernmental Approach

Scholars taking an intergovernmental approach view international organizations as formed and controlled entirely or predominantly by states to further state interests—not those of non-state actors or semi-autonomous lower-level government officials. From a classical realist perspective, international institutions reflect the interests of the most powerful states and do not constrain their operations.21 Rational institutionalists, however, maintain that even powerful states often agree to constraints imposed on them by international institutions in order to further national goals.22 In their view, states create international institutions to reduce the transaction and information costs of negotiating and monitoring agreements, thereby helping to ensure that mutually beneficial bargains are sustained.23

A variant of intergovernmental theory broadens this analysis by focusing on a two-level game that combines competition between domestic private interests leading to the formation of national positions, with competition between states that promotes those interests internationally.24 National positions are first formed "liberally" through domestic political

21 See NEOREALISM AND ITS CRITICS (Robert Keohane ed., 1986); ROBERT GILPIN, THE
POLITICAL ECONOMY OF INTERNATIONAL RELATIONS (1987); JOSEPH M. GRIECO, COOPE-
RATION AMONG NATIONS: EUROPE, AMERICA, AND NON-TARIFF BARRIERS TO TRADE
(1990) (while Grieco agrees that institutions matter, as a neorealist, he focuses more on state power and the importance of relative gains in the negotiation of trade liberalizing agreements). For a realist approach to international environmental politics, see ANDREW
HURRELL & BENEDICT KINGSBURY, THE INTERNATIONAL POLITICS OF THE ENVIRONMENT:
AN INTRODUCTION, IN THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 11 (Andrew
Hurrell & Benedict Kingsbury eds., 1992). One of its three central themes is "the nature and significance for international environmental protection of the conflicts between states over power, over the distribution of the costs of environmental management, and over questions bearing upon state sovereignty and freedom of action." Id.

22 See, e.g., ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN
THE WORLD POLITICAL ECONOMY 14, 243–47 (1984); Kenneth W. Abbott, Modern Inter-

23 Rational institutionalists borrow from game theory and neo-institutional economics. In a two-player "prisoners’ dilemma" game, for example, either player gains from cheating unless both players cheat, in which case both are worse off. If the game is repeated into the future, both players will have an incentive not to cheat. See Abbott, supra note 22, at 358–
68. See also Duncan Snidal, Coordination versus Prisoners’ Dilemma: Implications for

24 See, e.g., Robert Putman, Diplomacy and Domestic Politics: The Logic of Two-level
Games, 42 INT’L Org. 427 (1988); Andrew Moravcsik, Introduction: Integrating Interna-
tional and Domestic Theories of Bargaining, in DOUBLE-EDGED DIPLOMACY: INTERNA-
TIONAL BARGAINING AND DOMESTIC POLITICS 1–42 (Peter B. Evans et al. eds., 1993). For
an application of the model to international environmental politics, see, e.g., GARETH POR-
TER & JANET WELSH BROWN, GLOBAL ENVIRONMENTAL POLITICS 22, 31–37 (2d ed. 1996)
(noting that "state actors are the final determinants of the outcomes of global environ-
mental issues," id. at 31, but that "[a] theoretical explanation for the formation of global
environmental regimes . . . must incorporate the variable of state actors’ domestic politics,"
id. at 22.).
processes, often involving conflicts among competing interest groups. These national positions are then defended by state representatives in bilateral and multilateral "intergovernmental" negotiations. For liberal intergovernmentalists, national positions are not abstract or static, but contingent and shaped by internal pressures from competing stakeholder interests. International institutions, such as the WTO, offer new possibilities of confrontation not only among, but also within, states. The WTO is not simply a neutral arena for facilitating reciprocally beneficial intergovernmental outcomes, but a new institutional means for domestic actors to attempt to obtain their demands.

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

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25 See, e.g., Miles Kahler, Conclusion: The Causes and Consequences of Legalization, 54 INT'L Org. 661, 683 (2000) ("To paraphrase E.H. Carr, legalized institutions offer a new meeting place for ethics and power, among, as well as within, societies").

26 Cf. Helen V. Milner, Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics, 52 INT'L Org. 759, 784 (1998) (noting that under her version of rational institutionalist analysis, "[t]he institutions are not viewed as neutral arenas for cooperation, rather they are political means to realize one's preferences").

27 Cf. Helen V. Milner, Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics, 52 INT'L Org. 759, 784 (1998) (noting that under her version of rational institutionalist analysis, "[t]he institutions are not viewed as neutral arenas for cooperation, rather they are political means to realize one's preferences").

28 See, e.g., U.S. Issues Final List of European Imports to Be Hit with Higher Duties in Banana Row, 16 INT'L Trade Rep. (BNA) 621 (Apr. 14, 1999) (listing European products that the United States “hit with 100 percent import tariffs” after the EU violated WTO rules by discriminating against U.S. banana distributors).

29 By incorporating trade in services and the protection of intellectual property rights into the WTO and NAFTA trade regimes, for example, the Office of the U.S. Trade Representative garnered support from powerful domestic constituencies to lobby for the ratification of these politically sensitive trade liberalization agreements.

30 U.S. trade representatives may refer to, and possibly even instigate, hard-line declarations from the U.S. Congress to coerce foreign negotiators. See, e.g., J.M. Destler, AMERICAN TRADE POLITICS 109–15 (3d ed. 1995) (noting how U.S. Trade Representative Robert Strauss used Congress when negotiating with the Japanese in the late 1970s). Similarly, the EU may refer to French hard-line positions on agricultural negotiations to constrain the demands of the United States and other negotiators for eliminating subsidies and other protective measures that favor EU agricultural producers. Cf. infra note 166 (discussing French suspicion of the EU's ability to act as its bargaining proxy).

31 For example, pursuant to the United States' "fast track" procedures, the U.S. Con-
can work in both directions, with domestic constituencies "liberally" shaping state positions and state representatives attempting to manipulate domestic preferences advocated in domestic fora. Two-level intergovernmental analysis thereby combines the domestic and international arenas into a single bargaining model.

A two-level intergovernmental approach would predict that states largely respond to domestic pressures in forming their positions within the WTO on trade and environment matters, particularly when these issues become politicized. To the extent that commercial interests have higher per capita stakes in the outcome of trade negotiations than other stakeholders, the model predicts that they indeed play a more predominant role in forming national positions. However, the positions of national commercial constituencies are not necessarily neoliberal, since many national sectors—such as agriculture, steel and textiles—often have protectionist proclivities. Thus, the model predicts that national policy on trade and environment matters tends to have a more nationalist, mercantilist orientation, which, on the one hand, attempts to exploit environmental arguments to limit imports and, on the other, is wary of environmental arguments by other countries that could prejudice exports. While the two-level intergovernmental approach is primarily a positive theory, it also has important normative and practical implications. It helps us assess the democratic legitimacy of decision-making within the CTE, and enables us to critically examine the efficacy of erecting alternative institutions to resolve trade-environment conflicts, as advocated by the WTO's critics.

B. A Supranational Technocratic Approach

A competing perspective on international relations maintains that networks of mid-level technocratic officials may be able to shape international policy by working within supranational regimes, such as the WTO, in a manner independent of national political processes. Robert Keohane and Joseph Nye, for example, define "transgovernmental" relations "as sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments," at least with respect to the details of negotiated outcomes. These relatively autonomous net-

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works of lower-level governmental representatives can work with members of international Secretariats in specific policy areas to define appropriate policy options and thereby determine policy outcomes. A supranational technocratic approach predicts that WTO outcomes reflect the bureaucratic interests and ideological and epistemological biases of a network of trade elites, rather than national interests as determined through national political processes.

The identity, background, and views of the predominant players in such networks, and the structure in which they operate, would determine the network's policy orientation. Since the primary aim of the WTO is to facilitate trade liberalization, the policy-making network would likely have a neoliberal bias if international civil servants at the WTO play a predominant role. In the trade-environment policy context, the network would tend to view environmental regulations as non-tariff barriers to trade, not as appropriate environmental protection measures. Network members would scrutinize, in particular, environmental regulations that have a greater adverse impact on foreign trading interests than on domestic producers. However, to the extent that national trade officials—and not WTO civil servants—play a dominant role in this network, the network's orientation will not necessarily be neoliberal, as trade officials represent protectionist producer interests as well as neoliberal export interests.

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

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33 These policy-making networks are sometimes referred to as "epistemic communities," defined as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue-area." Peter Haas, Introduction: Epistemic Communities and International Policy Coordination, 46 INT'L ORG. 1, 3 (1992). On ways institutions can shape state behavior through defining "logics of appropriateness," see James G. March & Johan P. Olsen, The Institutional Dynamics of International Political Orders, 52 INT'L ORG. 943, 951–52, 964 (1998) (noting that international institutions are not only sites for intergovernmental strategic negotiations, but also "institutions for socializing individuals and creating meaning and for promoting specific concepts," such as the role of markets).

34 See infra notes 136–138 and accompanying text.
The view that trade-environment policy-making is being forged by a technocratic network operating through the WTO's agency lies at the center of normative debates over the WTO's legitimacy. On the one hand, this view is precisely why the WTO is pilloried by its critics as an undemocratic, neoliberal institution, independent of national democratic control. On the other hand, libertarians and public choice theorists, including some former members of the GATT Secretariat, unabashedly advocate a neoliberal policy role for the WTO through which networks of national and international trade policymakers may promote the "public interest" by freeing economic exchange from governmental regulatory constraints. For them, such technocratic, officials are more likely to make "better" policy, from the perspective of national and world economic welfare, than national officials subject to nationalist, mercantilist political biases. This Article assesses the extent to which national trade bureaucrats, working with the WTO Secretariat and business interests, shape the trade and environment debate within the CTE and—through coordination facilitated by the CTE—beyond it.

C. A Civil Society/Stakeholder Approach

Theorists taking a civil society or stakeholder approach depict non-governmental actors as playing a central and increasing role in the international arena, independent of state representatives. Some non-state theorists focus on the way in which international market liberalization processes favor transnational corporations, who dominate policy-making nationally and internationally. Many others, however, focus on the role

35 See supra note 2.
37 In international relations theory, the civil society model of politics is sometimes referred to as "transnational relations" (in contrast to intergovernmental relations), because it focuses on the role of private non-governmental actors working across borders to directly determine transnational policy outcomes. See Pollack & Shaffer, Transatlantic Governance, supra note 16.
38 See, e.g., SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY 3–15 (1996) (noting how non-state actors exercise power through providing and withholding credit, defining the nature of knowledge and deciding the terms and conditions of production, and stating that "the impersonal forces of world markets, integrated over the postwar period more by private enterprise in finance, industry and trade than by the cooperative decisions of governments, are now more powerful than the states to whom ultimate political authority over society and economy is supposed to belong"); ROBERT W. COX, APPROACHES TO WORLD ORDER (1996) (noting the primary role played by capitalist interests in a hegemonic world order). See also DAVID C. KORTEN,
of non-business actors in constructing knowledge, setting agendas, and transforming perceptions of alternative outcomes through their interactions with policymakers at the national and international levels.\textsuperscript{39}

Under this latter analysis, transnational networks of environmental activists are striving to change the structure of the trade-environment debate within the WTO on the appropriateness of trade measures imposed for environmental reasons. These civil society theorists tend to focus more on the power of persuasion than on material coercion, particularly with respect to NGOs’ dealings with powerful states.\textsuperscript{40} Some theorists go so far as to declare that transnational environmental activists not only constructively shape outcomes, but also directly determine policy outcomes through transnational coordination within “world civic politics.”\textsuperscript{41}

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The focus on how actors shape (or “construct”) norms that thereby affect policy outcomes is often referred to as “constructivism.” For an analytical account of constructivism and its variants in international relations theory, see John Gerard Ruggie, \textit{What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge}, 52 Int’l Org. 835 (1998) (noting constructivism’s grounding in the sociological approaches of Emile Durkheim and Max Weber). For constructivist analysis of the power of international organizations, see Michael Barnett & Martha Finnemore, \textit{The Politics, Power, and Pathologies of International Organizations}, 53 Int’l Org. 699, 710 (1999) (assessing how international organizations exercise power, that is autonomous from states, through their abilities to “classify the world, creating categories of actors and action, fix meanings in the social world, and articulate and diffuse new norms, principles, and actors around the globe”).


Arguably, as communication and transportation barriers diminish, the ability of an organization in one country to influence perceptions and policies in another expands.42

Although the civil society approach has a positive, descriptive aspect, in the context of debates over the WTO, it is most commonly used in a normative sense. Most northern environmental activists advocate the adoption of a stakeholder model precisely because the model is not operational within the WTO or CTE. Criticizing the WTO as unrepresentative and dominated by commercial concerns,43 they support an alternative in which “stakeholders” other than business interests play a greater role in international policy formation. They recommend that the views of multiple stakeholders from developed and developing countries, and particularly those of environmental interest groups, be incorporated into WTO negotiating and dispute settlement processes.44 The aim of these

but not seriously assessing them when using the term “global social movements”). See also Peter Willets, Who Cares About the Environment?, in THE ENVIRONMENT AND INTERNATIONAL RELATIONS 133 (John Vogler & Mark Imber eds., 1996) (“[t]he Global Politics paradigm, with its emphasis on values and issues, gives a sound theoretical basis for the instinctive feeling, on the part of environmental researchers, that NGOs really are important in a more fundamental way.”).


43 Many of these critics typically contend that the WTO serves multinational corporate interests. See Knapp, supra note 2. For other critiques of the dominance of corporate trading interests in environmental matters, see, e.g., WALLACH & SPORZA, supra note 2, at 79; Matthias Finger & James Kilcoyne, Why Transnational Corporations are Organizing to “Save the Global Environment,” 27 THE ECOLOGIST 138 (1997) (maintaining that multinational businesses, through the World Business Council on Sustainable Development “will be uniquely positioned to determine and control global environmental and other standards, as well as trade rules”); CHATTERJEE & FINGER, supra note 38; KORTEN, supra note 38.

northern activists is to integrate into WTO decision-making an "environmental" perspective alongside the predominant "trade" one.\textsuperscript{45}

These advocates, however, typically fail to examine which stakeholders would likely benefit from the implementation of this alternative model, especially in light of which stakeholders presently monitor CTE developments most closely and who lobby state representatives on their positions. The advocates rarely review how representative the NGOs themselves are.\textsuperscript{46} Not surprisingly, representatives of northern NGOs, with greater resources and organizational capacities, are more likely to advocate adoption of a "stakeholder model."\textsuperscript{47} They hope that under this alternative model, their northern environmental views would more likely prevail.

* * *

This Article now assesses the explanatory power of these three theoretical frameworks in helping us understand (i) why the CTE was formed; (ii) what accounts for its agenda; (iii) what explains the current status of CTE discussions; and (iv) what external developments the CTE internal process has catalyzed. This, in turn, permits us to respond more critically to challenges to the WTO's legitimacy and accountability.

\textsuperscript{45} See infra notes 251–262, 314–326 and accompanying text.


\textsuperscript{47} See infra notes 262–272 and accompanying text.
III. Why Was the Committee on Trade and Environment Formed?

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

No provisions in the original GATT document clearly addressed environmental protection because the environment was not on the domestic policy agenda when the GATT was signed in 1947. At the time, environmental protection agencies and environmental NGOs, such as Greenpeace, World Wildlife Fund, and Friends of the Earth, did not exist in the United States and Europe. When environmental concerns became domestic and international policy issues in the 1970s, they were not addressed within GATT, but through the United Nations (“UN”) system. In anticipation of the 1972 UN Conference on the Human Environment, GATT members agreed to form the EMIT Working Group to “examine upon request any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment especially with regard to the application of the provisions of the General Agreement . . . .” However, no requests were made and the EMIT Working Group did not meet until twenty years later. Once it did convene, in 1991, defining its agenda was no easy matter, requiring over eleven months of internal debates within the GATT Council.

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48 See Edith Brown Weiss, *Environment and Trade as Partners in Sustainable Development: A Commentary*, 86 Am. J. Int’l L. 728 (1992), but see Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. World Trade 37 (1991) (noting that states discussed wildlife agreements in the context of their negotiations on the creation of an International Trade Organization in the late 1940s). Although Article XX(b) and XX(g) of GATT 1994 respectively refer to “measures . . . necessary to protect human, animal or plant life or health; . . . [and] relating to the conservation of exhaustible natural resources,” these provisions do not expressly mention environmental protection, and it is unclear what they were intended to encompass. The first GATT cases that clearly confronted environmental concerns did not appear until the 1990s.


51 The convening of the EMIT Working Group was first raised in a Uruguay Round negotiating meeting in December 1990, but the first EMIT Working Group meeting was not held until November 1991. See Statement on Trade and the Environment, MTN.TNC/W/47 (Dec. 3, 1990) (proposal to convene the EMIT Working Group, submitted by member countries of the European Free Trade Association); EMIT Working Group, *Report of the*
There is some misunderstanding about why the EMIT Working Group finally convened and the CTE then formed in the 1990s. Many assume that the two were primarily the result of pressure from U.S. environmental groups, who harnessed United States negotiating power to achieve their ends. This assumption is understandable given the contemporaneous signature of the 1993 environmental side agreement to the NAFTA, the importance of environmental issues in U.S. domestic debates over NAFTA's ratification, and the formation within the Organization for Economic Cooperation and Development ("OECD") of an analogous Joint Session of the Trade and Environment Committees ("OECD Joint Session"). As Keohane has written: "If there is one key variable accounting for [international environmental] policy change, it is the degree of domestic environmental pressure in major industrialized democracies, not the decision-making rules of the relevant international institutions."54

Moreover, most developing countries opposed the convening of the EMIT Working Group and the formation of the CTE precisely because they feared that these groups could serve to justify U.S. and European trade measures against developing country imports, resulting in "green protectionism."55 In the GATT Council meetings leading up to the con-

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53 In 1991, the members of OECD formed the OECD Joint Session which, like the CTE, continues to meet periodically. For a fuller description of the work of the OECD Joint Session and its impact, see Robert Youngman & Dale Andrew, Trade and Environment in the OECD, in SUSTAINABLE DEVELOPMENT: OECD POLICY APPROACHES FOR THE 21ST CENTURY 77 (OECD 1997). For a presentation of trade-environment issues by the OECD Trade Committee Chairman at the beginning of the OECD Joint Session, see Géza Feketekuty, The Link Between Trade and Environmental Policy, 2 MINN. J. GLOBAL TRADE 171 (1993). Many commentators believe that greater progress in exploring the substantive linkages between trade-environment policy was made in the OECD deliberations than in the CTE. The greater likelihood of common social values among OECD members (developed countries) and the fact that there is no binding OECD dispute settlement system that could enforce the findings of the OECD Joint Session explain this conclusion in part.


55 Mounir Zahran, Egypt's WTO ambassador, recalls that "the environmental issue was imposed on the WTO during the last phase of the Uruguay Round with the argument that those who would oppose it would bear responsibility for the Round's failure." He confirms "that many developing countries feared the entry of 'trade and environment' in the WTO would lead to more protectionism." Martin Khor, South Concerned Over New Issues at WTO (text from author's listserv printout, on file with the Harvard Environmental Law Review) [hereinafter Khor] (reporting on remarks at a conference in Malaysia on July 9, 1996 entitled "The WTO: Perspectives from the South"). At the conference, Dr. Vandana Shiva of the Research Foundation for Science, Technology and Natural Resources Policy (India) maintained that developed countries sought to link trade and the environment in the
vening of the EMIT Working Group, the Thai representative asserted (on behalf of the Association of Southeast Asian Nations ("ASEAN"); that, "for GATT to address environmental protection problems as a general trade policy issue was inappropriate;"\(^{55}\) the Moroccan delegate questioned whether the GATT had the "competence to legislate on this subject;"\(^{57}\) the Tanzanian delegate queried "whether the GATT had the capacity to handle this matter;"\(^{58}\) and the Egyptian delegate concurred that GATT "was not the forum to deal with this matter."\(^{59}\) They did not want to be pressured into signing an environmental side-agreement analogous to NAFTA's.\(^{60}\)

However, the full explanation for the CTE's formation is twofold, involving both an effort to assuage northern environmental constituencies and an effort to subject environmental regulatory developments to greater GATT scrutiny and control. First, it is true that environmental groups within such powerful states as the United States and EC members became increasingly active on international environmental issues during the 1980s and 1990s, particularly in connection with the 1992 UN Conference on Environment and Development.\(^{61}\) They also pressured their home states to enact environmental measures that led to trade conflicts, with issues ranging from tropical logging\(^{62}\) to ocean fishing practices. The

WTO "to serve as a justification for unilateral trade measures." \(Id.\) at para. 6. \(See\ also\) Cristina Hernández, \textit{Green Protectionism: Does the End Justify the Means?}, \textit{in Striking a Green Deal: Europe's Role in Environment & South-North Trade Relations} (Liselotte Isaksson & Colin Moorcraft eds., 1993) (denouncing unilateral measures with extraterritorial effect as "green protectionism").

Developing countries' reluctance to have environmental matters addressed in international fora is nothing new. They have long feared that environmental obligations could be imposed that limit their autonomy and economic growth. Developing countries were similarly wary of the 1972 UN Conference on the Human Environment and the creation of the United Nations Environment Programme ("UNEP"). \(See, e.g.,\) David Kay & Eugene Skolnikoff, \textit{International Institutions and the Environmental Crisis: A Look Ahead}, 26 \textit{Int'l Org.} 469, 474 (1972).

\(^{56}\) GATT Council, \textit{Minutes of Meeting Held in the Centre William Rappard on 6 February 1991}, at 22, CIM/247 (Mar. 5, 1991) [hereinafter \textit{February 1991 Council Meeting}]. ASEAN typically designated one member to speak for the association within the EMIT Working Group and the CTE. The WTO members of ASEAN are Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand.

\(^{57}\) \textit{Id.} at 25.

\(^{58}\) \textit{Id.} at 23.

\(^{59}\) \textit{Id.} at 26.

\(^{60}\) \textit{See} Richard Eglin, Director, Trade and Environment Division, WTO Secretariat, Speech before the Korea Environmental Technology Research Institute at the International Symposium on Trade and Environment (July 24, 1996 draft of speech at Sept. 4–5, 1996 symposium on file with the \textit{Harvard Environmental Law Review}).

\(^{61}\) The Conference is sometimes referred to as the Earth Summit or Rio Conference since it was held in Rio de Janeiro, Brazil.

\(^{62}\) In 1990, Austria mandated a labeling scheme for all tropical timber and imposed a new seventy percent tariff on tropical timber imports. After ASEAN called for a boycott on all Austrian products, Austria backed down, realizing it would lose a GATT case. In a subsequent GATT working paper, Austria criticized the use of extraterritorial environmental measures. \textit{See} PORTER & WELSH BROWN, \textit{supra} note 24, at 135–36 (citing Austria's
The most famous of these measures in GATT history was the United States’ ban on tuna imports from Mexico because Mexican tuna boats used fishing methods that killed dolphins trapped in their nets. Mexico reacted to the U.S. ban by filing a complaint with a GATT dispute settlement panel, which found that the ban was contrary to GATT rules.\(^6\) This trade conflict, known as the Tuna-Dolphin dispute, generated more commentary and publicity than any other dispute in GATT history.\(^6\) Suddenly, the GATT became a symbol for groups that were interested in trade issues only because of the impact of trade rules on non-trade initiatives. Because environmental groups believed that GATT rules constrained their ability to achieve environmental goals, they lambasted, and at times demonized, the GATT system for failing to accommodate their desired policies. For example, following the Tuna-Dolphin decision, Greenpeace erected a banner at GATT headquarters in Geneva depicting a lean dolphin being devoured by a great white shark named “GATT,” and other groups papered Washington with posters of “GATTzilla.”\(^6\)

The United States and EC did not want challenges by environmentalists to jeopardize the conclusion of the Uruguay Round of trade negotiations. They attempted to defuse these challenges to trade policy by supporting the formation within GATT of the EMIT Working Group, followed by the creation of a formal Committee within the new and expanded WTO structure, the CTE.\(^6\)

Trade interests in all states, including powerful states, were concerned with the proliferation of environmental measures, evidenced by new national labeling and packaging requirements,\(^6\) the 1991 Tuna-

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\(^6\) According to Scott Vaughan, the public paid little attention to GATT panel reports until the Tuna-Dolphin case. There was a “sectoral interest maybe,” but not a “public interest.” He said the case brought the “first concerted commentary and critique of a panel report. Before, no one paid much attention to panel reports or GATT reasoning except for a small and narrow group of trade specialists.” Interview with Scott Vaughan, Member of the WTO Secretariat assigned to the CTE, in Geneva, Switz. (June 4, 1997) (on file with the Harvard Environmental Law Review) [hereinafter Vaughan Interview].

\(^6\) See Nancy Dunne, Fears Over ‘GATTzilla the Trade Monster,’ FIN. TIMES, Jan. 30, 1992, at I3. The poster of GATTzilla can be seen in ESTY, GREENING THE GATT, supra note 5, at 34.


\(^6\) See supra note 62 and infra notes 74–76.
Dolphin case, and the 1992 UN Conference on Environment and Development. The first nations to actually call for the convening of the EMIT Working Group were not the United States and EC members, but members of the European Free Trade Association ("EFTA"). These northern European countries, despite their "green" reputations, demanded that the EMIT Working Group be convened to defend their trade interests, not just to promote environmental goals. As an EFTA representative stated before the GATT Council, GATT needed to confront "the rising tide of environmental measures and international environmental agreements . . . , not least because many of these agreements used trade measures to realize their objectives."68 The EFTA countries fretted about foreign environment-related measures impeding exports, not about accommodating more of them. They "drew attention to the forthcoming [Rio Conference] at which further environmental instruments having trade implications would be adopted" and hoped that GATT would prepare a "contribution to it.69

Trading interests throughout the world, including those in the United States and Europe, shared EFTA's concerns. In the second Tuna-Dolphin case, the EC challenged the United States' secondary ban on tuna imports, also imposed on environmental grounds.70 The United States likewise threatened to challenge an EC directive that would have banned the import of U.S. fur products based on inhumane U.S. trapping methods.71 Even in the context of the contemporaneous Tuna-Dolphin dispute, the U.S. representative maintained: "Contracting parties should not let the important principles of GATT be trampled upon by governments trying to protect the environment . . . ."72 With regard to international environmental negotiations, the EC representative stated that, "[t]he sooner the GATT was involved in the design stages of environmental policies . . . the easier it would be to bring in a moderating influence from the trade policy point of view.73

The proposed development of national eco-labels designed to modify consumers' buying habits also threatened foreign trade. The United States and EC were concerned by each other's labeling and environment-

69 Id. GATT Secretariat members attended the Rio Conference and did submit contributions concerning GATT principles and rules. See infra note 221.
73 Id. at 19.
related standards that could disproportionately raise their own producers’ costs. Developing countries claimed that their relatively small producers were even more disadvantaged by new U.S. and European labeling and packaging requirements. Although U.S. and European environmental groups criticized the GATT Tuna-Dolphin panel decision as anti-environmental, Mexico found the decision extremely threatening to its fishing industry because it held that the United States “dolphin safe” private labeling regime complied with GATT rules.

In short, states convened the EMIT Working Group and formed the CTE in large part because, in reaction to domestic producer complaints, they perceived that environmental measures increasingly threatened their trading interests. As traditional trade barriers such as tariffs and quotas steadily declined, U.S. and European environmental regulations proliferated. Environmental and other domestic regulatory policies corre-

74 These concerns continue today. See, e.g., Rossella Brevetti, Glickman Warns Senate Panel about Mandatory Country-of-origin Meat Labeling, 16 Int’l Trade Rep. (BNA) 919 (June 2, 1999) (citing U.S. Agricultural Secretary Dan Glickman’s testimony before the Senate Committee on Agriculture, Nutrition and Forestry, that “mandatory origin labeling could be used to the detriment of U.S. exports in some markets,” such as the EU). See generally Atsuko Okubo, Environmental Labeling Programs and the GATT/WTO Regime, 11 Geo. Int’l Envtl. L. Rev. 599, 639 (1999) (describing the potential increase in costs of a system consisting of numerous regimes having different labeling requirements).

75 Cut flower producers in Kenya, Colombia, and Ecuador, for example, denounced Germany’s packaging requirements for subjecting them to higher costs than their German competitors. Esty, GREENING THE GATT, supra note 5, at 102. See also Report of the Meeting Held On 25 and 26 March 1996, at para. 31, WT/CTE/M/8 (Apr. 11, 1996) (Mexico’s comments in CTE noting “[i]mporters were also subject to disproportionate costs. Packaging requirements favoured the use of local materials”). For a developing country perspective on the impacts of northern eco-labeling requirements on developing countries, see ECO-LABELLING AND INTERNATIONAL TRADE passim (Simoneita Zurrilli et al. eds., 1997); Harman Verbruggen et al., Eco-labelling and the Developing Countries: The Dutch Horticultural Sector, in ECO-LABELLING AND INTERNATIONAL TRADE, id. at 155–56 (addressing how Dutch eco-labeling schemes “derived from the specific environmental and economic circumstances in the Netherlands,” can be “unfair towards developing-country exporters”).

76 See Parker, supra note 63, at 46 (noting that “Mexico was dissatisfied because the GATT decision upheld the cannery boycott [based on a strict dolphin-safe labeling requirement], which was more economically threatening than the [U.S. legal] embargo”).

77 The eight multilateral trade rounds under GATT have reduced the amount of average ad valorem tariffs to under 5%, down from an average of 40% ad valorem at the end of World War II. See Raj Bhala & Kevin Kennedy, World Trade Law 6 (1998). See also Mark R. Sandstrom et al., Market Access, in The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation 117 (Terence P. Stewart ed., 1996) (examining the decrease over time, particularly since the Uruguay Round, of traditional trade barriers imposed at borders).

spondingly became the object of battle between government authorities.\textsuperscript{79} Both trade and environmental factors were important to the CTE's formation. Yet the forces of trade competition, in reaction to the perception of environmental groups' success in promoting environmental regulation in national and international fora, first brought environmental issues to the GATT and WTO.

IV. What Accounts for the Agenda of the WTO Committee on Trade and Environment?

Since all environmental measures have economic effects and all trade measures affect the environment, GATT and WTO members had to frame the EMIT Working Group's and CTE's mandates accordingly. Developing countries, in particular, persistently pointed out that the GATT was a "trade" organization, not an environmental one. In response, the member governments focused primarily on the trade impacts of environmental measures—not on the environmental impacts of trade rules.'\textsuperscript{79} Governments, and particularly the trade-oriented bureaucracies within governments, see the WTO as a "dollars and cents organization" with rules and a dispute settlement system that affect their economic interests. States have largely relegated concerns over the environmental impacts of trade to other international institutions with fewer detailed rules and less (or no) adjudicative enforcement regimes, such as the United Nations Environment Programme ("UNEP") and single issue international environmental organizations created under UNEP's and others' auspices.

The EMIT Working Group's initial mandate was "to examine upon request any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment" (emphasis added).\textsuperscript{82} The EMIT Working Group then divided this trade-focused

\textsuperscript{79} See, e.g., David Vogel, Barriers or Benefits? Regulation in Transatlantic Trade 2 (1997).

\textsuperscript{80} On developing country concerns of "green protectionism," see supra note 55 and accompanying text. Although in the end the EMIT Working Group's original trade-focused mandate was retained, the EC and United States argued that the mandate should not be limited. The EC was concerned that "the 1971 Group's original terms of reference risked being seen as an attempt to screen environmental protection measures having an impact on trade . . . ." March 1991 Council Meeting, supra note 66, at 18. The EC objected "to any restrictive interpretation of the GATT's competence on this matter." February 1991 Council Meeting, supra note 56, at 30. The United States likewise observed that it "was not certain that the 1971 Group's mandate was sufficiently broad to address the full range of issues involved." Id. at 26. Nonetheless, in order to speed the convening of the group, its initial mandate was retained.

\textsuperscript{81} Interview with Andrew Griffith, former Canadian Representative to the CTE, in Geneva, Switz. (June 11, 1997) (on file with the Harvard Environmental Law Review) [hereinafter Griffith Interview I].

\textsuperscript{82} The terms of reference are "[t]o examine upon request any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment especially with regard to the application of the provisions of the General Agreement taking
mandate into three issues: (a) "trade provisions contained in existing multilateral environmental agreements...vis-à-vis GATT principles and provisions"; (b) "multilateral transparency of national environmental regulations likely to have trade effects"; and (c) "trade effects of new packaging and labelling requirements aimed at protecting the environment" (emphasis added). While each of these issues permitted countries to assert environmental interests, the primary focus was on the adverse trade impacts of certain environmental measures, and not the environmental impacts of trade policy. As the EMIT Working Group's Chair affirmed in 1994: "The Group has been careful to ensure that the scope of its discussions remained well within its mandate and GATT's competence, namely the trade-related aspects of environment policies which may result in significant trade effects for GATT contracting parties" (emphasis added).

Although the initial push for the formation of the CTE came from developed countries, developing countries agreed to its formation provided the CTE's agenda also reflected their development concerns. The agenda of the CTE was expanded to incorporate ten items balancing concerns of developed and developing countries. The entire agenda is set forth in Table 1. The table indicates whether developed or developing countries were primarily interested in an item and notes the number of interventions of the most active developed and developing countries. The ten items were re-categorized in 1997 into two central clusters: a cluster involving "market access" issues and a cluster involving "linkages between the multilateral environment and trade agendas."

into account the particular problems of developing countries." Group on Environmental Measures and International Trade, TRE/2 (Dec. 17, 1991).

The preamble to the decision establishing the CTE provides that its competence is "limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members." Trade and Environment, Decision of April 14, 1994, reprinted in Report of the Committee on Trade and Environment (1996), Annex I, WT/CTE/1 (Nov. 12, 1996).


By "competence," delegates typically mean whether states have granted the WTO, as an international institution, the legal power and authority to address an issue. In CTE debates, states would often maintain that the committee had "competence" to address only trade issues, not environmental issues. Some commentators, however, also have used the term "competence" in a practical sense, maintaining that the WTO has developed an expertise on trade issues that it does not hold on environmental issues. Interview with Richard Eglin, former director of the Trade and Environment Division of the WTO, in Geneva, Switz. (June 9, 1997) (on file with the Harvard Environmental Law Review) [hereinafter Eglin Interview].

The numerous market access issues addressed within the CTE were of equal concern to both developed and developing countries. However, contrary to popular perception, the cluster involving a potential revision of WTO rules to accommodate environmental goals was not promoted only by developed countries. Rather, this cluster can be further divided between those issues promoted primarily by developed countries, and those by developing countries. In each case, states defended their respective trading interests, ultimately blocking any CTE recommendations for changes to WTO law.

A. Market Access Issues of Concern to All

Countries' positions on the four items known as the "market access cluster"—Items 2, 3, 4, and 6 on Table 1—shatter the conventional notion of a clean North-South split on trade-environment matters. Developing countries are increasingly outward looking, demanding greater access to U.S. and European markets. They are correspondingly less focused on preserving domestic import substitution policies, which helps explain the decline of southern solidarity over trade policy. This policy

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55 Items 3 and 6 generated a significant amount of debate. Item 4, however, was less controversial, and became the only item for which CTE members recommended a concrete initiative—the creation of a database by the WTO Secretariat of all such measures and requirements, which the Secretariat continues to compile and update. See Report (1996) of the Committee on Trade and Environment, at para. 192, WT/CTE/1 (Nov. 12, 1996) [hereinafter CTE 1996 Report]. Item 2 was a catchall item that yielded little focused debate.

57 On North-South divisions over environmental policy, see, e.g., The North, the South and the Environment: Ecological Constraints and the Global Economy 1-4 (V. Bhaskar & Andrew Glyn eds., 1995) (integrating concerns over "equity" in its analysis); Environment: North and South (Charles Pearson & Anthony Pryor eds., 1978) (addressing issues of economic growth and environmental protection).

58 See, e.g., Alejandro Jara, Bargaining Strategies of Developing Countries in the Uruguay Round, in The Developing Countries in World Trade: Policies and Bargaining Strategies 11, 27 (Diana Tussie & David Glover eds., 1993) ("[c]oalitions seem to better serve their purpose when built around well-defined interests of like-minded countries, whether developed or developing."); Diana Tussie, Bargaining at a Crossroads: Argentina, in The Developing Countries in World Trade, supra, at 119, 135 ("[b]efore the Uruguay Round, Argentina, like most developing countries, had concentrated its trade diplomacy on the defense of import substitution, applying its skills mainly to securing import protection .... [b]ut gradually Argentine interests focused on issues of market access, both in the bilateral and the multilateral arena."); Rajiv Kumar, The Walk Away from Leadership: India, in The Developing Countries in World Trade, supra, at 155, 165, 168 ("India's position in the multilateral trade negotiations will henceforth be more unambiguously inspired by clearly defined national interests" and not by "classical North-South positions."); Rajiv Kumar, Developing-Country Coalitions in International Trade Negotiations, in The Developing Countries in World Trade supra, at 205, 213 ("[t]he Uruguay Round has been unique in witnessing the evolution of hybrid coalitions of developing and developed countries that have continued to function."). One developing country WTO representative claimed that the roles have been reversed: developing countries "now push for market access" and the United States and Europe try to block it. Interview with Delegate A, South Asian representative to the WTO, in Geneva, Switz. (June 12, 2000) on file with the Harvard Environmental Law Review.

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Table I: The CTE Agenda and State Participation

<table>
<thead>
<tr>
<th>CTE Item Number</th>
<th>Item Cluster and Relative State Interest</th>
<th>Most Active States</th>
<th>No. State/Secretariat Papers</th>
</tr>
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<tbody>
<tr>
<td>Item 1. Trade Measures for Environmental Purposes, “relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements”</td>
<td>Links Between Environment and Trade Agendas: U.S. and EU Interest</td>
<td>EU, New Zealand (2 each)</td>
<td>State: 14 Secretariat: 26</td>
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<tr>
<td>Item 2. Trade-Environment Catchall, “relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system”</td>
<td>Market Access Cluster: Discussion not focused</td>
<td>U.S. (2), Canada, India, Sweden (1 each)</td>
<td>State: 5 Secretariat: 1</td>
</tr>
<tr>
<td>Item 3. Eco-labeling, Packaging and Environmental Taxes, “relationship between the provisions of the multilateral trading system and: (a) charges and taxes for environmental purposes; (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labeling and recycling”</td>
<td>Market Access Cluster: Of great interest to all</td>
<td>U.S. (5), Canada (4), EU (3), Egypt, India, among others</td>
<td>State: 17 Secretariat: 9</td>
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| Item 4. Making Environmental Measures Transparent.  
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<tr>
<td><strong>“provisions of the multilateral system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects”</strong></td>
</tr>
</tbody>
</table>
| Market Access Cluster: Of interest to all.  
| Sole issue to result in substantive development: a new WTO database |
| Hong Kong (1) |
| State: 1  
| Secretariat: 8 |

| Item 5. Dispute Settlement.  
<table>
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<tr>
<td><strong>“relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements”</strong></td>
</tr>
<tr>
<td>Links Between Environment and Trade Agendas: collapsed into Item 1</td>
</tr>
<tr>
<td>Chile (1)</td>
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| State: 1  
| Secretariat: 1 |

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<td><strong>“effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions”</strong></td>
</tr>
</tbody>
</table>
| Market Access Cluster: Of great interest to all, particularly the U.S. and Cairns Group.  
| EU (3), U.S. (2), Japan (2), Argentina, Australia, Brazil, India, Korea, among others |
| State: 17vi  
<p>| Secretariat: 7 |</p>
<table>
<thead>
<tr>
<th>Item Number</th>
<th>Item Cluster and Relative State Interest</th>
<th>Most Active States</th>
<th>No. State/ Secretariat Papers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Item 7. Restricting Exports of Domestically Prohibited Goods (DPGs), &quot;issue of the export of domestically prohibited goods&quot;</td>
<td>Links Between Environment and Trade Agendas: African Interest</td>
<td>Nigeria (3)</td>
<td>State: 3 Secretariat: 4</td>
</tr>
<tr>
<td>Item 8. TRIPS, &quot;relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights&quot;</td>
<td>Links Between Environment and Trade Agendas: Indian Interest</td>
<td>India (4), Australia, Korea (1 each)</td>
<td>State: 6 Secretariat: 3</td>
</tr>
<tr>
<td>Item 9. GATS, &quot;work programme envisaged in the Decision on Trade in Services and the Environment&quot;</td>
<td>Links Between Environment and Trade Agendas: Little discussed</td>
<td>U.S. and India (1 each)</td>
<td>State: 2 Secretariat: 2</td>
</tr>
<tr>
<td>Item 10. Relations with Intergovernmental Organizations and NGOs, &quot;input to the relevant bodies in respect of appropriate arrangements for relations with intergovernmental and non-governmental organizations referred to in Article V of the WTO&quot;</td>
<td>Links Between Environment and Trade Agendas: U.S. and EU Interest. Debate moved to Council</td>
<td>U.S. (1)</td>
<td>State: 1 Secretariat: 2</td>
</tr>
</tbody>
</table>
This represents the Author's best count of papers submitted, based on data through December 31, 1998. The calculations in columns 3 and 4 are approximate, as (i) some items overlapped or were collapsed into each other; (ii) states at times addressed more than one item in a single paper; (iii) multiple states sometimes submitted a paper collectively; and (iv) some "non-papers" were found, but others were not. The calculations include submissions before the EMIT Working Group on its three agenda items, which were revised slightly to become items 1, 2 and 3 of the CTE agenda, as well as all ten items addressed by the Preparatory Committee to the CTE during the eight and a half month period between signature of the Uruguay Round Agreements and formation of the WTO.

On the two clusters see notes 85-86 and accompanying text.

Most active states refers to those states submitting the greatest number of written submissions to the Committee on Trade and Environment.

The secretariat submitted a number of general papers that are not identified with any one category.

The "Cairns Group" consists of a group of 14 predominately agricultural exporting countries and was formed in Cairns Australia early in the Uruguay Round of trade negotiations. It includes developed and developing countries. The original members were Argentina, Australia, Brazil, Canada, Chile, Fiji, Hungary, Indonesia, Malaysia, Philippines, New Zealand, Thailand, and Uruguay. See JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND 30, 31 (1995).

States made nine further submissions on this market access Item in 1999, in anticipation of a new round of trade negotiations. In contrast, only one state submitted a separate paper on one of the other nine Items.
shift now facilitates the formation of North-South coalitions, and South-South conflicts, over specific trade matters.

The key market access issue before the CTE was Item 6, which broadly covers "the effect of environmental measures on market access . . . and environmental benefits of removing trade restrictions and distortions." The purported environmental benefits of eliminating politically sensitive agricultural, fishery, energy, and other subsidies generated extensive debate within the WTO Committee. Agricultural exporting nations, including the United States, Australia, New Zealand, Argentina, Chile, Brazil, and even India, joined forces in the CTE to employ environmental rationales to challenge the EU, Japan, and Korea for protecting their agricultural sectors.\textsuperscript{89} India's support of the United States is particularly noteworthy, as India often led the defense of developing country interests vis-a-vis the United States.\textsuperscript{90} The EU, Japan, and Korea, in turn, however, also adopted arguments to which many developing countries were sympathetic, such as the need for agricultural protection to ensure "food security."\textsuperscript{91} The issue of "packaging, labelling and recycling" requirements (Item 3) also resulted in North-South coalitions and pitted northern governments against each other, as demonstrated by ongoing disputes involving Canada and the United States against EU labeling of wood products,\textsuperscript{92} and EFTA's early challenge to EU packaging and labeling requirements.


\textsuperscript{90} India stressed the need for "special and differential treatment for developing countries" and their "sovereignty over environmental resources." CTE 1996 Report, supra note 86, at para. 48 (citing India's non-paper of July 23, 1996 on Item 2; for more on non-papers, see infra note 100). See also infra note 106 (discussing media's views on Items 1 and 8).

\textsuperscript{91} For Korea's food security argument, see Report on the Meeting Held on 25 and 26 March 1996, supra note 75, at para. 12. On the resonance of the "food security" argument, see, e.g., India Willing to Abandon Traditional Allies in WTO Talks, If Necessary, Officials Say, 16 Int'l Trade Rep. (BNA) 1526, 1527 (Sept. 22, 1999) (reporting that Indian Commerce Secretary P.P. Prabhu said that "India definitely wants discussed . . . agricultural subsidies in developed countries, specifically the European Union" in the new round of trade negotiations, yet also quoting his special secretary in the Commerce Ministry for the WTO who admitted, "we have our own food security and rural employment issues in agriculture"). See also Vandana Shiva, Ecology in International Trade: A Small-Scale Perspective, in WTO as a Conceptual Framework for Globalization 114, 118 (Eva Haxton & Claus Olsson eds., 1998) (referring to the need to secure "food security"); Uruguay's Envoy Says Tarification's Effects Must Be Overcome in Next WTO Farm Round, 16 Int'l Trade Rep. (BNA) 786 (May 5, 1999) (noting that "many net food-importing nations perceive that liberalized agriculture trade will impede access to inexpensive food and diminish their food security . . .").

States attempted to harness the effects of non-state actors to support their negotiating positions. In June 1997, the environmental group World Wide Fund for Nature ("WWF") sponsored a symposium at the UN in Geneva on how subsidies to the fishing industry contribute to the depletion of world fisheries by stimulating over-fishing. This, in turn, spurred the WTO Secretariat assigned to the CTE to prepare its most ambitious analytical paper, assessing the adverse environmental effects of agricultural, fishing, energy and other subsidies. The focus on market access in Item 6 permitted states to harness both trade-liberal and environmental NGO support to advance their interests. For a neoliberal-oriented trade community, Article 6 helped frame the trade-environment linkage in terms of trade-environment synergies instead of conflicts. Yet even though the framing may have temporarily brought together certain non-state actors from the trade and environment communities, states continued to clash—in particular the United States, Japan, Europe and the "Cairns group"—over agricultural trading interests.

B. Environmental Issues of Primary Concern to the United States and EU

The purportedly "environmental" items of primary interest to the United States and Europe were, not surprisingly, of primary interest to

...
U.S. and European NGOs. These items examined the existing environmental exceptions in GATT (Item 1) and in the General Agreement on Trade in Services ("GATS") (Item 9), their adjudication before WTO panels (Item 5), and relations between the WTO and NGOs (Item 10). Of these items, only Item 1, concerning "the relationship between ... WTO rules and trade measures for environmental purposes," generated considerable debate as it implicated current GATT rules around which the controversial Tuna-Dolphin dispute turned. However, since these items would disproportionately affect the trading interests of smaller states and, in particular, developing countries, the latter (supported by developing country interest groups) viewed them less as "environmental" issues and more as market access/anti-protectionist issues. Working with smaller developed countries, they successfully opposed U.S. and European proposals to amend or interpret WTO rules to accommodate certain trade-restrictive environmental measures.

98 Developing countries were interested in the outcome of discussions over these items from a defensive perspective, but they would have preferred that the items be kept off the CTE/WTO agenda. They believed that the United States and EU would use the items asymmetrically with developing countries bearing the burden of the outcome. See discussion infra notes 99, 272–282 and accompanying text.

97 Item 5 was "discussed in conjunction with" and largely folded into Item 1. See CTE 1996 Report, supra note 86, at para. 32. Item 9, which concerned issues under GATS similar to those under GATT Article XX, generated little debate with discussions deemed merely "exploratory." Id. at para. 154. Discussions over Item 10, concerning the input of intergovernmental organizations and NGOs, were largely transferred to General Council meetings, resulting in a General Council Decision on "[g]uidelines for arrangements with non-governmental organizations" of July 18, 1996. Id. at para. 165. Nonetheless, on an informal basis the CTE Secretariat worked relatively closely with NGOs organizing a number of NGO symposia, as well as with representatives of international intergovernmental organizations, who were invited to give presentations to the CTE. See discussion infra notes 281–290 and accompanying text.

96 In particular, Article XX, the GATT exception clause, conditionally permits trade restrictions "to protect human, animal or plant life or health" and for "the conservation of exhaustible natural resources." GATT, Uruguay Round of Multilateral Trade Negotiations Final Act, art. XX(b),(g), WLI/200 (Nov. 8, 1995).


94 For an overview of the nine member submissions on Item 1 before the CTE, see Chiedu Osakwe, Finding New Packages of Acceptable Combinations of Trade and Positive Measures to Improve the Effectiveness of MEAs: A General Framework, in TRADE AND THE ENVIRONMENT: BRIDGING THE GAP 38, 43–45 (Agata Fijalkowski & James Cameron eds., 1998) [hereinafter Osakwe, Finding New Packages]; Magda Shahin, Trade and Environment in the WTO: A Review of its Initial Work and Future Prospects, 5 Third World Network Trade & Development Series (1997) (on file with the Harvard Environmental Law Review). Shahin and Osakwe were respectively the Egyptian and Nigerian delegates before the CTE. Osakwe is now a member of the WTO Secretariat. See also CTE 1996 Report, supra note 86, at 3 n.12, 5 n.18, 7 n.26 (referring respectively to a non-paper of Switzerland, May 20, 1996; a non-paper of the European Community, Feb. 19, 1996; a non-paper of the United States, Sept. 11, 1996; and submissions of a number of other countries). In WTO/GATT parlance, the curious term "non-paper" refers to a submission by a state whereby the state expressly reserves its position. A state may, for example, submit a "non-
C. Environmental Issues of Primary Concern to Developing Countries

The two "environmental" items of primary interest to developing countries enabled them to adopt environmental arguments to restrict trade: Item 7 concerning "the export of domestically prohibited goods" (that is, goods not permitted to be sold in developed countries), and Item 8 concerning "the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights" ("TRIPs Agreement") in relation to sustainable development objectives. Not surprisingly, these two items were opposed by northern business groups and governments and advocated most fervently by southern environmental and developmental NGOs.

Although the CTE focused primarily on environmental measures' impact on trade, states freely adopted "environmental" arguments where their trading interests could benefit. Most developing countries initially opposed the convening of the EMIT Working Group because environmental issues fell outside the WTO's "competence." However, they did not hesitate to adopt environmental arguments to limit other countries' exports after the CTE's formation. African states, led by Nigeria, asserted that WTO rules should restrict the export of waste materials and paper when its position has not been fully cleared through an inter-agency process, or it wishes to reserve taking a formal position because of domestic political concerns.

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

This and related issues have been negotiated in parallel in other fora. For example, in December 1999, the parties to the Basel Convention on the Control of Transboundary Movement of Wastes and Their Disposal adopted a Protocol that establishes liability for anyone who causes damage resulting from non-compliance with the convention's provisions on the export of hazardous wastes from developed to developing countries. See Frances Williams, Toxic Wastes Group Agrees to Liability Protocol, FIN. TIMES, Dec. 13, 1999, at 6. In September 1998, countries signed a new treaty requiring prior informed consent by a developing country before certain chemicals and pesticides are exported to it. This latter treaty was negotiated under UN auspices, co-sponsored by UNEP and the UN Food and Agricultural Organization ("FAO"). See Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 11, 1998, U.N. Doc. UNEP/FAO/PIC/CONF/2, reprinted in 38 I.L.M. 1 (1999).

See discussion infra notes 107–109 and accompanying text.

Environmental arguments have long had an elastic nature. For example, they have been employed in U.S. domestic commerce and EC internal market cases. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 545 (1981) (concerning a Minnesota statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but not cardboard nonreturnable, nonrefillable containers); Case 302/86, Comm'n v. Denmark, 1 C.M.L.R. 619 (1989) (concerning a Danish law requiring the use of only certain re-usable containers for the sale of beer and soft drinks).

See supra notes 36–39 and accompanying text.
domestically prohibited goods to protect the African environment and health.\footnote{Egypt, for example, argued that “commercial interests should not prevail over the protection of human, animal or plant life or health.” CTE, Report of the Meeting Held on 16 February 1995, at para. 5, WT/CTE/M/1 (Mar. 6, 1995). The United States countered that these issues were more appropriately addressed in other international environmental fora. See CTE, Report of the Meeting Held on 14 December 1995, at para. 32, WT/CTE/M/6 (Jan. 17, 1996) (where the United States maintains that other organizations, unlike the CTE, “had the competence and technical expertise” to address these items). This constituted a reversal of the parties’ respective positions on Item 1 where developing countries maintained that, because environmental issues were to be addressed in other international fora, unilateral trade restrictions on environmental grounds were not in compliance with WTO rules.} India pressed for changes in the TRIPs Agreement to limit patent rights, create farmer rights, and to recognize indigenous knowledge in order to promote sustainable development. India knew that these changes would economically benefit its farmers vis-à-vis U.S. and European agribusiness and pharmaceutical concerns. India maintained that forcing developing countries to recognize and enforce intellectual property rights over life forms, as in the case of genetically modified plant varieties, could result in monopolization of seeds available on the market, the growth of mono-crops, the loss of traditional farmer and indigenous knowledge of seed use, and ultimately a decrease in biological diversity because fewer plant varieties would be available. India, supported by other developing countries, argued that the TRIPs Agreement was in conflict with the 1992 Convention on Biological Diversity.\footnote{See, e.g., CTE, Report of the Meeting Held on 11–13 September 1996, at paras. 35, 37, 38, WT/CTE/M/12 (Oct. 21, 1996). India has also proposed that countries prohibit the granting of patents to inventions made with foreign genetic material obtained in contravention of the principles of sovereignty over genetic resources and fair and equitable sharing of benefits set forth in Article 15 of the UN Convention on Biological Diversity. See remarks of India in Preparations for the 1999 Ministerial Conference, WT/GC/W/147 (Feb. 18, 1999), Protection of Biodiversity and Traditional Knowledge: The Indian Experience, WT/CTE/W/156–IP/C/W/198 (July 14, 2000) and Preparations for the 1999 Ministerial Conference, WT/GC/W/225 (July 2, 1999). Similarly, India has proposed transferring environmental technology, particularly if mandated by multilateral environmental agreements, to developing countries on favorable terms. Id. For the position of Kenya on behalf of the “African Group,” see Preparations for the 1999 Ministerial Conference, WT/GC/W/302 (Aug. 6, 1999) (addressing protection of indigenous and farmers’ rights and knowledge, implementation of developing country rights under the Convention on Biological Diversity, limits on the patentability of life forms, and compulsory licensing).} When it came to calls for amending intellectual property rules, however, the United States and Europe switched stances on the issue of WTO competence. Defending U.S. biotechnology, agribusiness and pharmaceutical interests, the United States responded, “the WTO was not an environmental organization and it lacked the competence to insert MEA [multilateral environmental agreement] goals in WTO Agreements.”
Switzerland, with its huge pharmaceutical companies now threatened by environmental arguments, "recalled the Committee’s mandate, bearing in mind that the WTO did not have a role in environmental standard-setting and that any interpretation of the Biodiversity Convention would be determined by its Conference of the Parties."\textsuperscript{109} The EU also took a clear bottom line: "The TRIPs Agreement should not be weakened by anything which might transpire in the CTE."\textsuperscript{109}

What mattered in CTE debates was not the consistency of states’ arguments, but rather the specific state objectives at stake. Agricultural-exporting countries such as Argentina pointed out the EU’s "inherent contradiction in claiming that free trade and environmental protection were mutually supportive, while at the same time, denying that [agricultural] trade distortions did not have negative environmental effects."\textsuperscript{110} But it was to no avail. The sub-Saharan African countries’ position on trade in domestically prohibited goods and waste products contradicted a host of developing country arguments, including the WTO-illegality of extraterritorial regulation, the inappropriateness of holding developing countries to developed country standards, and GATT’s limited competence on environmental policy matters.\textsuperscript{111} India likewise capitalized on environmental arguments to promote its economic interests with respect to intellectual property issues, but argued that the WTO had limited competence to assess environmental perspectives under Item 1 concerning the WTO-legality of trade restrictions imposed on environmental grounds.\textsuperscript{112}

States argued about the WTO’s limited competence only when they believed that environmental issues prejudiced their economic interests. Thus, states made dollars and cents of the trade-environment linkage before this dollars and cents organization. They formed alliances with neo-liberals and transnational environmental and business groups when it served their interests.\textsuperscript{113}

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\textsuperscript{112} ASEA nations, with business constituents potentially engaging in such trade, perceived how these arguments could be used against their interests on other agenda items, in particular Item 1 concerning the use of trade measures for environmental purposes, and thus did not support their African counterparts on this issue.

\textsuperscript{113} See CTE 1996 Report, supra note 86, paras. 133, 137, 139.

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\textsuperscript{113} For common interests between northern environmental groups and developing
V. ALTERNATIVE EXPLANATIONS OF THE CURRENT STATUS OF THE CTE PROCESS: CONTENDING STATES, NEOLIBERAL NETWORKS, CONFLICTED STAKEHOLDERS

A. Why Negotiation of the CTE 1996 Report Mattered

The CTE presented a forty-seven-page report to the first WTO Ministerial Meeting in November 1996 after a grueling negotiating process.\textsuperscript{114} Despite the intensity of the negotiation, none of the conclusions proposed any substantive legal changes to WTO rules, but rather called for “further work” on all ten agenda items.\textsuperscript{115}

It was not as if state representatives had not fully explored the issues. By December 1996, when the CTE delivered its Report (“CTE 1996 Report”), the WTO trade and environment body (in various permutations) had met thirty-one times over multiple days and members had also consulted informally. Formal meeting minutes alone, in their summarized form, totaled around 1,000 pages.\textsuperscript{116} States had submitted more than sixty countries over Item 8 (TRIPs Agreement), see Shahin, supra note 99, at 52–53 (“It is worth stressing at this juncture that developmental and environmental NGOs from the North as well as from the South latched on to the issue [of the TRIPs Agreement and sustainable development] that developing countries should have been tackling in depth much earlier . . . . The recent failure of the lengthy negotiations on the Multilateral Agreement on Investment in the Organization for Economic Cooperation and Development . . . . clearly denotes the strength and skills of environmental NGOs and, if they feel sidelined, TRIPs [sic] could be next in turn.”). Shahin also notes common interests of northern business groups and developing countries on market access issues, such as trade restrictions based on production and process methods. Id. at 55.

\textsuperscript{114} See CTE 1996 Report, supra note 86. For two succinct presentations by participants in the negotiation of the CTE Report, see Shahin, supra note 100; and Andrew Griffith, Canadian Dep’t of Foreign Affairs and Int’l Trade, Reference Doc. No. 3, A Negotiator’s Point of View 17 (1997) (on file with the Harvard Environmental Law Review). Shahin and Griffith represented Egypt and Canada respectively in the negotiation.

\textsuperscript{115} The 1996 WTO Ministerial Conference was held in Singapore on December 9–13, 1996. At the conclusion of the Conference, the Ministers issued a “Singapore Ministerial Declaration,” paragraph 16 of which briefly summarized the work of the CTE, noting that “further work needs to be undertaken on all items of its agenda.” WTO Ministerial Conference, Singapore Ministerial Declaration, WT/MIN(96)/DEC (Dec. 11, 1996), reprinted in 36 I.L.M. 218 (1997). Between Ministerial sessions, the WTO is run by the General Council, which oversees and receives reports from the WTO’s numerous committees and subcommittees, including the CTE. The General Council and each committee consist of a representative of each WTO member state.

\textsuperscript{116} In internal WTO terminology, there are “formal” and “informal” meetings. The most difficult negotiations often take place in “informal” meetings, for which there are no minutes. When the delegates negotiated the language of the final CTE 1996 Report, they went into “closed” sessions (a.k.a. held “informal” meetings). Insiders confirm that, if busy, delegates may only attend the “informal” meetings since those are the ones which “count.” Griffith Interview 1, supra note 81. An interesting development in WTO-speak is the formation of an “Invisible Committee,” which discussed issues for a new round of negotiations. See WTO Members Consider Packaging Future Negotiations as New Round, Inside U.S. Trade, Nov. 14, 1997, at 13–14 (referring to a “meeting of the so-called Invisible Committee, a small group of WTO members . . . . The Invisible Committee meeting was chaired by Canada and included the United State, EU, Japan, Argentina, Australia,
written proposals and observations. At the member states’ request, the WTO Secretariat assigned to the CTE ("CTE Secretariat") had prepared more than thirty working papers with background information and analysis on the ten agenda items, which in turn cited numerous other studies from the World Bank, the OECD, the UN Conference on Trade and Development ("UNCTAD"), and other intergovernmental organizations.

Exhausted by a process which led to such a meager outcome, WTO members significantly reduced the CTE’s working schedule after 1996. The CTE met only three times per year from 1997 to 2000 and tailored the meetings toward an analytic study of the trade-environment issues on the Committee’s agenda. Although at the request of the United States and EU, a March 1999 “high level meeting” brought together heads of state from around the world to spur negotiation over trade-environment matters, it too resulted in no substantive developments. At the third WTO Ministerial Meeting in December 1999, the United States and EU again paid lip service to environmental issues, but there is no evidence that the WTO rule changes that U.S. and European environmental NGOs desire will soon result.

The intensity of the negotiations over the CTE 1996 Report may seem unreasonable as the Report produced no procedural or substantive changes in WTO rules or practices. Yet the line-by-line negotiation of the Report’s language did matter. As one state delegate noted, it was negoti-
ated in an institution where "words have consequences."122 State representatives contrast the tenor of WTO discussions with those in UN bodies where states do not face the same "consequences" when negotiating generalized principles concerning environmental norms.123

State delegates perceive that words are more likely to have "consequences" in the WTO because of the economic impact of its binding dispute settlement process.124 Potential disputes with real economic impacts tend to polarize the discussion of complex trade-environment issues. As an African representative confirmed, "Delegates are wary of the WTO. GATT is a binding contract. People are not as open and freewheeling as in other international fora. In the WTO, everything you say matters and can be used against you."125

National representatives were vigilant about the wording of the CTE 1996 Report because they feared that it could be used against them in subsequent disputes. In the WTO's first major trade-environment dispute following the Report—the Shrimp-Turtle case—the claimants (Thailand, Malaysia, India, and Pakistan), the respondent (the United States) and three third-party participants (Australia, Nigeria and Singapore) each supported their positions by citing different paragraphs from the CTE.

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122 Interview with Chiedu Osakwe, former Nigerian delegate to the CTE, in Geneva, Switz. (June 4, 1997) (on file with the Harvard Environmental Law Review). Osakwe was contrasting discussions among states within the WTO compared to those same discussions within UN bodies.

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

124 The WTO has the most active dispute settlement system of all international organizations. States are thus more careful with the text of WTO agreements and agreed interpretations of WTO provisions. The interpretation of WTO legal provisions can have extremely high stakes. For example, when the Appellate Body held U.S. "foreign sales corporation" tax exemptions conflicted with WTO rules on export subsidies, it was estimated that U.S. corporations would lose as much as $4–5 billion annually if the U.S. does not reach a settlement agreement with the WTO panel. See Joseph Kahn, U.S. Loses Dispute on Export Sales, N.Y. TIMES, Feb. 24, 2000, at A1. During the first five years of the WTO's existence, WTO members filed 185 claims (as determined by the number of formal consultations requested, the first step of the process) before its dispute settlement body, and WTO panels rendered substantive decisions in thirty matters that the WTO Dispute Settlement Body formally adopted. Most of the filed claims, as well as claims never formally filed, were settled within the shadow of the WTO's dispute settlement system. See Overview of the State-of-play of WTO Disputes (Jan. 13, 2000) WT/DSB/14, available at http://www.wto.org.

125 Osakwe Interview, supra note 122. Similarly, in the words of a representative from UNEP, the WTO, unlike UNEP, is a "contract-based organization" where breaches have consequences. Interview with Deborah Voorhees, member of the Trade and Environment division of UNEP, in Geneva, Switz. (June 9, 1997) (on file with the Harvard Environmental Law Review).
1996 Report. The dispute settlement panel also cited the Report, as did the Appellate Body in reversing certain panel determinations. Although the Report was not decisive in any of these disputes, each party “spun” it to support its reasoning. Ultimately, while the Appellate Body concluded that the United States’ import ban was “not justified” under GATT Article XX (the GATT exception clause), it nonetheless applied Article XX in a manner more accommodating to U.S. trade restrictions than earlier GATT reports. In being more sympathetic to trade restrictions for environmental ends, the Appellate Body decision could significantly affect developing countries’ trade interests. The Thai shrimping industry had annually exported almost a billion dollars of shrimp and shrimp products to the United States in the years immediately preceding the ban, and U.S. imports constituted more than 50% of Thailand’s total exports of these products.

The CTE Report was also negotiated in the context of ongoing demands by the United States and EU that WTO rules incorporate labor standards and possibly authorize trade restrictions against countries that did not comply with them. Trade restrictions based on labor standards

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126 See id. para. 7.50 (in findings) and para. 9.1 (in concluding remarks).
127 See WTO Appellate Body Report, paras. 154–55, United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), 38 I.L.M. 118 (1999) [hereinafter Shrimp-Turtle Appellate Report] (referring to the importance of the environmental objectives and the absence of CTE “specific recommendations” in the context of its finding that the GATT Article XX(g) exception concerning the “conservation of exhaustible natural resources” is applicable); id. at paras. 167–68 (noting the CTE’s affirmation of the importance of “multilateral solutions” in the context of its critique of the U.S. failure to engage in “serious, across-the-board negotiations”).
128 See id. at paras. 154–55.
129 The Appellate Body found that Article XX must be read “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.” Id.
131 ICTSD, Shrimp Trade and Sea Turtle Conservation, BRIDGES, Apr. 1997. The uncertainty of access to the U.S. market resulted in a glut of shrimp on the Thai market and plummeting prices. Many Thai shrimp farmers were forced to sell at a loss. Some lost their entire investments and a number reputedly committed suicide as a result. Interview with anonymous officials from the Thai Department of Fisheries, in Bangkok, Thai. (Jan. 10, 2000).
132 Following the Appellate Body’s ruling, the United States continues to impose its legislation mandating the use of sea turtle excluder devices and has simply modified procedures pursuant to its implementing regulations in an attempt to comply with the Appellate Body’s more accommodating requirements. See Shaffer, Shrimp-Turtle Dispute, supra note 100, at 513.
133 See Gary G. Yetkey, “Discussion” of Trade-Labor Link Will Be Sufficient, Lang Says, 13 Int'l Trade Rep. (BNA) 1629 (Oct. 23, 1996) (reporting the efforts of the United States and almost all EU member states to have labor standards included on the agenda of the WTO’s first ministerial meeting). This concern over the inclusion of labor standards in
are analogous to those based on environmental standards because both depend on the manner in which a product is produced (in WTO jargon, on “process and production methods,” or “PPMs”), and not on any danger inherent in the product itself. Developing countries feared that if the CTE 1996 Report suggested that WTO rules authorized trade restrictions for environmental protection, it would imply that WTO rules also authorized restrictions to protect a country’s workers. Since the latter would even more severely prejudice developing country trading interests, the words of the CTE Report mattered. As a Brazilian WTO representative confirmed, “We [developing countries] cannot be in favor of a change in Article XX [the clause providing for exceptions to GATT obligations]. We think that this would create an imbalance in terms of a whole set of disciplines and commitments and would set a precedent for other issues,” namely trade restrictions based on unfair labor standards.

Given the WTO’s dispute settlement system, which is relatively effective, binding, and implicates significant economic interests, states have been justifiably concerned about the repercussions of the CTE’s more abstract discussions on their specific trading interests. They were thus extremely guarded about the substance and language of the CTE agenda was a central conflict in the 1999 WTO Ministerial Conference in Seattle, particularly after President Clinton appeared to call for trade restrictions against countries not meeting minimum standards. See Roger Cohen, Clinton Remark on Child Labor Irks Brazil, N.Y. TIMES, Dec. 7, 1999, at A14; David E. Sanger, After Clinton’s Push, Questions About Motive, N.Y. TIMES, Dec. 3, 1999, at A12 (“India, Brazil, South Africa and other developing nations abhor the idea” of “making labor rights a central part of the World Trade Organization’s mission”).

The Tuna-Dolphin and Shrimp-Turtle cases both involved the issue of trade restrictions based on production and process methods (the restrictions were, in WTO parlance, “non-product related”). Developing countries are extremely wary of opening the door to trade restrictions based on production and process methods. For example, the Egyptian ambassador to the WTO, Mounir Zahran noted developing countries’ concern “that the ecolabelling issue could be a prelude to introducing PPMs [process and production methods] into the WTO.” See Khor, supra note 55. The PPM issue was also raised with respect to Item 3(A) concerning taxes for environmental purposes. The CTE 1996 Report notes that “[d]ifferent views have been expressed on the likely treatment under the Agreement of a rebate for exported products of indirect environmental taxes on a non-product related PPM in excess of the tax rebate on like products when sold for domestic consumption.” CTE 1996 Report, supra note 86, at para. 53.

135 Interview with Delegate B, South American delegate to the WTO, in Geneva, Switz. (June 19, 1998) (on file with the Harvard Environmental Law Review). For further comments concerning labor standards from major figures from developing countries, see Julius Nyerere, Social Issues in International Trade Discussions, 3 BRIDGES: BETWEEN TRADE AND SUSTAINABLE DEV. (Special Seattle Ministerial Issue) (Oct.-Nov. 1999) (Nyerere, former president of Tanzania, maintains that the demands for social issue standards cloak protectionist designs and that, in any case, they should be accompanied by serious international anti-poverty measures); THIRD WORLD NETWORK, LET UN AGENCIES TACKLE LABOUR & ENVIRONMENT SAYS ANNAN, available at http://www.twnside.org.sg/title/annan cn.htm (last visited Nov. 21, 2000) (on file with the Harvard Environmental Law Review) (noting Kofi Annan’s statement that, “labour and environment issues should not be used as pretexts for ‘trade restrictions’ and they were better dealt with by the specialized United Nations agencies promoting their causes”).
Report and remain guarded about the possibility of substantive recommendations coming out of this or any other WTO Committee.

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

B. The Predominant Role of States

States are the primary players in the WTO political process and, not surprisingly, they played the lead role in shaping the CTE agenda. Only states are formal members of the WTO, permitted to vote on WTO matters and file claims under WTO rules. Moreover, only states may attend, speak, and submit papers to meetings of WTO committees, including the CTE.\textsuperscript{136} As the former director of the Trade and Environment division of the WTO Secretariat confirms, “The [CTE] process was driven by proposals from individual WTO members.”\textsuperscript{137} By December 1996 (the month of the CTE 1996 Report), states had submitted more than fifty documents to the Committee and its predecessor working group setting forth their national experiences, observations, and positions with respect of the CTE’s ten agenda items. These written submissions supplemented states’ numerous interventions at committee meetings, which were also typically based on policy papers developed in home capitals.\textsuperscript{138}

1. Intrastate Conflicts

The reason for stalemate over the CTE’s ten-point agenda is not solely a lack of consensus among states, but also a lack of consensus

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\textsuperscript{136} The only exception to this rule is where states, by consensus, invite representatives of other international organizations to observe and sometimes present overviews of such organizations’ work programs. Technically, to be a WTO member, an entity only needs to have a separate customs policy and need not be recognized as a separate political entity or state. However, as of December 1, 2000, of the 140 WTO members, only Hong Kong is not a full-fledged state.

\textsuperscript{137} Eglin Interview I, supra note 84.

\textsuperscript{138} Many state delegates have confirmed that the positions they present at CTE meetings are typically based on policy papers prepared with representatives in home capitals. In many cases, states simply read the policy papers at the CTE meeting. Confirmed in numerous interviews with state delegates to the CTE in Geneva, Switz. (June 1997, June 1998) (on file with the Harvard Environmental Law Review).
within states. Divisions within the United States and EU over controversial CTE items, such as Item 1 (concerning trade measures for environmental purposes) and Item 3 (concerning eco-labeling and related national regulations), hamper their taking a more aggressive role in changing WTO rules to accommodate trade restrictions on environmental grounds.

In the United States, for example, conflicts between powerful business and environmental constituencies impeded the Clinton Administration from forming a clear position on the permissibility of trade restrictions on environmental grounds. One WTO Secretariat representative criticizes the United States for bringing to the WTO what it is "incapable of solving at the national level," calling this "madness." Yet it was not madness for U.S. government representatives. They could appease domestic constituents by appearing to address issues in the WTO while letting other countries block changes to WTO rules that could affect U.S. business interests. They could use the CTE as a foil to avoid taking clear positions that would disaffect politically powerful constituencies.

139 See, e.g., Administration Unclear on Policy for WTO Environment Committee, Inside U.S. Trade, Jan. 26, 1996, at 19 (citing Gregory Mertz of the U.S. Environmental Protection Agency ("EPA") concerning the slow pace of interagency discussions on account of "conflicting concerns"). On controversial Item 1, the United States only submitted to the CTE, during the final negotiations of the CTE 1996 Report, a "non-paper" setting forth certain general principles that the United States wished the Committee to endorse. These general principles merely stated that "WTO rules should not hamper the ability of MEAs [multilateral environmental agreements] to achieve their environmental objectives" and that WTO panels should "seek input from relevant MEA bodies in any dispute involving questions relating to an MEA." CTE 1996 Report, supra note 86, at para. 22. U.S. business groups argued for clearer rules to prevent protectionist barriers on environmental grounds, and U.S. environmental groups argued for greater discretion for the use of trade policy as a measure to promote environmental protection abroad.

A case in point may be the Cartagena Protocol on Biosafety which permits countries to restrict the import of genetically modified seeds on the basis of the "precautionary principle" (that is, without conclusive scientific evidence that the seeds could harm the environment). For a discussion of the Biosafety Protocol and its relation to the WTO Sanitary and Phytosanitary Agreement, see Mark Pollack & Gregory Shaffer, Genetically Modified Organisms: The Next Transatlantic Trade War?, Wash. Q. (Autumn 2000) [hereinafter Pollack & Shaffer, GMOs]. While business groups have close relations with the Office of the U.S. Trade Representative, environmental groups also exercise power in the United States because they can block the granting of "fast-track" negotiating authority to the executive branch, or otherwise block the negotiation of trade liberalization agreements. See, e.g., Environmentalists Seek Stronger U.S. Position in New WTO Talks, Inside U.S. Trade, Oct. 1, 1999, at 22 (citing environmentalist warning that, "failure to achieve changes [in the U.S. position for "millennium round" negotiations] could result in environmental groups lobbying against fast-track for any new WTO agreements that arise out of the negotiations").


141 For example, a WTO critic from India, Vandana Shiva, Director of the Research Foundation for Science, Technology and Natural Resources Policy (India), states, "There were two functions sought to be served by linking trade and environment in the WTO: to serve as a justification for unilateral trade measures; and to pacify the demands of environmentalists as well as deflect their interests and actions away from the national level by
CTE Secretariat members were similarly unclear about the EU's position on the WTO-legitimacy of private eco-labeling regimes.\textsuperscript{142} Eco-labels are controversial because they are typically based on production methods that affect only the environment of the foreign country, not the product consumed in the importing country. Moreover, domestic producer interests generally influence the details of national eco-label regimes and thus can tailor them to discriminate against foreign competitors. Divisions among EU business and environmental interests impeded the EU's ability to clarify its position.\textsuperscript{143} The divisions between the EU directorates responsible for trade and environmental policy reflected these internal EU stakeholder divisions.\textsuperscript{144} While the trade directorate appeared more accommodating, the environmental directorate argued that the EU should refrain from agreeing that private eco-labeling regimes are subject to WTO rules because they could then more easily be challenged before WTO panels.\textsuperscript{145}

EU member states' competing interests also clashed over a range of issues including eco-labels, packaging regulations, and the reform of the EU agricultural regime. Agricultural issues, for example, have pitted blaming poorer countries for causing global environmental problems.""} Khor, supra note 55.

\textsuperscript{142} Interview with Member A, member of the CTE Secretariat, in Geneva, Switz. (June 15, 1998) (on file with the Harvard Environmental Law Review). Eco-labels involve labeling a product as relatively nonhazardous to the environment compared to substitutable products. Most eco-labels take account of a product's entire "life cycle," from production to disposal. Eco-labels are controversial because they can be created in a manner that favors local producer interests over foreign producers, thus constituting a discriminatory barrier to trade. The private sector often develops these eco-labels in conjunction with environmental groups, without government involvement.

\textsuperscript{143} For example, EU businesses, including members of the Union of Industrial and Employers' Confederations of Europe ("UNICE"), argued that the WTO Agreement on Technical Barriers to Trade ("TBT") should govern all eco-labels, including voluntary labels (i.e., those developed voluntarily by private groups). See UNICE Position on Eco-Labeling for the WTO Discussion on Trade and Environment, at 3–4 (July 22, 1996) (position paper on file with the Harvard Environmental Law Review). European environmental groups, fearing the constraints of TBT rules, argued otherwise. See, e.g., WWF, Eco-Labeling in The WTO Committee on Trade and Environment—Is It Serious?, at http://www.panda.org/resources/publications/sustainability/wto/eco.htm (last visited Sept. 22, 2000) (on file with the Harvard Environmental Law Review) ("[t]he WTO should not attempt to limit the consumers right to know, nor interfere with the development of this potentially important new environmental policy tool"). See also Vinod Rege, GATT Law and Environment-Related Issues Affecting the Trade of Developing Countries, 28 J. WORLD TRADE 95, 141 (1994) (noting conflicting pressures from EU industry and environmental groups on the position to take concerning Indonesia's export restrictions on unprocessed rattan).

\textsuperscript{144} The European Commission is currently divided into twenty-four directorates general, one being the Directorate General for External Trade and another being the Directorate General for the Environment.

France and Germany, the EU’s two most powerful members, against each other, again hampering the formation of a clear EU position. The EU is, as a consequence, less likely to expend political capital within the WTO on eco-labeling and other environmental issues. If it did, the EU could be pressed to trade off EU—and, in particular, French and southern European—agricultural interests as part of an issue-linked package WTO deal.

2. State Power

States have not been equal players within the CTE. In the hundreds of pages of minutes of CTE and EMIT Working Group meetings, only twenty-two states (out of the WTO’s 134 members) spoke more than six times on the different items in the CTE’s agenda. The most active participants were the United States, the EU, and Canada, in that order. Some WTO insiders, however, have faulted the United States for not taking a more proactive role. India and Mexico were particularly active among developing countries—India because of its large population, relatively large gross national product, and its leading role among developing countries, and Mexico because of its relative size and relevant experience with trade and environment negotiations under NAFTA. Smaller developing countries remain at a distinct disadvantage. Their bureaucracies are less experienced with the details of international trade rules. In addition, they may have only one (or in many cases, no) representative in Geneva to follow all WTO matters. More powerful parties, such as the United


147 This figure is based on an approximate count of interventions found in the minutes of the EMIT Working Group and CTE meetings from November 1991 through April 1998.


149 As of November 1999, 28 WTO members did not even maintain permanent offices in Geneva because of a lack of resources. See WTO Organizes “Geneva Week” For Non-Resident Delegations, 43 WTO Focus 16 (1999). Where a developing country has only a single national representative, that representative must divide his or her time between more than seventy different WTO councils, committees, working parties, and other groupings. See GARY P. SAMPSON, TRADE, ENVIRONMENT, AND THE WTO: THE POST-SEATTLE AGENDA 24 (2000). As Sampson notes, “[t]he Egyptian delegation to the WTO has estimated that there were 2,847 meetings in the WTO in 1997, or an average of 10 meetings per working day.” Id. at 30 (citing Communication from Egypt, High Level Symposium on Trade and Development, mimeo, Geneva: WTO, 17 March 1997). In consequence, many countries’ representatives simply do not attend or keep up with developments in most WTO
States and EU, thus drive WTO agendas. As a senior Brazilian delegate confirms, "It's a question of power." He notes that Brazil does not have the power to call for a high level meeting on matters important to it, such as tariff escalation or agricultural protection in the EU, because Brazil would simply be ignored. Only the United States and EU have the power to pressure other countries into holding high level meetings of ministers on specific matters of interest.\textsuperscript{150}

3. \textit{Divisions Among Powerful States}

Divisions within and between powerful states blocked proposals that could adversely affect developing countries' trading interests. Divisions between the United States and EU over agenda items impeded them from presenting a united, coherent negotiating package.\textsuperscript{151} Under Item 1, for example, the EU sought a politically negotiated clarification of GATT Article XX, while the United States wished to leave this for resolution by WTO dispute settlement panels. Under Items 3 and 6, the United States challenged EU eco-labeling schemes, most recently those covering genetically modified seeds and food,\textsuperscript{152} and supported the CAIRNS Group's challenge of EU agricultural subsidies as detrimental to the environment. Because of intra- and inter-transatlantic divisions, the United States and EU could not offer developing countries sufficient side payments to agree to changes in WTO rules advocated by U.S. and EU environmental groups. From a realist perspective, these divisions over trade-environment policy between the WTO's two most powerful members explain why WTO rules have not changed.

4. \textit{Divisions Among Developing Countries}

Developing countries' positions within the WTO/GATT have shifted from protecting their domestic import-substitution policies to expanding committees, and they are much less likely to bring forth new policy initiatives.

\textsuperscript{150} Interview with Carlos A. da Rocha Paranhos, Brazil's Deputy Permanent Minister to the WTO, in Geneva, Switz. (June 18, 1998) (on file with the \textit{Harvard Environmental Law Review}). Vandana Shiva agrees, stating, "Industrialized countries can demand a forest convention which imposes obligations on the Third World to plant trees. The Third World cannot demand of the industrialized countries a reduction in the use of fossil fuels and energy. In the way the 'global' has been structured, the North (as the globalized local) has all the rights and no responsibilities, while the South has no rights and all responsibility." Vandana Shiva, \textit{The Greening of Global Reach}, 22 \textit{The Ecologist} 258 (1992) (hereinafter Shiva, \textit{Global Reach}). By the term "globalized local," Shiva means that what is being "globalized" are predominantly northern "local" demands favoring northern interests. Hurrell and Kingsbury similarly note that, "[t]he states and peoples of the South have had less success in securing prominence for environmental problems closely associated with development." Hurrell & Kingsbury, supra note 21, at 37.

\textsuperscript{151} See generally supra notes 70–74, 89, 92 and accompanying text.

\textsuperscript{152} See Pollack & Shaffer, GMOs, supra note 139; see also Brevetti, supra note 74, at 919.
their exports to the developed world. The result is increased competition and trade conflicts among developing countries and a reduction in developing country solidarity.\textsuperscript{153} Although there were North-South divisions over intellectual property issues in the CTE, most issues addressed in the CTE could pit any states against each other before WTO judicial panels, irrespective of their levels of development. While the United States and EU remain the most common adversaries in WTO litigation, developing countries increasingly file trade claims against one another.\textsuperscript{154}

5. Attempts to Change Southern Norms

Developed countries have attempted to change the appreciation of trade-environment matters within developing countries by working through, and in conjunction with, the WTO Secretariat and transnational NGOs. The Dutch, for example, have financed a pilot series of regional symposia that would bring together state representatives from trade, industry, environment, and other ministries with business, environmental, and developmental NGOs. They hope these NGO-government symposia will spur greater policy coordination on trade-environment matters in developing countries. This, in turn, could help overcome gridlock in the CTE during a new round of trade negotiations. Following the Dutch initiative, the WTO, the Dutch embassy, and the Geneva-based NGO consortium International Centre for Trade and Sustainable Development became partners in the program. The WTO Secretariat organized seven regional trade-environment intergovernmental symposia held in Malaysia, Trinidad and Tobago, Chile, Czech Republic, Ivory Coast, Egypt, and Zimbabwe. The Secretariat arranged parallel symposia involving regional NGOs for the meetings in Chile and Zimbabwe.\textsuperscript{155} There is no sign, however, that the

\textsuperscript{153} For instance, the former Egyptian representative to the CTE comments on the “lack of solidarity today” among developing countries, “in stark contrast with their solidarity during the 1960s, 1970s and 1980s.” Magda Shahin, Multilateral Investment and Competition Rules in the World Trade Organization: An Assessment, 6 Transnat’l Corp., 171, 173 (1997). See also Mark Drajer, India Willing to Abandon Traditional Allies in WTO Talks, If Necessary, Officials Say, 16 Int’l Trade Rep. (BNA) 1526 (1999). A trend toward less developing country unity in international trade talks reflects, in part, structural changes in the global economy, with developing countries being more export-oriented, and an ideological shift in favor of a more market-oriented trading system.


\textsuperscript{155} For a book containing the presentations at the meetings in Chile and Zimbabwe, see Trade, Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America (Peider Künz ed., 2000). The organization of regional trade and environment symposia by the WTO was initially to involve only government representatives. The Netherlands promoted and financed the organization of parallel NGO symposia involving government officials and NGOs. See International Centre for Trade and Sustainable Development Proposal for Civil Society Participation in WTO Trade and Environment Regional Seminars for Developing Countries, Apr. 3, 1998 (on file with the Harvard Environmental Law Review).
regional meetings have changed national positions in developing countries.

Similarly, northern NGOs have formed networks with developing country NGOs to empower environmental constituencies within the developing world. As examined below, however, developing country NGOs continue to support their respective country representatives against northern governments on the issues addressed before the CTE. This is particularly true in relation to the legality of unilateral trade sanctions imposed on environmental grounds. Constituencies in developing countries continue to hold different social priorities, reflective of their different interests. Their state representatives continue to represent these interests and priorities before the WTO.

C. Role of Neoliberal Interests and Ideas

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

Many critics of the WTO as a neoliberal institution imply that the WTO Secretariat defines the WTO's outlook. Yet since only states can speak and vote within the WTO, a more subtle analysis of neoliberal influences must focus on the role of state delegates, influenced by national commercial interests, and assisted by the Secretariat working within the WTO institutional context. In assessing neoliberal ideas and interests, advanced within the CTE, one must start with states' representatives themselves, who largely came from state trade and foreign ministries.

1. Role of State Trade Bureaucracies

State representatives before the CTE came predominantly from foreign or trade ministries. While the United States, EU, and other developed countries also sent representatives from agricultural and environ-

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156 See supra note 41 and accompanying text; infra note 235.
157 See infra notes 260–278 and accompanying text.
158 This analysis is developed in Part IV.E and infra notes 259–278.
159 See, e.g., Holmes, supra note 2; Invisible Government, supra note 2.
160 For an overview of the neoliberal perspective, see supra note 18.
161 This statement is based on dozens of interviews the Author conducted with WTO delegates in Geneva, Switzerland, in June 1997, June 1998, and June 2000 (on file with the Harvard Environmental Law Review).
mental agencies, their trade delegates typically presented the national position. Developing countries, by contrast, almost always appointed representatives from foreign or commercial ministries.\(^\text{162}\)

Close analysis of the CTE undermines the simplistic critique that the WTO and the CTE have not accommodated environmental measures because they are neoliberal-dominated institutions. Indicia include: the domestic political salience of trade-environment issues addressed within the CTE; constituent demands for economic protection in agricultural, energy, and other sectors; the trade and environmental slants actually adopted by state delegates; and the outcome of the CTE debates. Especially in the United States and Europe, environmental NGOs actively lobbied their government representatives on these issues. For example, they pressed Congress not to grant the Clinton Administration “fast-track” negotiating authority and opposed trade liberalization initiatives by the EU’s trade directorate.\(^\text{163}\) While some trade delegates played a predominant role in CTE debates, they received their instructions from home capitals, which, in countries with more developed bureaucratic systems, involved intra-agency debates.\(^\text{164}\) Trade representatives did not even play the dominant role in determining and representing developed country positions on some agenda items. For example, representatives from the agricultural ministries of the United States, EU, Japan, Korea, Canada, Australia, and New Zealand all attended CTE meetings and typically delivered their countries’ positions on Item 6 (concerning the “environmental benefits of removing trade restrictions”), insisting or denying (in reflection of constituent demands) that a removal of agricultural subsidies would benefit the environment.\(^\text{165}\) Although EU and Japanese trade nego-

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\(^{162}\) For an overview of the trade policy process in a number of developing countries, see \textit{The Developing Countries in World Trade}, \textit{supra} note 88. Whereas the United States and EU have a specialized trade bureaucracy, developing countries typically do not. Developing country diplomats often must rotate from Geneva to what they consider to be less desirable foreign posts. Interview with Delegate D, diplomat from a developing country, in Geneva, Switz. (June 12, 2000) (on file with the \textit{Harvard Environmental Law Review}).


\(^{165}\) Agricultural ministries were closely involved with Item 6 of the CTE’s agenda concerning the “environmental benefits of removing trade restrictions;” since some states used this item to promote liberalization of the agricultural sector—including the reduction and
tiators may have been more willing to compromise on liberalizing agricultural sectors, national agricultural associations made sure that EU and Japanese agricultural ministries intervened. In consequence, the outcome of CTE debates on this issue was not neoliberal.

National delegates advanced issues that were politically salient in their home countries, as a two-level intergovernmentalist perspective would predict. Canada focused on challenging EU eco-label regimes concerning wood and paper products because these were economically important industries. In 1998, the wood products sector accounted for more than 12% of Canada’s exports and more than 6% of Canadian employment. Argentina, Australia, Brazil, and New Zealand, among others, focused on attacking agricultural subsidies because this item interested their most vocal constituents on CTE matters—their agricultural export sector. Japanese, Korean, and EU negotiators, recalling the mass demonstrations in their countries in protest against the WTO Agricultural Agreement, would not permit the CTE to recommend further liberalization in agricultural trade.

elimination of tariffs, quotas, and subsidies—as well as environmental goals.

For example, a representative from a northern EU member state confirmed that the EU could agree to remove some of its agricultural trade barriers in exchange for developing country compromise on Item 1, but that southern EU member states and their agricultural constituencies opposed this exchange. Interview with Delegate E, an EU representative, in Geneva, Switz. (June 16, 1998) (on file with the Harvard Environmental Law Review). France closely monitored the European Commission’s position on agricultural trade liberalization, having little confidence in the EU’s ability to negotiate on France’s behalf in agricultural trade negotiations. See Lionel Barber et al., US Stands Ground on Farm Pact: Statement as France Renews Threats to Veto GATT Deal, FIN. TIMES, Sept. 22, 1993, at 26; Except Us, ECONOMIST, Oct. 16, 1999, at 53 (quoting French foreign minister Alain Juppé’s 1993 statement, “We do not trust you, Monsieur Brittan, and we will never trust you,” addressed to the EU trade commissioner and chief trade negotiator). For a discussion of disputes between EU trade officials and France over the EU’s negotiating position during the Uruguay Round trade negotiations, see PAEMAN & BENSCH, supra note 146, at 46–48.

On the power of Japanese agricultural pressure groups, see, e.g., Aurelia George, The Organization of Agricultural Cooperatives as a Pressure Group in Japan, in Cooperation in World Agriculture 97, 98 (Theodor Bergmann & Takekazu B. Ogura eds., 1985). See also Ex uno, plus. ECONOMIST, Aug. 21, 1999, at 44 (concerning the power of the Zenchu (Central Union of Agricultural Co-operatives) in Japan).


Colin Narbrough, The Free-trade Bandwagon Is Finally Morocco-bound. TIMES
Differences among national agencies on CTE matters reflected divisions among WTO members. Agricultural ministries were more likely to defend agricultural interests, and environmental ministries were more likely to prioritize environmental goals.¹⁷¹ Involvement of multiple ministries representing distinct national constituencies, however, also led to stalemates within national administrations so that no clear position was taken.¹⁷² Concerning eco-labels (Item 3), for example, the Canadian delegate observed that the United States "appeared to be backing off [from taking a position] given their own inter-agency differences on labels based upon non-product related PPMs [production and process methods]."¹⁷³

A neoliberal ideology promoted by technocratic networks of mid-level trade officials does not explain the positions of developing countries either. On the one hand, because developing countries with a less organized governmental infrastructure held fewer inter-agency meetings to determine national positions, foreign and commercial ministries had more autonomy.¹⁷⁴ Some Geneva-based delegates from developing countries also had greater discretion than their counterparts from developed countries.¹⁷⁵ On the other hand, where developing countries had more structured, experienced civil services, such as in Brazil, India, and Mexico, national capitals typically established clear guidelines.¹⁷⁶ For example, the United States suspected that Mexico's intransigence on U.S. demands for greater WTO "transparency" did not reflect Mexico's national position. When the United States complained to high officials in Mexico's central administration, these officials quickly confirmed that Mexico's positions were properly represented.¹⁷⁷ Lower level trade officials

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¹⁷¹ The Geneva-based delegate from the Japanese foreign affairs ministry involved the environmental ministry in the formation of Japan's position on Item 1 to counterbalance the trade ministry's trade focus. Interview with Delegate F, an East Asian representative, in Geneva, Switz. (June 18, 1998) (on file with the Harvard Environmental Law Review).

¹⁷² See supra notes 139–146 and accompanying text.

¹⁷³ GRIFFITH, supra note 114, at 17. See also supra notes 143–146 and accompanying text (discussing internal EU divisions). On the issue of process and production methods, see supra note 134.

¹⁷⁴ In relatively developed countries such as Korea, while environmental ministries were consulted, they were less prepared for the legalistic and trade-oriented issues than were the trade, agricultural and foreign ministries. Interview with Sung Hwan Son, Counselor to the Republic of Korea's permanent mission in Geneva, in Geneva, Switz. (June 19, 1998) (on file with the Harvard Environmental Law Review) (confirming that "since environmental benefits are difficult to quantify, it is difficult for [the] environmental ministry to have much impact").

¹⁷⁵ For instance, the delegate from Nigeria, Chiedu Osakwe, was active in the CTE process until he joined the WTO in May 1998, especially on the issue of trade restrictions on domestically prohibited goods. When he left the Nigerian mission, however, Nigeria became significantly less engaged with the process in the CTE.

¹⁷⁶ Paranhos Interview, supra note 150.

¹⁷⁷ Interview with Ricardo Barba, Deputy Permanent Representative to the WTO from Mexico, in Geneva, Switz. (June 12, 1997) (on file with the Harvard Environmental Law
were not autonomously determining Mexican policy outside of the control of Mexican heads of state.

Although northern governments and environmental NGOs complain that developing countries do not integrate the views of environmental ministries in their national positions, it should be recalled that the United States did not create its Environmental Protection Agency ("EPA") until 1970. At that time, the United States had a per capita gross domestic product far above, and poverty and malnutrition rates far below, those of developing countries today. It is not surprising that developing country representatives and their constituencies see environmental preservation in a different light than northern NGOs.

Even where developing country delegates with a trade orientation predominated in the formation of their national positions, their positions were typically neither neoliberal nor unified. When India's delegates raised environmental arguments in an attempt to amend the TRIPs Agreement, they did not do so because of diplomatic ideological preferences in an Indian trade bureaucracy for or against environmental protection. They did so because India's agricultural interests feared that permitting the patenting of seeds and life forms would favor northern interests to their economic detriment. Similarly, in opposing northern environmental demands for amending GATT Article XX (the exceptions clause) to permit greater use of unilateral trade restrictions for environmental ends, India was not reflecting a commitment to neoliberal trade ideology. In fact, India is known for having one of the most protected economies among WTO members.

Review).


179 See comments of Cheiku Osakwe in POLICING THE GLOBAL ECONOMY: WHY, HOW AND FOR WHOM? 251–52 (Sadruddin Aga Khan ed., 1998). For a description of trade policy-making in Nigeria, see Enoch E. Okpara, DEVELOPMENT OF TRADE POLICY IN SUB-SAHARAN AFRICA: THE ROLE OF CIVIL SOCIETY, IN TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: VIEWS FROM SUB-SAHARAN AFRICA AND LATIN AMERICA, supra note 155, at 189, 192–95 (noting that "[t]he ministry primarily responsible for external trade was the Ministry of Commerce and Industry," which still dominates policy formation but increasingly receives input from a private sector that seeks import protection "to protect locally manufactured goods from unbridled foreign competition" and "liberalized import policy . . . [for] industrial raw materials and other inputs").

180 Farmers in India engaged in mass demonstrations against the TRIPs Agreement. See John Tanner, BIODIVERSITY-INDIA: U.S. Giant, Peasants Battle for "Blessed Tree," INTER PRESS SERVICE, Oct. 12, 1993 (reporting half a million farmers in the central Indian city of Bangalore protesting "against the patenting of agricultural products"). Indian negotiators correspondingly raised environmental arguments in support of an amendment of the TRIPs Agreement, even though they had earlier maintained that the WTO was not competent to discuss environmental impacts. Developing countries attempted to deploy environmental rationales to weaken the TRIPs Agreement because they realized that it was likely to benefit developed country constituencies to the detriment of developing country producers and consumers.

181 One commentator implicitly criticizes India with its highly protected market for taking a hypocritical position on the use of trade measures to promote environmental goals,
In short, state delegates were careful to advance (if on the offensive) and not compromise (if on the defensive) their national positions within the CTE for future WTO negotiations over agriculture, intellectual property rights, technical standards, and other matters. State representatives were not predominantly neoliberal, but mercantilist. Instead of promoting free trade regardless of their domestic producers' interests, they attempted to expand their countries' exports and limit competition from imports.\textsuperscript{182} As assessed subsequently, the positions advanced by state trade delegates on specific trade-environment issues reflected those advocated by their own vocal stakeholder constituencies, including those of non-business advocacy groups. State trade delegates did not support neoliberal foreign exporting interests, as they would have if they were truly committed to free trade economic theory.\textsuperscript{183}

2. Role of Business Interests

Large transnational businesses in the United States and Europe certainly mobilized to help shape the debate of trade and environment issues within the CTE and other fora.\textsuperscript{184} They operated through long-standing associations, such as the International Chamber of Commerce ("ICC"),\textsuperscript{185} the U.S. Council on International Business, and the EU’s *Union des Confederations de l’Industrie et des Employeurs d’Europe*, and relatively new ones, such as the World Business Council for Sustainable Development\textsuperscript{186} and the Transatlantic Business Dialogue.\textsuperscript{187} These associations stating, “Even governments that routinely employ trade measures to protect favored domestic industries evinced no embarrassment in casting doubt on the propriety of trade measures in MEAs [multilateral environmental agreements] . . .” *See* Chamovitz, *infra* note 5, at 356. Yet India, like other developing countries, consistently defended its conception of its most vocal constituents' economic interests.

\textsuperscript{182} As one developing country delegate states, “We are all a bunch of haggling merchants here.” Interview with Delegate G, an Island Nation representative, in Geneva, Switz. (June 9, 2000) (on file with the *Harvard Environmental Law Review*). Like merchants, when delegates use environmental arguments, they use them to advance their trading interests.

\textsuperscript{183} *See* Part V.C, *infra* notes 159–230 and accompanying text.

\textsuperscript{184} *See*, e.g., Gary G. Yetkey, *U.S., EU Business Leaders to Urge Further Easing of Impediments to Trade*, 14 Int’l Trade Rep. (BNA) 1909, 1910 (1997) (noting how “[c]ompanies with a particular interest in intellectual property rights protection—such as Pfizer Inc., Time Warner Inc., and Microsoft Corp.—will also be pressing the U.S. and the EU at the [Transatlantic Business Dialogue] meetings . . . to ensure that governments live up to the commitments made in the WTO [TRIPs Agreement]”).

\textsuperscript{185} The International Chamber of Commerce ("ICC") consists of sixty-three national committees as well as individual companies from countries where a national committee has yet to be formed. The U.S. Council for International Business is the U.S. ICC member. *See* ICC Web site, at http://www.iccwbo.org/index.asp (last visited Dec. 2, 2000) (on file with the *Harvard Environmental Law Review*).

\textsuperscript{186} The Geneva-based World Business Council for Sustainable Development consists of approximately 120 multinational corporations from around the world.

\textsuperscript{187} A U.S. Department of Commerce official maintains that "virtually every market-opening initiative undertaken by the U.S. and the EU in the past couple of years has been
generally have greater access to state trade representatives than other non-state actors because of their professionalism and their importance to
domestic economies and elections.\textsuperscript{188} They thus can work more discreetly
than other non-state actors.\textsuperscript{189}

Businesses obtain information on what transpires in the WTO through consultants and trade association representatives, many of whom
are based in Geneva,\textsuperscript{190} and many of whom were formerly leaders in
international and national trade organizations. For example, Arthur Dunkel,
the former director-general of GATT, became the chair of the ICC’s
Commission on International Trade and Investment Policy, which follows
the CTE and other WTO committees.\textsuperscript{191} Paula Stern, former chair of the
U.S. International Trade Commission, became the Transatlantic Business
Dialogue’s trade consultant and a member of President Clinton’s Advisory
Committee on Trade Policy and Negotiations.\textsuperscript{192} The former Cana-

suggested by the [Transatlantic Business Dialogue].” Yerkey, \textit{supra} note 184, at 1990. For
example, the Transatlantic Business Dialogue formed an “issue group” consisting of
representatives of United States and European forest and paper industries to explore “areas of
common concern” and the potential for “concerted action.” The group found that the “most
immediate issue” it faced was the EU’s proposed eco-labeling scheme for paper products.
It formally opposed it before the EU “on the grounds that it is discriminatory and a breach
of fair competition and trade.” \textit{World Trade Organization Singapore Ministerial Meeting:
Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means, 104th
Cong. 92 (1996) } \textit{(statement of W. Henson Moore, President and CEO of American Forest
and Paper Association)}.

\textsuperscript{188} Private parties in the developed world have resources that dwarf those of developing
countries. Of the 100 largest holders of wealth in the world, fifty-one are companies and
forty-nine are national states. Robert D. Kaplan, \textit{Was Democracy Just a Moment?}, \textit{Atlantic
Monthly}, Dec. 1997, at 71. Commercial interests can afford lawyers and consultants to
represent them, including former “insiders,” such as former national trade delegates and
WTO Secretariat members. Not surprisingly, when northern commercial interests present
their views before CTE symposia, their well-informed remarks are more pertinent to issues
currently before the CTE. Stated in interviews with a number of developed country dele-
gates to the CTE, in Geneva, Switz. (June 1997 and June 1998) \textit{(on file with the Harvard
Environmental Law Review)}.

\textsuperscript{189} Businesses may not wish to provide ammunition to WTO critics by being too visi-
bly connected with WTO policy developments.

\textsuperscript{190} The ICC and World Business Council for Sustainable Development have offices in
Geneva. The International Council on Mining and the Environment has hired as a consult-
ant the husband of the director of the WTO Appellate Body Secretariat.

\textsuperscript{191} The ICC’s Commission also “[f]ormulates recommendations on post-Uruguay
Round trade policy issues for the 1990s including: trade and the environment, trade and
competition, trade and investment, trade and labour standards.” ICC Commission on Inter-
national Trade and Investment Policy, \textit{at http://www.wiccbo.org/comm/html/Trade.html } \textit{(last
visited Sept. 5, 1997) } \textit{(on file with the Harvard Environmental Law Review)}.

\textsuperscript{192} Stern engages in what she terms “entrepreneurial diplomacy,” whereby corporations
take a leading entrepreneurial role in defining the agenda and the terms of trade negotia-
tions. Consider, for example, the Transatlantic Business Dialogue’s role in the negotiation
of mutual recognition agreements and harmonized international standards. See Jeff Gerth,
\textit{Where Business Rules: Forging Global Regulations That Put Industry First, N.Y. Times,
} Jan. 9, 1998, at D2. Stern is president of the Stern Group, an international trade advisory
group in Washington. She was an ITC commissioner for nine years and chaired the ITC
from 1984–86. \textit{Id. } Other examples of the revolving door include Alan Holmer and Judith
Bello, former members of the legal division of the Office of the U.S. Trade Representative,
dian national representative to the CTE confirms that he was in close contact with Canada's Pulp and Paper Association on CTE matters, forthrightly stating, "Canada's approach on eco-labels reflected the business needs of its forest products industry."193 Personal relationships with key figures in government and intergovernmental organizations provide businesses with access unavailable to others.194 Businesses exercise their influence primarily through access to state representatives, not the WTO Secretariat. They recognize that state representatives are the primary decision-makers within the WTO.195

Commercial interests are not always neoliberal, however, which results in conflicts between export-oriented and purely domestic businesses. The U.S. steel industry, for example, constantly demands relief from imports and emphasizes the need to preserve U.S. antidumping laws to keep out low-priced import competition. Agricultural interests in the EU, Japan, and Korea oppose the elimination of agricultural trade subsidies and tariff barriers on environmental or any other grounds. Similarly, developing country non-exporting interests are typically less supportive of WTO trade liberalization initiatives than developing country exporting interests.196

and now, respectively President and Vice-President of Pharmaceutical Research and Manufacturers of America (PhRMA), the U.S. pharmaceutical industry's main lobbying association.

193 Interview with Andrew Griffith, Canadian representative to the CTE, in Geneva, Switz. (June 15, 1998) (on file with the Harvard Environmental Law Review) [hereinafter Griffith Interview II]. The same approach holds true for developing countries. Regarding the Brazilian government's response to its pulp and paper industries on the eco-label issue, see, e.g., EC Eco-label Program Raises Concerns for Brazilian Business, Government Officials, INT'L ENVTL. REP. (BNA) (Feb. 3, 1993).

194 In the United States, the Federal Advisory Committee Act requires the creation of sectoral and functional committees consisting of representatives of civil society "fairly balanced" in their viewpoints to provide input on trade policy formation. Federal Advisory Committee Act, 5 U.S.C. app. § 5(b)(3) (1988). Business interest groups, however, are predominantly represented in these committees. Environmental groups had to litigate to obtain even a single seat on sectoral committees involving lumber and wood products and paper and paper products. See, e.g., Panels Must Include Environmentalists, NAT'L L.J., Nov. 22, 1999, at B5 (noting that a federal court ordered the U.S. Trade Representative to "name at least one environmentalist to each of two panels that advise her on trade agreements for wood and paper products" in order to comply with the Federal Advisory Committee Act); Gary G. Yerkey, Administration to Work Closely with NGOs, but Has Appealed Ruling on Advisory Groups, 17 Int'l Trade Rep. (BNA) 78 (Jan. 20, 2000); Rossella Brevetti, Environmental Groups Warn About Possible Lawsuit on Advisory Committee Composition, 16 Int'l Trade Rep. (BNA) 1946 (Dec. 1, 1999) (noting environmental NGO demands for appointment to an advisory committee on trade in chemicals). On U.S. trade advisory committees, see, e.g., Kenneth W. Abbott, "Economic" Issues and Political Participation: The Evolving Boundaries of International Federalism, 18 CARDOZO L. REV. 971, 991–93 (1996) (discussing the composition and work of the CTE).

195 See Powers of Persuasion: Behind the Scenes with Some of the World's Top Lobbyists, CORP. LEGAL TIMES, Mar. 2000, at 20 (citing a global manufacturer of construction products on the importance to industry lobbyists of national capitals as opposed to the WTO Secretariat).

196 Interview with Ricardo Metiéndez, currently Director of the International Centre for Trade and Sustainable Development, and former Colombian delegate to the CTE, in Ge-
Moreover, U.S. and EU businesses favoring greater WTO constraints on environmentally based trade restrictions do not always prevail in domestic policy debates. They have often criticized their national delegates' positions within the CTE and other fora for being too accommodating to environmental exceptions to trade rules. U.S. biotechnology companies and agribusinesses could not block the signature of the Cartagena Protocol on Biosafety in January 2000, although they believed that it could undermine WTO rules by accommodating import bans of genetically modified seeds and foods on allegedly environmental grounds, but without any clear scientific basis.197

3. Role of the WTO Secretariat

Opponents of neoliberalism, both on the left and the right, typically criticize the WTO for encroaching upon national sovereignty, as if the WTO were an undemocratic autonomous actor with a single voice, independent of its member states. Its critics have portrayed the WTO as an insidious agent of globalization of commerce and culture that infiltrates national borders and wreaks local havoc. At the GATT's fiftieth anniversary in 1998, protestors spray-painted Geneva walls with "WTO—World Terrorist Organization."198 This demonstration turned out to be a relatively mild precursor to the huge protests in Seattle, Washington, at the third WTO Ministerial Meeting in December 1999.

Northern environmental activists are particularly upset by WTO judicial decisions in trade-environment disputes, which have held that U.S. laws enacted to address foreign environmental harms violate WTO rules. One of the CTE's purposes was to attempt to provide guidance from a

neva, Switz. (June 16, 1998) (on file with the Harvard Environmental Law Review). Meléndez also noted that many developing country businesses in the export sector are more willing to compromise on trade and environment matters than non-exporting businesses because they already have had to adapt to changes in international markets. Id.

197 Businesses noted that the new Protocol "could potentially cause trade disruptions primarily because it creates new momentum for countries banning imports based on uncertain science" on allegedly environmental grounds. AG Groups Fear Biosafety Precaution Principle, Producers Downplay, Inside U.S. Trade, Feb. 18, 2000, at 7. See also Pollock & Shaffer, GMOS, supra note 139.

For frustrations of EU businesses, see, e.g., UNICE Position on the Relationship Between the Provisions of the Multilateral Trading System and Trade Measures For Environmental Purposes, Including Those Pursuant to Multilateral Environmental Agreements (MEAs) (July 22, 1996) (unpublished position paper on file with the Harvard Environmental Law Review) (critiquing the European Commission for going too far in its proposal and advocating retention of a more constraining "necessity" test); Telephone Interview with Dr. Reinhard Quick, a UNICE member involved in drafting UNICE trade and environment position papers (on file with the Harvard Environmental Law Review) (confirming the position of UNICE).

199 In June 1998, the author also witnessed protestors overturn and burn vehicles, and ransack such globalization symbols as Burger King and McDonald's restaurants. It was reported to be the most violence Geneva had experienced in decades.
WTO political body to WTO judicial panels that hear these disputes. This section assesses the role of the WTO Secretariat in that political process.

There are approximately five hundred professional civil servants within the WTO who provide assistance to the member states upon request. This Secretariat consists primarily of trade economists and trade lawyers. Of the six Secretariat members assigned to the WTO's Trade and Environment Division in 1998, one were economists and two were international trade lawyers, one formerly a member of a national trade ministry. WTO Secretariat members thus could be viewed as an epistemic community having "shared normative beliefs" (in free trade theory), "shared causal beliefs" (in how trade liberalization creates wealth), "shared notions of validity" (in applying neo-classical economic methodology), and "a common policy enterprise" (to facilitate government negotiations toward trade liberalization). On the basis of their expertise, reputation for impartiality, inside information, and close contacts with trade diplomats, Secretariat members can, at least at the margins, help shape knowledge, frame issues, identify interests, facilitate coalition-building, and thereby affect outcomes.

The capacity of a technocratic, supranational Secretariat to affect outcomes, however, depends on what it actually does and the political saliency of the issue at stake. The members of the CTE Secretariat perform primarily five functions in the WTO political process: the organization of meetings and recording of minutes; research on trade and envi-

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199 For ease of reference, members of the WTO Secretariat assigned to the Trade and Environment Division are sometimes referred to as the CTE Secretariat.

200 Interview with Member C, member of the Secretariat assigned to the CTE, in Geneva, Switz. (June 18, 1998) (on file with the Harvard Environmental Law Review).

201 As a former CTE Secretariat member stated, the WTO "works on first-best principles." Vaughan Interview, supra note 64. "First-best" is an economic term which signifies, in the CTE context, that trade and environment policies should be as economically efficient as possible.

202 Haas, supra note 33, at 3 (noting the attributes of epistemic communities).

203 By "impartial," I mean that the Secretariat does not favor any particular WTO member. As noted above, the Secretariat is not impartial from an ideological perspective.

204 For example, economist and former Director of the WTO's Trade and Environment Division, Richard Eglin, stated before a meeting of Korean trade and business representatives that the CTE's role is to ensure that "steps taken to resolve environmental problems must uphold and safeguard the principles of the multilateral trading system" and to "remain vigilant to the threat of the use of environmental measures for trade protectionist purposes." Eglin, supra note 60 (draft at 5, 24). Eglin also confirmed that the CTE "must remain strictly within the competence of the WTO," which is "limited to trade and those trade-related aspects of environmental policies which may result in significant trade effects for its members." Id.

205 Another example of the Secretariat's potentially key role is the dispute settlement process. The WOT Secretariat has a legal division that attends all hearings and typically prepares the drafts of decisions for approval by the panelists. While the panelists are designated for only a single panel, the Secretariat's legal division remains constant. The legal division thus represents a reservoir of knowledge as to past practice and cases. Although the creation of an Appellate Body may constrain the role of the Secretariat, the Secretariat nonetheless retains an inside role in the dispute settlement process.
enronment issues; liaison with international organizations addressing these issues; public relations, especially vis-à-vis NGOs; and mediation between states. The Secretariat influences outcomes primarily through its research, its liaison with other international organizations, and its mediation services.

States expect Secretariat members to keep abreast of trade and environment studies, particularly those conducted by other international organizations. In distributing information to all state delegates, the Secretariat helps create a common base of understanding to defend the WTO from challenge by transnational environmental NGOs. Upon states’ request, the Secretariat researches and prepares papers on specific issues. By October 30, 1998, the CTE Secretariat had provided delegates with sixty-nine papers, totaling almost 1000 pages. Secretariat submissions addressed the environmental benefits of trade liberalization as well as the economic and trade implications of specific environmental instruments, such as packaging requirements, eco-labeling schemes, and eco-taxes and charges, among other matters. The CTE Secretariat coordinates its research with other international organizations, such as the OECD, UNCTAD, and the World Bank, which it cites in the papers that it prepares for the Committee. Many of these studies, in turn, were cited in the CTE 1996 Report.

206 A count of 983 pages includes some annexes of new environmental agreements or proposed drafts of agreements. The most important CTE matters in terms of Secretariat output were: Item 1 (26 papers), Item 3 (9 papers), Item 4 (8 papers) and Item 6 (7 papers). See Table I. Most of the Secretariat’s papers relevant to Item 1 concerned developments in different international environmental fora. See discussion infra note 288 and accompanying text.

207 See, e.g., infra notes 211, 214.

208 See EMIT, Agenda Item 2: Multilateral Transparency of National Environmental Regulations Likely to Have Trade Effects: Note by the Secretariat, TRE/W/10 (Mar. 17, 1993); EMIT, The Trade Effects of Environmental Measures: Note by the Secretariat, at 9, TRE/W/13 (June 29, 1993) (recalling that content requirements for packaging “are likely to be tailored to domestic resource availability, technology, or preferences”).

209 See EMIT, Agenda Item 3: Packaging and Labelling Requirements: Note by the Secretariat, TRE/W/12 (June 14, 1993).

210 See CTE, Taxes and Charges for Environmental Purposes—Border Tax Adjustment: Note by the Secretariat, at 1, WT/CTE/W/47 (May 2, 1997).

211 Widely cited organizations in CTE papers include: the OECD, UNCTAD, the World Bank, the FAO, and UNEP. See, e.g., Environmental Benefits of Removing Trade Restrictions and Distortions, supra note 93, at Annex (containing 32 cites to the OECD, 32 to UNCTAD, 31 to the FAO and 29 to the World Bank). The Secretariat’s first report to the CTE on the environmental benefits of removing trade restrictions and distortions cites contributions from a World Bank discussion paper series seven times. See CTE, Environmental Benefits of Removing Trade Restrictions and Distortions: Note by the Secretariat, WT/CTE/W/1 (Feb. 16, 1995).

212 As stated in the CTE 1996 Report, “the CTE welcomes efforts of other intergovernmental organizations, in particular the UNCTAD and ITC [the WTO’s joint research center with UNCTAD], to collect and disseminate additional information on the use of trade-related environmental measures, and recommends the WTO Secretariat cooperate with those organizations to ensure duplication is avoided.” CTE 1996 Report, supra note 86, at para. 193.
Although the Secretariat largely controls the content of its CTE submissions, it is usually cautious not to appear partisan. Secretariat submissions were thus largely informative and not argumentative in tone. Nonetheless, this is not always the case, as some Secretariat members have clear preferences. For example, members of the CTE Secretariat certainly wanted to explore how trade liberalization can benefit the environment. As the former director of the CTE Secretariat confirmed with pride, “the Secretariat did not pull any punches in saying that agricultural protection is by and large a disaster for the environment.”

In public relations, which has become particularly important for the WTO, the Secretariat protects its employer and defends trade policies with a neoliberal bent. For example, the WTO Secretariat periodically publishes reports on its own initiative with a view toward defending the WTO’s trade policy before the larger public. In response to the U.S. outcry over the Tuna-Dolphin decision, the WTO Secretariat included an extensive analysis of trade and environment matters in its annual report, International Trade 90–91. The Secretariat authors argued that, “uni-

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The most influential document for purposes of the CTE 1996 Report was probably the OECD’s 1995 Report on Trade and Environment to the OECD Council at Ministerial Level. The CTE Secretariat, member states, and the final CTE 1996 Report cited this report. See, e.g., CTE 1996 Report, supra note 86, at paras. 103-05 (citing the OECD Report’s findings of “positive effects” of high levels of environmental protection on competitiveness and the principle that trade measures should not be used to force harmonization of environmental standards). During the negotiation of the CTE 1996 Report, many delegates compared the language in the OECD Report with that being negotiated in the CTE. See Michael Reiterer, Trade and Environment: Reflection on the Impact of the OECD Joint Session, 9 Int’l. Envt’l. Aff. 69, 78 (1997) (“I can also confirm from my personal observation that many delegates—and not just those of the OECD countries—were carrying the green-banded OECD Ministerial Report during the final negotiations.”). Reiterer concludes that this shows that the Joint Session “has fulfilled the think-tank function that is generally ascribed to the OECD,” and that “positive spill-over effects from the OECD and the WTO process will be needed and welcome.” Id. at 78. Delegates also confirmed the usage of the OECD report. Griffith Interview II, supra note 193.

213 See Eglin Interview I, supra note 84.

214 See id. (expressing how the CTE was particularly interested in exploring “win-win” type situations, where the WTO could use an environmental rationale for further liberalizing trade); Interview with Gary Sampson, former head of the WTO’s Trade and Environment Division, in Geneva, Switz. (June 8, 1997) (on file with the Harvard Environmental Law Review). See also Environmental Benefits of Removing Trade Restrictions and Distortions, supra note 93 (citing numerous economic studies of the relationship between growth in per capita income and the intensity of polluting effluents). The Secretariat explains how generally, “trade liberalization has the potential to have a twofold positive effect on the environment” since it stimulates efficient resource allocation so that fewer resources are used per unit of output, and it generates wealth which can be invested in environmental protection. Id. at para. 5.

215 Eglin Interview I, supra note 84.

lateral restrictions on trade would never be the most efficient instrument for dealing with an environmental problem."\textsuperscript{217} They warned, "There is a serious risk that the trading system could get badly bruised by a rush to deal with environmental issues."\textsuperscript{218} Focusing on the situation in agriculture, they also pointed out that "current restrictions on international trade can be bad for the environment."\textsuperscript{219} The Secretariat helped highlight these issues for state delegates. Two years later, the issue of potential "win-win" benefits from agricultural trade liberalization was incorporated in Item 6 of the CTE's agenda.

The CTE Secretariat also acts as a liaison with international environmental organizations to help states' WTO delegates monitor international developments. At the instruction of state delegates, members of the CTE Secretariat observe meetings of, periodically address, submit papers to, and correspond with these environmental organizations.\textsuperscript{220} They then report back to the CTE on developments within them.\textsuperscript{221} The Secretariat thereby helps states quell potential conflicts between environmental

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\textsuperscript{217} International Trade 90–91, supra note 216, at 21.

\textsuperscript{218} Id.

\textsuperscript{219} Id. at 38. The report also cites empirical studies which "suggest caution in asserting that cost differences due to differences in environmental regulations are substantial, or that the trade and investment effects within particular industries are large" and pointedly states that, "GATT rules block the unilateral use of trade measures to dictate changes in the environmental policies of other nations." Id. at 31, 32. Cf. Shrimp-Turtle Appellate Report, supra note 128, and Shrimp-Turtle Panel Report, supra note 126 (assessing third party reactions).

\textsuperscript{220} For example, Richard Eglin, Director of the Secretariat's Trade and Environment Division, wrote Lawrence Eicher, Secretary-General of International Organization for Standardization ("ISO") and recommended changes to an ISO draft with respect to its depiction of WTO rules, noting, "[t]he WTO Secretariat followed closely the proceedings of the ISO Technical Committee 207 and its sub-committees at their meetings in Rio de Janeiro from 16–23 June, with particular attention to the drafting of the trade principles in ISO draft principles concerning eco-labelling schemes," and found the draft language "confusing." Letter from Richard Eglin, to Lawrence Eicher, Secretary-General of ISO (July 3, 1996).

\textsuperscript{221} Secretariat members assigned to the EMIT Working Group and then to the CTE attended meetings and made contributions to the Rio Conference and its various follow-ups before the Commission on Sustainable Development. See, e.g., CTE, Communication from the Secretariat, WT/CTE/W/3 (Mar. 10, 1995). Similarly, Secretariat members attended meetings of the Basel Convention, the Montreal Protocol, FAO, and UNEP. The Secretariat then reported back to the CTE delegates on developments in these different fora in a series of papers. See, e.g., CTE, UNCED Follow Up: Results of the Third Session of the Commission on Sustainable Development: Note by the Secretariat, WT/CTE/W/7 (May 18, 1995); CTE, Environment and TRIPS, WT/CTE/W/8 (June 8, 1995); CTE, Results of the Fourth Session of the Commission on Sustainable Development: Note by the Secretariat, WT/CTE/W/30 (May 22, 1996); CTE, FAO Code of Conduct for Responsible Fisheries: Note by the Secretariat, WT/CTE/W/15 (Dec. 1, 1995); CTE, Seventh Meeting of the Parties of the Montreal Protocol: Note by the Secretariat, WT/CTE/W/19 (Jan. 23, 1996). In addition, the Secretariat members corresponded independently with other Secretariats, providing them with information concerning WTO norms and rules.
measures proposed in these fora and WTO rules. The Secretariat’s oversight also helps state delegates intervene by instructing their domestic colleagues on WTO constraints, thereby protecting state trading rights.

Finally, the Secretariat provides drafting and mediation services when states negotiate over trade and environment issues. The Secretariat’s mediation services were central to the CTE 1996 Report. The Secretariat prepared successive drafts and circulated them with bracketed passages containing alternative language. The Director of the Secretariat’s Trade and Environment Division, Richard Eglin, met with key states over controversial items, such as the relation of WTO rules to multilateral environmental agreements, and proposed alternative language that states might accept. While the Secretariat cannot dictate what states accept, it can push states to the limits of what they can accept to reach consensus.\(^\text{222}\) As confirmed by a former Canadian delegate, “The role of the Secretariat in the informal drafting process [for the CTE 1996 Report] reflects the professionalism and skill of the Secretariat in developing the basis for a consensus text.”\(^\text{223}\)

While the Secretariat speaks predominantly from a trade vantage, and there is no one in the WTO Secretariat who, like the Lorax, “speaks for the trees,”\(^\text{224}\) the influence of the WTO Secretariat is nonetheless marginal compared to that of powerful states and powerful constituencies within states. While a neoliberal-leaning WTO Secretariat may have some influence, it is misleading to characterize the Secretariat as an independent voice that significantly shapes states’ trading policies. Within the WTO, Secretariat members operate under the instructions of states and the watchful eyes of state delegates.\(^\text{225}\) As a former member of the CTE Secretariat confirms, “Unlike the World Bank Secretariat, which

\(^{222}\) Robert Hudec, international trade law professor at the University of Minnesota, notes that the role of the WTO Secretariat in the drafting process considerably expanded in the more complex Uruguay Round of trade negotiations, compared to the eight previous GATT negotiating rounds. E-mail from Robert Hudec to Author (Nov. 27, 1999, 21:26:00 CST) (concerning an earlier draft) (on file with the Harvard Environmental Law Review). This greater de facto delegation of states to a centralized international Secretariat is explained by the increased number, scope of coverage, and complexity of the Uruguay Round agreements that states negotiated as part of a single package, ultimately requiring approval by consensus.

\(^{223}\) The former Canadian delegate further notes how “the drafting sessions of October 31 and November 1 indicated how effective such informal processes can be, as did the TRIPS discussions held late in the marathon session.” Griffith, supra note 173, at 22–23.

\(^{224}\) Dr. Seuss, The Lorax 35 (1971).

\(^{225}\) As Richard Eglin states, “[WTO] members’ views clashed so much that the Secretariat could not play much of a role . . . . Although the Secretariat should act as a broker, . . . it can’t when member views are diametrically opposed.” Interview with Richard Eglin, former Director of the Trade and Environment Division of the WTO, in Geneva, Switz. (June 15, 2000) (on file with the Harvard Environmental Law Review) [hereinafter Eglin Interview II]. Another Secretariat member noted that, “Parties closely oversee the Secretariat when they feel affected [by it].” Interview with Sabrina Shaw, in Geneva, Switz. (June 9, 1997) (on file with the Harvard Environmental Law Review) [hereinafter Shaw Interview].
makes executive decisions on project finance, the WTO Secretariat has significantly less power226 and "works as an intermediary" to facilitate state-to-state discussions, negotiations and monitoring.226 The WTO did not use states as agents to enforce WTO trade liberalization norms. Rather, states used the WTO Secretariat as an agent to monitor international environmental negotiations in order to protect state trading interests.227

Because of the consequential nature of WTO decision-making, states keep the WTO Secretariat on a "tighter leash."228 Trade and environment issues addressed within the CTE are highly politicized (witness the Seattle demonstrations) and can significantly affect states' economies. State delegates, as well as business, environmental, and developmental organizations, thus heed developments within the CTE. Ultimately, states with conflicting interests dominated CTE discussions and negotiations.229 The endless debates leading to no concrete results frustrated and exhausted CTE Secretariat members as much as national delegates.230

D. Role of Other Stakeholders: Environmental and Developmental NGOs

Different interests have attempted to advance their goals through the institutionalization of trade and environment issues within the WTO, as suggested by neoliberal and stakeholder perspectives. The CTE's failure to recommend any changes in WTO rules has frustrated northern environmental groups, especially regarding the issue most important to them: Item 1, concerning the use of trade measures to enforce international environmental agreements and advance environmental goals through unilateral state action. Because of the stalemate within the CTE, they advocate a stakeholder model under which they would play a greater role in CTE deliberations. They have already used the CTE process to pressure the WTO to make its decision-making more transparent so that NGOs may better coordinate pressure on governments, in particular through the media, domestically and internationally.231

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226 Vaughan Interview, supra note 64. Unlike the Secretariat in the World Bank, the WTO Secretariat has no independent executive decision-making authority.
227 See infra notes 295-307 and accompanying text.
228 Id.
229 See infra notes 259-278 and accompanying text.
230 See Shaw Interview, supra note 225.
231 In response to intense NGO pressure in the United States, in recent years, the World Bank has worked much more closely with NGOs, integrating their views into its decision-making process. See Citizens' Groups: The Non-Governmental Order, ECONOMIST, Dec. 11, 1999, at 20, 21 [hereinafter Citizens' Groups] (noting that environmental NGO campaigns against the World Bank in the mid-1990s led the Bank to develop working relations with NGOs so that now "[m]ore than 70 NGO specialists work in the Bank's field offices" and "[m]ore than half of World Bank projects last year involved NGOs").
Not all NGOs, however, have advocated adopting a stakeholder model of WTO governance.\textsuperscript{232} The model has been primarily advocated by environmental groups in the United States and Europe, because southern NGOs, although sometimes large in number,\textsuperscript{233} are short on resources and typically localist in orientation. They thus recognize the northern NGOs' advantage in international fora. Just as all states are not equal, all NGOs are not equal. Northern NGOs have more funding, are located closer to WTO offices in Geneva,\textsuperscript{234} are more likely to finance international networks,\textsuperscript{235} and have greater indirect access to information from their state representatives.\textsuperscript{236} Southern NGOs have less access, in part because southern governments themselves have difficulty monitoring all developments in the WTO.\textsuperscript{237} One London-based environmental NGO, the

\textsuperscript{232} While a large number of grassroots northern and southern NGOs signed a joint "Statement ... Opposing a Millennium Round" which they presented to the WTO-organized Symposium on International Trade the day before the Ministerial Meeting began in Seattle, the Statement was abstract, blurring the serious differences among NGOs on specific issues. See Statement from Members of International Civil Society Opposing a Millennium Round or a New Round of Comprehensive Trade Negotiations, at http://www.citizen.org/pctrade/gattwto (last visited Oct. 8, 2000) (on file with the Harvard Environmental Law Review). For a description of the differences among NGOs signing the statement, see Debi Barker & Jerry Mander, Invisible Government, reprinted in NGOs Voice Their Views at Seattle, at http://www.twinside.org.sg/title/deb11-cn.htm (last visited Nov. 21, 2000) (on file with the Harvard Environmental Law Review). For the perspective of a southern non-governmental opponent of the WTO, see, e.g., Walden Bello, Why Reform of the WTO is the Wrong Agenda, 43 FOCUS ON TRADE 1 (Jan. 2000), available at http://www.globalexchange.org/wn/bello030800.html (last visited Dec. 4, 2000) (arguing that, "[Northern-biased] inequalities [are] built into the structure, dynamics, and objectives of the WTO" and that developing countries should aim "to radically reduce [the WTO's] power and to make it simply another international institution." In contrast, northern NGOs maintain that environmental and labor standards should be integrated into the WTO and that NGO stakeholders should have the right to directly participate in WTO dispute settlement hearings and committee meetings).

\textsuperscript{233} See Citizens' Groups, supra note 231, at 20 (citing an article in World Watch that estimates that India has about one million grassroots NGOs, compared to around two million in the United States).

\textsuperscript{234} Geographically, U.S. and European NGOs are located closer to Geneva, reducing their transportation costs and inconvenience. WWF International's headquarters is in Glind, Switzerland, within 25 miles of Geneva, and connected by train. The U.S. NGO, Center for International and Environmental Law ("CIEL"), leases office space in Geneva, while other NGOs use the office space provided by the International Centre for Trade and Sustainable Development consortium.

\textsuperscript{235} The WWF family, for example, has affiliates or offices in at least 27 countries. WAPNER, WORLD CIVIC POLITICS, supra note 41. Friends of the Earth has offices and multiple local chapters in more than 50 countries. Id. at 121.

\textsuperscript{236} For example, environmental NGOs are represented on the U.S. Trade Advisory Committees. U.S. and EU trade representatives also periodically meet with NGOs on trade-environment issues before WTO meetings or in relation to trade-environment disputes. The author, for example, was invited to U.S. Trade Representative briefings of NGOs on the controversial WTO Shrimp-Turtle case. Business interests dominate U.S. trade advisory committees, however, and environmental NGOs have had to sue the Office of the U.S. Trade Representative to obtain access to sectoral trade advisory committees. See supra note 194.

\textsuperscript{237} Developing countries' primary concern with respect to the "transparency" of WTO decision-making is that WTO rules traditionally have been negotiated by small groups of
Foundation for International Environmental Law and Development ("FIELD"), even negotiated a deal with a developing country, Sierra Leone, to represent it before the CTE. Sierra Leone, beset by violent civil conflict, did not have the resources or the priority to represent its "stakeholder" interests before the CTE. A northern NGO, though with serious conflicts of interest, offered to do so in its stead. FIELD supported the cost of attending and reporting in meetings in exchange for direct access to CTE meetings.238

In short, northern NGOs are much better positioned than southern NGOs and southern trading interests to have their views heard at the international level.239 Given scarce resources, southern states even question the appropriateness of the WTO sending NGO delegates to Geneva for symposia when those resources could be spent on water purification, nutrition, education, and disease control projects in developing countries.240 While some northern commentators may condescendingly counter that the alternative use of funds will not go to social services, but to line the pockets of southern elite,241 the fact remains that international NGO con-

representatives from large developed countries without developing country representatives. See, e.g., John Burgess, Green Room's Closed Doors Couldn't Hide Disagreements, Wash. Post, Dec. 5, 1999, at A6 ("green room" refers to the conference room in GATT headquarters where former GATT Director-General Arthur Dunkel held informal meetings with key GATT members to drive forward the Uruguay Round negotiations). See also infra note 265.

238 In other words, in return for FIELD's access, Sierra Leone would receive information on what transpired within the CTE, albeit filtered through the London-based NGO. Sierra Leone had no permanent representative in Geneva because of its lack of resources. Within the CTE, the FIELD representative, Beatrice Chaytor, allegedly read a long "NGO-type" statement about how the WTO was "anti-environment." Eglin Interview II, supra note 225. For Chaytor's version of this experience, see Beatrice Chaytor, Cooperation between Governments and NGOs: The Case of Sierra Leone in the CTE, in Trade, Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America, supra note 155, at 89.

239 An article published by the southern NGO, Third World Network, for example, maintains that agenda-setting of large "international NGOs" is "led from their head offices in London, Paris or Brussels. There is great reluctance to give their offices based in developing countries a greater say in running international campaigns . . . . The involvement of Southern counterparts is often restricted to generating research data to be used by Northern advocates . . . ." Binu S. Thomas, WTO Steals a March on International NGOs, at http://www.twnside.org.sg/souths/twn/title/march-en.htm (last visited Dec. 9, 1999) (on file with the Harvard Environmental Law Review).

240 Interview with Delegate H, a developing country representative to the CTE, in Geneva, Switz. (June 19, 1998) (on file with the Harvard Environmental Law Review). The delegate also questioned the representativeness of some "developing country NGOs," some of which were created and/or financed by environmental NGOs from the United States and thus "played no policy role in the developing country." Id. The CTE Secretariat financed the expenses of certain developing country NGOs for the 1996 meeting "on an exceptional basis out of the Secretariat's own budget." Report of the WTO Informal Session With Non-governmental Organizations (NGOs) on Trade and Environment, Trade and Environment Bulletin No. 16, at 3, PRESS/TE016 (Nov. 28, 1996), available at http://www.wto.org [hereinafter 1996 NGO Symposium].

241 Comments of a former delegate from a developed country who attended CTE meetings (Apr. 6, 2000).
ferences remain more of a prerogative of northern governments and constituencies.

Information comes at a price. Northern environmental NGOs such as Greenpeace and WWF, have multi-million-dollar budgets that they use to address environmental matters. Some of their budgets exceed that of the WTO itself. They can channel more resources toward CTE negotiations than the vast majority of WTO members. Northern NGOs publish glossy magazines, circulate statements and pamphlets, coordinate lobbying campaigns, call press conferences, take out full page adds in major publications such as the New York Times, and, more recently, submit amicus briefs to WTO dispute settlement panels. NGOs such as the WWF proactively fund major symposia held within the UN, to which they invite state delegates and representatives of the WTO and other international organizations. WWF has even created a parallel CTE, which it calls the “Expert Group on Trade and the Environment,” consisting of trade and environment specialists from developed and developing countries.

In particular, northern environmental NGOs attempt to harness the media to shape perceptions of problems and desired outcomes. They

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244 See, e.g., Invisible Government, supra note 2.

245 In the Shrimp-Turtle case, the WTO Appellate Body admitted an amicus brief jointly submitted by WWF and FIELD. In addition, an amicus brief prepared by the Washington, D.C.-based CIEL, in association with other NGOs, was attached as a supporting annex to the U.S. submission to the Appellate Body. See Shaffer, Shrimp-Turtle Dispute, supra note 100.

246 The WWF primarily funded the WWF-UNEP conference on fisheries, held in June 1997 at the UN in Geneva. CTE Secretariat members saw the conference as a model. The CTE Secretariat cited studies from the conference seven times in its paper concerning the environmental benefits of removing state subsidies. See Environmental Benefits of Removing Trade Restrictions and Distortions, supra note 93.

247 The group meets a few times per year and issues periodic reports that WWF International then distributes to the CTE Secretariat, state delegates to the CTE, and any other interested party. See WWF, TOWARDS SUSTAINABLE TRADE FOR PEOPLE AND THE ENVIRONMENT, available at http://www.panda.org/resources/publications/sustainability/people/intro.html (last visited Dec. 4, 2000).

248 As Deborah Rhode writes,
can more effectively work the media, not only because of their greater resources, but also because of the media's determination of what is worthy for print. In large part, this reflects that the international media's primary audiences are located in developed countries. For example, in response to the December 1999 demonstrations at the WTO Ministerial Meeting in Seattle, the New York Times wrote in its lead editorial entitled "Messages for the W.T.O.,” “The lesson from the demonstrators this week is that future trade panels must not just talk about protecting the environment but actually do so . . . . The W.T.O. is now on notice that future panels should bend over backward to side with the environmental advocates when the cause is just and not a disguised form of protectionism.” The New York Times editorial, of course, did not bend over backward to take account of the views of developing country constituencies about the appropriateness of unilateral U.S. sanctions.

In these information campaigns, northern environmental NGOs do not represent the environmental perspective. Rather, the term “envi-

Deborah Rhode, A Bad Press on Bad Lawyers: The Media Sees Research, Research Sees the Media, in SOCIAL SCIENCE, SOCIAL POLICY AND LAW 139, 139 (Patrick Ewick et al. eds., 1999) (citing JOHN FISKE, MEDIA MATTERS: EVERYDAY CULTURE AND POLITICAL CHANGE (1994), among others). Northern international environmental NGOs engage with the media in an attempt to define the issues in public debate. See Alison Anderson, Source-media Relations: The Production of the Environmental Agenda, in THE MASS MEDIA AND ENVIRONMENTAL ISSUES 51–68 (Andrew Hansen ed., 1993) (noting how environmental NGOs hire scientists and consultants in order to gain legitimacy as primary sources and definers of issues before the media).

By “international media,” this Article refers to that available, read, and/or viewed worldwide—in particular, in international centers such as Geneva, Switzerland. This media includes CNN, Sky TV, the International Herald Tribune (joint venture of the New York Times and Washington Post), the Financial Times, the Wall Street Journal, and wire dispatches such as AP, Reuters, and Agence France-Presse. Vandana Shiva claims that

Within the dominant discourse on development, the ‘local’ has been written out of environmental concerns: now all environmental problems are portrayed as global problems requiring global solutions . . . . The ‘global’ is the political space which enables such dominant local interests [from the North] to free themselves from local, national and international restraints . . . . The ‘global’ thus creates the moral base for green imperialism.

Shiva, Global Reach, supra note 150. Northern critics of the WTO fault the mainstream media for its pro-WTO coverage. See, e.g., Seth Ackerman, Prattle in Seattle: WTO Coverage Misrepresented Issues, Protests, 13 EXTRA!, Jan./Feb. 2000, at 13. They fail to note, however, that such coverage still reflects a northern focus on the relation of WTO rules to U.S. environmental laws that restrict developing country imports. See, e.g., infra note 250.

250 Messages for the W.T.O., N.Y. TIMES, Dec. 2, 1999, at A34. Although the statement is vague, the editorial probably referred to the controversial U.S. Shrimp-Turtle case, which U.S. environmental groups were protesting about in Seattle.

251 There is not a single northern environmental group perspective. See, e.g., AUDLEY.
rnonment” has vastly different meanings to a northern public than to stakeholders in developing countries. In developing countries, it is much more difficult to separate the notion of the “environment” from that of “development” because people’s livelihoods are more intimately connected on a day-to-day basis with the environment. Developing country stakeholders are thus much less likely to adhere to a preservationist perspective of environmental protection when their lives and livelihoods are directly at stake.\(^{252}\)

While northern environmental NGOs may be internationalist in orientation and more likely than the WTO Secretariat to represent the “trees,” they do not represent a “global civil society.”\(^{253}\) They have a specifically northern perspective, and often, even more specifically, an Anglo-Saxon one.\(^{254}\) Their representatives were raised and educated in


252 For an assessment of the different treatment of the environment in the United Kingdom and India, see Graham Chapman et al., Environmentalism and the Mass Media: The North-South Divide, at xiv (1997). The editors also note the different perceptions of the word “environment” in Britain and India. For an examination of environmentalism from a wide variety of perspectives, see Worldviews and Ecology (Mary Evelyn Tucker & John A. Grim eds., 1993).

253 For a call for the development of a “cosmopolitan” state-decentered politics, see, e.g., David Held, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance 226–31, at 227 (1995) ("[d]emocratic public law needs to be buttressed and supported by ... ‘cosmopolitan democratic law.’" meaning “a democratic public law entrenched within and across borders”). The sense that northern environmental groups’ views represent a “global” and not a parochial northern outlook is reflected in the statement, “Environmentalism has become synonymous with a global outlook.” David Held et al., Global Transformations: Politics, Economics and Culture 376 (1999). Similarly, in his review of Christopher Stone’s proposal “to establish a system of guards who would be legal representatives for the natural environment.” Jeffrey Dunoff states that these guardians may already exist in the form of international NGOs. Jeffrey L. Dunoff, From Green to Global: Toward the Transformation of International Environmental Law, 19 HARV. ENVTL. L. REV. 241, 275–76 (1995). Yet Dunoff fails to address the issue by citing only northern-based NGOs with northern perspectives (World Wide Fund for Nature, the Sierra Club, and Friends of the Earth). Id. at 276. Cf. Ann-Marie Clark et al., The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women, 51 WORLD POL. 1, 34 (1998) (noting that geographical representation has been skewed in favor of northern NGOs, which are better funded and more influential).

254 While NGOs exist throughout Europe, those located in southern Europe typically do not have the finances of those based in northern Europe. Although financing is of relatively less importance for purposes of local networking to influence local policy, it is much more important if one wishes to follow and participate in negotiations in international fora, such as the WTO and its CTE. Moreover, NGOs generally play a less influential role in countries such as France with strong centralized state institutions. See, e.g., Vivien A. Schmidt, From State to Market? The Transformation of French Business and
the North. Almost all of their funding comes from contributors from the North. They obtain their financing by focusing on issues that strike the northern public’s imagination, in particular animal rights and species preservation issues. This was the motivating force for their demand for changes in WTO rules under Item 1 following the two Tuna-Dolphin decisions.

Southern states and southern NGOs thus distrust demands for greater WTO transparency when “transparency” means greater access for private groups to WTO decision-making. Southern interests are wary that this form of transparency will merely permit northern NGOs to better exploit the media to pressure state delegates, the WTO Secretariat, and WTO dispute settlement panels to take their views into account and thereby advance northern ends. Southern delegates fear precisely these “constructivist” aspects of the stakeholder model. As a developing country consultant to WWF (India) states, “there is an urgent need to contest the anti-environment image of the WTO so assiduously disseminated by northern academics and environment groups” pursuant to their “dual strategy” of pressuring WTO dispute settlement bodies through critiques and amicus curiae briefs, on the one hand, and pressuring northern governments to include trade-environment issues in the next round of WTO negotiations, on the other.

Govern (1996) (noting how France is not a pluralist or corporatist system, but rather one she characterizes as “statist”).

285 As a former UNCTAD representative confirmed, “developing countries are concerned about the weighting of the transparency process, that it will be northern-dominated, that it will be biased in that it will predominantly present the views of northern interests.” Interview with Veena Jha, former representative from the UNCTAD Trade and Environment Division, in Geneva, Switz. (June 11, 1997) (on file with the Harvard Environmental Law Review). For developing country views on participation of NGOs in WTO dispute settlement, see, e.g., Chakrabarti Raghavan, NGOs Have More Rights Now than WTO Members! SOUTH-NORTH DEVELOPMENT MONITOR (SUNS) 4719, Jul. 31, 2000, available at http://www.sunsline.org (noting developing country complaints about the acceptance by WTO dispute settlement panels of NGO amicus briefs).

Nonetheless, where greater NGO involvement could support their trading interests, developing countries switched their stances on NGO involvement. For example, when northern NGOs supported developing country demands to modify the TRIPS Agreement, Egypt advocated that NGO views be integrated “through a formal or informal round table discussion or seminar.” See Report of the Meeting Held on 21–22 June 1995, supra note 108, at para. 34 (citing Egypt’s remarks). Similarly, southern NGOs have often worked with northern NGOs to block development projects financed by international banks and development agencies. See Wapner, WORLD CIVIC POLITICS, supra note 41. However, this latter example presents a completely different context than those confronted within the WTO. In the WTO, northern environmental groups work with northern commercial interests and northern governments to ban imports from developing countries. See, e.g., Shaffer, Shrimp-Turtle Dispute, supra note 100, at 508–09 (discussing cooperation among environmental groups and the U.S. shrimp industry to force the U.S. Department of State to fully apply an import ban).

NGOs from the United States and Europe are already relatively powerful in affecting WTO agendas and outcomes precisely because they can work with and through the WTO’s most powerful members. They simply lobby and otherwise pressure their national representatives. Developing countries question whether a stakeholder model would, in fact, exacerbate this disequilibrium. While communitarian and civic republican models may work relatively better at the local level, they are much more problematic at the international level where numbers, complexity, and inequality of access to information and decision-makers increase.

E. Relation of State and Stakeholder Positions

It is certainly true that the views of U.S. and European NGOs on trade and environment matters conflict with those of most states—although particularly those of southern states. It is also true that this is, in part, because business and economic concerns hold a privileged position in defining state interests. Yet what is often ignored in critiques of state-based WTO models is that, although there are divisions within states, NGO stakeholders’ strongest defenders in the WTO on the trade and environment matters addressed within the CTE are typically their own national representatives. While interest groups may wish their national

257 See supra notes 236, 243–258.

258 See, e.g., Veena Jha & René Vossenaa, Breaking the Deadlock: A Positive Agenda on Trade, Environment, and Development?, in TRADE, ENVIRONMENT AND THE MILLENNIUM, supra note 99, at 65, 69 (“[t]here is a risk that certain proposals that may be labelled under the heading ‘transparency,’ . . . could, in practice, accentuate certain imbalances in the agenda. This is because NGOs in the South have fewer financial resources to avail themselves of such opportunities.”).

However, this is not necessarily an argument for limited WTO transparency. The ultimate question is a comparative one—that is, while there may be minority biases under a stakeholder model, how do they compare to the biases under the current system? This author, for example, is a strong supporter of making all WTO submissions immediately publicly available in order to facilitate constituents’ pressure on state representatives to take their views into account. Yet it remains important to point out that not all stakeholders will equally participate in the process. As Gary Sampson points out, “some larger countries—frequently the most vocal ones in claiming support for NGO involvement—provide the least funds, or none at all” to make it possible for small NGOs from developing countries to come to Geneva to deliberate over trade-environment issues. Sampson, supra note 149, at 126. A stakeholder model in which interest groups are able to attend and participate in WTO proceedings would be subject to severe problems of minoritarian bias in favor of well-organized interests in developed countries.

259 See, e.g., Shell, supra note 20.

260 At a high level of generalization, one can argue that this statement does not apply to northern and southern activist groups who call for the disbandment or radical curtailment of the WTO and generally oppose trade liberalization policies. For a categorization of NGO perspectives on the WTO as conformist, reformist, and radical, see Jan Aart Scholte et al., The WTO and Civil Society, 33 J. WORLD TRADE 107, 112 (1999). However, northern and southern groups expressing general views opposed to trade liberalization policies nonetheless typically diverge on specific issues such as the politically controversial issue of U.S. unilateral measures taken for environmental or any other social ends. Groups that are considered radical within the U.S. political context, such as the Earth Island Institute,
representatives to take stronger positions in the WTO, the positions taken
by their representatives on specific trade-environment issues are typically
closer to their own views than those taken by other states. This is
clearly seen on the issues that were arguably the two most important
for northern environmental NGOs—greater WTO accommodation of trade
measures imposed on environmental grounds, and greater transparency in
WTO decision-making.

On the issue of transparency, southern environmental and develop-
mental NGOs largely support their national representatives in keeping the
WTO process closed to private observers, while northern govern-
ments—lobbed by northern environmental NGOs—demand greater participatory
rights for NGOs. This is an easy issue for northern governments be-

strongly support such measures and commence legal proceedings before U.S. courts to
compel a more aggressive U.S. stance, while groups that are considered relatively radical
within developing country contexts, such as the Third World Network, oppose such U.S.
measures. See, e.g., Third World Network, Joint NGO Statement on Issues and Proposals
for the WTO Ministerial Conference, at http://www.twinsdc.org.sg/titleissue-cn.htm (last
signed by thirty-four developing country NGOs stating that “[t]he environment should not
be made use of as an issue for protectionism by the powerful for that would unfairly shift
the adjustment cost to the weaker countries and people” id. at para. 52; rejecting “the idea
of introducing labour standards or a ‘social clause’ in the WTO system” id. at para. 72; and
stating that “[t]here should be no recourse to unilateral trade actions for any purpose” id. at
para. 74).

A separate caveat to the statement that national positions more closely reflect the
positions of national NGOs, is the position of development NGOs in the U.S. and Europe.
Developed country NGOs that focus on southern development, such as Oxfam, typically
assume a more development-oriented stance, and thus are more likely to adhere to develop-
ing country positions. These northern development NGOs, however, receive consider-
ably less media attention in relation to the WTO, and have considerably less political clout
within the U.S. and EU, than do environmental NGOs such as Greenpeace, the Sierra Club,
and Earth Island Institute.

See, e.g., Cheryl Hogue, Environmental Groups Want Administration to Press for
Reforms at WTO Ministerial, Int’l Env’t Rep. (BNA) (Oct. 1, 1999) (quoting representa-
tives of various U.S. environmental groups criticizing the U.S. Administration for not
making a clearer “commitment for environmental reform of the WTO”); Daniel Pruzin,
Env’t Rep. (BNA) (Oct. 13, 1999) (noting “the Clinton administration will continue to
push for conclusion of labor and environment issues on the agenda of the new round of
global trade talks”); Developing Countries Resist Expansion of Environment Role for
World Trade Body, Int’l Env’t Rep. (BNA) at 224 (Mar. 17, 1999) (citing remarks of
representatives from Brazil, India and Mexico); Al R. Dizon, Preparations Continue for
WTO Ministerial, Bus. World (Philippines), Oct. 12, 1999, 2 (noting that the Group of 77,
comprised of 132 developing countries and China “took a strong stance against linking
trade to labor and environment”).

For the EU negotiating position on the issue of transparency for a Millennium
Round, see, e.g., EUROPEAN COMMISSION, COMMUNICATION FROM THE COMMISSION TO
THE COUNCIL AND TO THE EUROPEAN PARLIAMENT: THE EU APPROACH TO THE MILLENNIUM
the Community has been a leading proponent of the need to improve transparency, by
making proposals for the early derestriction of documents and minutes of meetings, and
supporting more regular and structured contacts and exchanges with NGOs.”). For the U.S.
position, see, e.g., Preparations for the Upcoming WTO Ministerial Meeting: Hearing
Before the Senate Comm. on Finance, 106th Cong. 3-33 (1999) (statement of Charlene
cause northern business groups adopt the same civic republican “stakeholder” language in support of greater WTO transparency and stakeholder participation. In the words of the ICC, the process for criteria development must become more “transparent and open to all stakeholders—and in particular to the international business community—so that stakeholders may be informed and involved in an effective manner.” In response to business lobbying, the United States consistently advocates direct business participation in WTO policy-making, more recently for the development of rules governing “electronic commerce.”

Given their vast resources, northern business interests are well positioned to exploit such openness. For southern NGOs, on the other hand, the issue of transparency revolves around the participation of their own national representatives, rather than that of private interest groups. They complain that developing country representatives typically are excluded from critical WTO negotiations. Opening up WTO negotiations to northern corporations and northern environmental NGOs with vast resources could only worsen existing biases.

Similarly, although northern business interests may criticize their own national representatives for sometimes going too far, they nonetheless support an amendment of GATT Article XX to accommodate some environmental measures, unlike southern NGOs. The ICC, for example, “proposed a way to make unilateral actions to protect an endangered spe-

Barshefsky, U.S. Trade Representative (noting the need for institutional reforms to ensure that the public can see the WTO and its processes in action).

See THE WHITE HOUSE, A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE 3 (1997), available at http://www.commerce.gov/framework.htm (last visited Dec. 2, 2000) (“[w]here government action or intergovernmental agreements [on electronic commerce] are necessary, on taxation for example, private sector participation should be a formal part of the policy making process.”). For an example of general U.S. support of increased transparency within the WTO, see U.S. comments in Preparations for the 1999 Ministerial Conference: General Council Discussion of the Singapore Work Program Issues and Other Issues of Concern to Members Pursuant to Paragraphs 9(b) and (d): Communication from the United States, WT/IGC/W/139 (Jan. 27, 1999).

Southern NGOs are more concerned about how the United States drives the WTO agenda, working behind the scenes with the EU, Canada, and other developed countries to place developing countries always on the defensive, reacting to U.S. initiatives on topics such as intellectual property rights, liberalization of service sectors, and, more recently, electronic commerce. As Chakravarti Raghavan, editor of the SUNS bulletin, notes with respect to North-South structural imbalances within the WTO, “[t]he [southern] Missions in Geneva had the task of safeguarding the interests of their countries. Since they were overstretched, representatives of developing countries are forced to think on their feet and to constantly react to proposals from the North.” Khor, supra note 55 at para. 45. See also Interviews with Pradeep Mehta, Secretary General, Consumer Unity & Trust Society of Jaipur, India, and Roberto Bissio, Executive Director, Instituto del Tercer Mundo de Montevideo, Uruguay; both interviews were at the UNCTAD conference in Geneva, Switz.

See supra notes 147–150.
cies, such as the shrimp embargo, compatible with international rules." The Northern business groups were willing to compromise with northern environmental NGOs because they feared disputes over Asian sea turtles could derail trade liberalization negotiations over electronic commerce, financial services, insurance services, telecommunications, and other high-value sectors. With too much to lose from negative publicity, multinational corporations create groups such as the World Business Council for Sustainable Development to "correct the misapprehension" that business interests are adverse to environmental protection. They create working groups "to demonstrate compatibility between principles

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UNICE considers that trade measures taken pursuant to MEAs should be accommodated by the WTO. . . . The accommodation of these trade measures could be achieved by introducing into GATT Article XX (B) [sic] the words 'and the environment,' and by adding to this amendment an Understanding on the relationship between trade measures taken pursuant to MEAs and the WTO rules.

(unpublished position paper on file with the *Harvard Environmental Law Review*).

268 In the United States, environmental groups raised environmental issues to help block the grant of fast track authority to the executive. See supra note 139. In both the United States and EU, environmental groups played important roles in the collapse of the negotiations of a Multilateral Agreement on Investment. See, e.g., Charlotte Denny, *Computers and the Net: Rough Trade Exposed*, GUARDIAN, Apr. 16, 1998, at 4 ("Pressure from environmentalists and development lobbyists have played a big part in derailing the [MAI] negotiators' timetable"). A reflection of political pressure within Europe is the European Parliament's demand for the Commission to be more proactive on Item 1 of the CTE agenda concerning the relation of WTO rules to trade restrictions imposed on environmental grounds, including pursuant to multilateral environmental agreements. See *Environment: Euro-MPs Urge WTO to Incorporate Environmental Protection*, EUR. REP., Apr. 18, 1998. See also *European Parliament Urges EU-Wide Fair Trade Labelling*, 15 Int'l Trade Rep. (BNA), 1215 (July 15, 1998) (noting a resolution of the European Parliament "that growing demand for 'fair trade' products with social and environmental benefits in developing countries be fostered by a common European Fair Trade label").

of free trade and environmental protection.”270 This has made it politically easier for the United States and Europe to demand, at least nominally, greater accommodation of some environmental measures within the WTO.271

Southern environmental NGOs, on the other hand, understand that Article XX is primarily invoked by northern states to restrict imports from the South.272 Many signed a joint statement declaring “our unambiguous opposition to Linkage of Labour and Environmental Standards to

270 Margaret Flaherty, Trade and Environment: A Business Perspective, 4 RECIEL 95, 97 (describing the premise to the work of the World Business Council for Sustainable Development’s Trade and Environment Working Group). Flaherty, the World Business Council’s Project Manager in Geneva, states, “[T]he international business community must play an active role in demonstrating their priorities and concerns for the benefit of the environment and the benefit of economic development.” Id.

Northern business interests have a competitive advantage in meeting more stringent environmental requirements over small and medium-sized businesses in developing countries. This argument is developed in David Vogel, Trading Up: Consumer and Environmental Regulation in a Global Economy (1995); Michael Porter, America’s Green Strategy, Sci. Am., Apr. 1991, at 168 (“Environmental protection can benefit America’s competitiveness.”); Lawrence E. Susskind, New Corporate Roles in Global Environmental Treaty Making, 27 COLUM. J. OF WORLD BUS. 62–71 (Fall/Winter 1992) (noting the “variety of benefits that a great many corporations can realize by supporting the globalization of environmental treaty-making”). Id. at 71.

271 This is reflected in U.S. and EU negotiating positions for a “Millennium Round” of trade negotiations. See supra note 262.

272 See, e.g., James Fahn, The WTO Battle that Had to Happen, NATION (Thailand), May 7, 1999 (noting, “Even the activists from the South who devote their lives to helping the oppressed or protecting the environment seem distinctly uneasy at the prospect of linking these issues to trade, if not downright opposed to the idea. They fear that if linkages are put in place, the rules will simply be imposed by the North”). For a Sub-Saharan African position, see Nicholas Kitikiti, The Use of Trade Measures for Environmental Purposes: An African View, in Trade, Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America, supra note 155, at 171, 181, (noting that “[t]he region must . . . see to it that the WTO upholds the principle that domestic environmental policies of the rich should not have an extra-territorial impact by way of trade-related environmental measures, requiring instead that environmental measures must be subjected to a ‘least trade-restrictive test’”). Kitikiti is a Zimbabwean who has worked with the NGOs ZERO and SEATINI (Southern and Eastern African Trade, Information and Negotiations Initiative). See also Martin Khor, The WTO and the South: Implications and Recent Developments, May 1997, at 6, at http://www.twside.org.sg/title/pli-cn.htm (last visited Oct. 8, 2000) (on file with the Harvard Environmental Law Review) (referring negatively to the trade-related environmental and labor issues pushed by northern governments “to their advantage”).

Similarly, on the issue of a “high level meeting,” southern environmental and business groups supported this, while southern states and NGOs were opposed because they felt that the only issues to be discussed were issues of importance to the North. See, e.g., The Unending Debate on Trade & Environment, ECONOMIQUTY, Jan.–Apr. 1998, at 3 (because Brittan’s proposal identifies as “key” problems in this field: multilateral environmental agreements (MEAs), ecolabelling, process and production methods (PPMs), and the precautionary principle,” which the southern NGO CUTS identifies as “the issues which are anathemaical [sic] to the developing world, because each of them are loaded with high potential for protectionism”). CUTS notes that “Brittan conveniently ignores the [CTR] issues which are in the South’s interest: TRIPs and biodiversity, transfer of environmentally sound technologies, and trade in domestically prohibited goods and hazardous wastes.” Id.
WTO and to trade treaties. We also wish to disabuse the media and the
governments in the developed countries of the notion that those who op-
pose Linkage are corporate interests and malign governments."²²³ The
Indian NGO Centre for Science and the Environment, in terms not so
different than India's representatives, "characterized the use of trade
measures in MEAs [multilateral environmental agreements] as an ineq-
uitable lever available only to stronger countries."²²⁴ While these southern
NGOs may focus on environmental concerns in the South, they also have
a southern perspective on social justice, and are concerned about U.S.
and EU coercion affecting southern development and rights of self-
determination.²²⁵ As Judith Mayer notes in her study of Indonesian envi-
ronmental NGOs, southern NGOs tend to focus on the "human use of
nature," and especially on protecting the "resource use rights of . . . citi-
zens in remote areas," placing their views "more in common with the
state's development imperatives than with the preservationist orienta-
tions of many 'Western' environmentalists."²²⁶ While environmental NGOs se-
verely criticize their national governments at the national level, at the
international level, their champions are typically their own gov-
ernments.²²⁷

²²³ Third World Intellectuals and NGOs Statement Against Linkage (Oct. 23, 2000)
(proposing that labor and environmental issues be handled in labor and environmental
agencies, such as the International Labour Organization and UNEP; the statement is now
being circulated and lists 105 third world intellectuals and NGOs as signatories) (on file
with the Harvard Environmental Law Review). See also Joint NGO Statement on Issues
and Proposals for the WTO Ministerial Declarations (Dec. 1996) (circulated by Third
World Network) ("The Ministerial Declaration should not endorse work in the WTO to
link trade to labour standards and other social causes") (on file with the Harvard Environ-
mental Law Review).
²²⁴ Sunita Narain, Multilateral Environmental Agreements and the WTO, Address be-
fore the WTO Symposium on Trade, Environment and Sustainable Development (May 20—
21, 1999) in Chad Carpenter & Aaron Coskey, WTO Symposium on Trade, Environment
and Sustainable Development, SUSTAINABLE DEVELOPMENTS, May 26, 1997 at 4 [herein-
after 1997 NGO Symposium Report].
²²⁵ See, e.g., Comments of Chiedu Osakwe, in POLICING THE GLOBAL ECONOMY, supra
note 179, at 194, 105 (Vandana Shiva, Director of the Research Foundation for Science,
Technology and Natural Resource Policy, India, claims, "[t]he principle that was the basis
of the negotiation of the Rio treaty . . . was a principle of human rights, democracy, sover-
eignty and development. It was the right to development, which also implies the full
realization of the right of peoples to self-determination, which in turn includes the exercise
of their inalienable rights to full sovereignty over all their natural wealth and resources. That
right to development, to me, is the key test in every dispute decision by the WTO").
²²⁶ Judith Mayer, Environmental Organizing in Indonesia: The Search for a Newer Or-
der, in RONNIE D. LIPSCHUTZ & JUDITH MAYER, GLOBAL CIVIL SOCIETY AND GLOBAL
ENVIRONMENTAL GOVERNANCE 169, 179 (1996). See also PORTER & WELSH BROWN, supra
note 24, at 52 ("Environmental NGOs in developing countries tend to be as much con-
cerned with poverty and other development issues as with strictly environmental issues").
²²⁷ See, e.g., PORTER & WELSH BROWN, supra note 24, at 54 (with respect to the nego-
tiations at the UN Conference on Environment and Development in Rio, "the southern
NGOs' position tended to parallel their governments"). Similarly, in her study of Indone-
sian NGOs, including their positions in international fora such as the 1992 Earth Summit
in Rio, Mayer confirms, "[w]ithin Indonesia, they [Indonesian environmental NGOs] act as
critics of government policies that affect Indonesia's own environment and people. Yet on
Overall, divisions between northern and southern NGOs largely paralleled divisions between northern and southern states. This was made clear in the multiple NGO symposia organized by the CTE Secretariat. For example, a representative from a northern NGO (MS-Denmark) “supported international coordination of an EU-like process, where, as trade barriers went down, environmental standards rose.” Yet he was countered by a representative of an Argentinean NGO (the Centro de Investigaciones para la Tranformacion) who “observed that larger companies with newer equipment seem to do well with trade liberalization and demands for environmental performance [while] small and medium-sized enterprises are often so vulnerable they cannot implement even local regulations.” A Thai NGO (Focus on the Global South) representative concurred with his South American counterpart, citing studies of the UN Conference on Trade and Development which “highlight many of the potential market-restricting impacts that higher green standards in the North might have in the South.” As NGO symposia discussions largely mirrored national differences within the CTE, southern governments became more comfortable holding them.

VI. LEGACIES OF THE WTO COMMITTEE ON TRADE AND ENVIRONMENT: SPILOVER EFFECTS WITHIN AND OUTSIDE OF THE WTO

The most enduring results of the CTE are neither the rather banal CTE reports nor the interminable debates over the CTE’s ten-point agenda. Rather, the importance of the CTE process primarily lies in its enhancement of the transparency of WTO decision-making, and its facilitation of interstate and intrastate coordination of trade-environment policy, albeit primarily in protection of state trading interests. The first

many issues, in international arenas they have lent their support to the government’s positions vis-a-vis those of foreign governments, and some of the more extreme demands of international environmental conservation groups. . . . In an international forum such as the 1992 Earth Summit (UNCED) and the preparatory meetings leading up to it, representatives of several of Indonesia’s most influential environmental groups took stands that were largely compatible with official Indonesian positions.” Mayer, supra note 276, at 174. Some developing country representatives nonetheless realize that they could benefit in international negotiations over intellectual property rights through alliances made with northern NGOs. Northern NGOs could pressure northern politicians to accommodate developing country concerns, as they have in regards to U.S. policy over the AIDS epidemic in sub-Saharan Africa. See Steven Meyers, South Africa and U.S. End Dispute Over Drugs, N.Y. TIMES, Sept. 18, 1999 at A8. (stating that 300 protestors gathered in Philadelphia in June 1999 to chant “Gore’s greed kills!”).

278 Similarly, a representative of the Canadian NGO International Institute for Sustainable Development, “asked why a system that could protect Madonna’s royalties by imposing trade barriers against pirated production of her music could not also protect dolphins by imposing trade barriers against tuna caught using ‘dolphin unfriendly’ methods.” See 1997 NGO Symposium Report, supra note 274, at 4. A southern non-governmental group, on the other hand, “objected to being forced to protect animals such as dolphins in a region where millions of children die each year from poverty-related preventable diseases.” Id. at 12.
legacy is partially in line with the predictions of a civil society/stakeholder approach. The second is partially in line with those of a supranational technocratic one. Yet in each case, state interests continue to predominate.

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

The CTE process served as a laboratory for opening up WTO internal processes to the public. The CTE’s secretariat was the first to create a section of the WTO Web site providing relatively timely and detailed reporting of a WTO committee’s deliberations. The CTE Secretariat published the results of CTE meetings well before the meetings’ official minutes were made public.\(^{279}\) It worked with states toward expeditiously making all CTE submissions, whether state proposals or CTE Secretariat analyses, publicly available. All CTE submissions may now be downloaded relatively quickly from the WTO Web site.\(^{259}\) This was a unique development for WTO committees.

The CTE’s Secretariat organized the first WTO symposia to which NGOs were invited to interact with the Secretariat and those state delegates who chose to attend. Few state delegates attended the first two symposia, one held following the second Tuna-Dolphin decision and the other in the midst of negotiation of the CTE 1996 Report.\(^{291}\) By the fourth

\(^{279}\) See http://www.wto.org. More recent bulletins now provide direct hyperlinks to unrestricted and derestricted state and Secretariat submissions to CTE meetings. State delegates to the CTE have increasingly agreed to immediately make their submissions publicly available, even though WTO General Council rules do not require this. For example, Canada and Colombia submitted their papers on eco-labeling in March 1998 on an unrestricted basis. The March 1998 Secretariat paper on the “Environmental Benefits of Trade Liberalization” was also derestricted upon the request of Canada’s and Australia’s delegates, despite initial EU, Japanese, and Korean opposition. Confirmed in interviews with Anonymous WTO Delegates I, J, and K, representing the EU, Korea, and Japan, respectively, in Geneva, Switz. (June 17, 18, and 19, 1998).

\(^{259}\) According to Sabrina Shaw of the Secretariat’s Trade and Environment Division, all submissions to the CTE have been immediately “derestricted” (i.e., made publicly available) and states no longer submit “non-papers.” Shaw Interview, supra note 225. On non-papers, see supra note 100.

\(^{291}\) The first NGO symposium was primarily reactive, organized by the WTO Secretariat just after the second Tuna-Dolphin decision in an attempt to defuse the backlash. At the meeting, environmental groups, bitter over the Tuna-Dolphin decision and the just-initiated Uruguay Round agreements, harangued the WTO Secretariat and those few state delegates who attended but did not speak. This is when Greenpeace welcomed participants with its banner of a giant white shark devouring a dolphin. See generally 1997 NGO Symposium Report, supra note 274.

State delegates did not even attend the second NGO symposium, which was held shortly before the CTE finalized the CTE 1996 Report. They were too preoccupied with the negotiation of the Report. Rather, representatives of the CTE Secretariat took the brunt of the invectives of the thirty-five invited NGOs, who knew that the long-awaited Report would not offer the modifications that they desired. These two symposia nonetheless served as an exchange of ideas for future WTO relations with NGOs. For an overview of
symposium, in 1998, with the formal report behind them, state delegates and NGOs were asking and responding to each other’s questions.282 Gradually, even NGOs confirm that state delegates have become more comfortable engaging with them in such public fora, in large part because developing countries’ fear of being isolated was assuaged.283 In line with two-level intergovernmentalist predictions, divisions among states were largely reflected in divisions among NGOs.284

More significantly, the issue of ensuring open, transparent decision-making migrated from the CTE to the WTO General Council. In July 1998, following his participation in the fourth CTE-NGO symposium, Director-General Ruggiero publicly announced “a plan for enhanced cooperation with NGOs.”285 The plan included “regular briefings for NGOs on the work of WTO committees and working groups,” the circulation to

the second Trade and Environment NGO Symposium, see 1996 NGO Symposium, supra note 240.

282 The third NGO symposium was more widely attended by states as the pressure on them to negotiate a formal report was over. Twice the number of NGOs participated, an increase from thirty-five to seventy. State delegates not only attended, they responded to and asked questions of NGO participants, and conversed in the hallways between sessions. A consortium of NGOs, the International Centre for Trade and Sustainable Development, organized a small follow-up meeting to discuss the potential for future NGO symposia, which the author attended as an observer. Overviews of this third NGO symposium are compiled in the Report and Recommendations from the Joint WTO/UNCTAD NGO Symposium on Trade-Related Issues Affecting Least-Developed Countries, WT/LDC/HL/16 (Oct. 24, 1997), as well as in WTO Symposium on Trade, Environment and Sustainable Development, Trade and Environment Bulletin No. 19, PRESS/TE 019 (July 1997) [hereinafter 1997 NGO Symposium], both available at http://www.wto.org.

The fourth NGO trade and environment symposium was again larger. Attendees included more than 60 state delegates and over 150 representatives from environment and development NGOs, business associations, and research and academic institutes. The meeting’s symbolic significance was punctuated by the participation of high-level figures, including the Director-General of the WTO, the Secretary-General of UNCTAD, the Executive Director of UNEP and the Director of the Bureau of Development Policy of United Nations Development Programme (“UNDP”). For an overview of the fourth NGO symposium, see International Institute for Sustainable Development, Report of the World Trade Organization Symposium on Non-Governmental Organizations on Trade, Environment and Sustainable Development (1998) [hereinafter 1998 NGO Symposium], available at http://www.iiisd.ca/linkages/sd/wtosymp/sdvol12no1e.html (last visited Oct. 8, 2000).

A fifth NGO symposium was held in Geneva in March 1999 in conjunction with the High Level Symposium on Trade and Environment and the High Level Symposium on Trade and Development. Full documentation of these symposia may be obtained from the WTO Web site at http://www.wto.org. A meeting with NGOs was also organized as part of the December 1999 WTO Ministerial Meeting in Seattle. See Sam Howe Verhovek, For Seattle, Triumph and Protest, N.Y. TIMES, Oct. 13, 1999, at A12.

283 As a representative from the Canadian environmental NGO International Institute for Sustainable Development concluded about the 1998 exchange, participants felt that “this symposium had witnessed more sophisticated commentary than previous sessions,” and that “most came away with a greater understanding, though perhaps not sympathy, for the positions of their traditional ‘opponents.’” 1998 NGO Symposium, supra note 282, at 2, 17.

284 See supra notes 260–278.

state delegations of "a list of documents, position papers and newsletters submitted by NGOs" and "a special section of the WTO Website . . . devoted to NGOs issues." The new Director-General, Michael Moore, confirmed that he will continue to promote greater openness. The move toward greater transparency, which started in the CTE, has now infiltrated the organization and is seeping through its committees. So far, however, this opening of the WTO to public scrutiny has not resulted in shifts in national positions, nor has it shifted the structure of the overall debate within the organization.

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

The CTE process has also made environmental issues more transparent for trade officials and trading interests. In line with institutionalist theory, states have used the CTE process to reduce information-gathering, monitoring, and coordination costs, and thereby enhanced state policy coordination. States used the CTE to monitor and subject developments in international environmental fora to greater oversight. They used the CTE’s Secretariat as agents to attend meetings of international environmental fora and to report on developments. The Secretariat has prepared over twenty papers on such developments, including papers concerning the Rio Conference, the Commission on Sustainable Development, the Montreal Protocol on the Ozone Layer, the Kyoto Confer-

26 See, e.g., Moore Sees Least-Developed Nations, Transparency as WTO Challenges, INSIDE U.S. TRADE, Oct. 1, 1999, at 23 (citing Moore’s statement, “[i]f we are not inclusive, we cannot expect public support”). All three initiatives started in the CTE. The CTE was the first WTO Committee to conduct a briefing of NGOs. The CTE Web site includes “Trade and Environment Bulletins” that periodically report on developments in the Committee, including detailed summaries of discussions at CTE meetings and references to CTE documents that can be downloaded. The idea “for the Secretariat to serve as an information clearing house for NGO reports and analysis and to maintain a bibliography, accessible to WTO members and NGOs, of relevant publications dealing with trade, environment and sustainable development issues” was first raised at the second trade-environment symposium. 1996 NGO Symposium, supra note 240. For an overview of the WTO’s relations with NGOs written by two members of the WTO Secretariat, see Gabrielle Marceau & Peter N. Pedersen, Is the WTO Open and Transparent?: A Discussion of the Relationship of the WTO with Non-governmental Organisations and Civil Society’s Claims for More Transparency and Public Participation, 33 J. WORLD TRADE 5 (1999).

27 Concerning rational institutionalist theory, see supra notes 22–23. As the Austrian representative stated within the EMIT Working Group, “[MEAs] were not fixed but were evolving over time, and this evolution had to be closely monitored. This could be done in two ways: by continuous contact between the Secretariat of GATT and the respective Secretariats of the various MEAs and by inviting the Secretariats of these MEAs to attend the Group’s meetings as observers.” EMIT, Report of the Meeting Held on 9–10 July 1992, at 36, para. 193, TRE/6 (Aug. 18, 1992). Similarly, in discussing the convening of the EMIT Working Group, Australia noted, “[c]ontracting parties involved in negotiations toward an international environmental agreement might also request that the Secretariat act as an advisory body to ensure that GATT’s views were incorporated therein.” Minutes of Meeting Held in the Centre William Rappard on 29–30 May 1991, C/M/250 (June 28, 1991) at 5.
ence on Climate Change, the Basel Convention on the Control of Transboundary Movements of Wastes, the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the Food and Agricultural Organization, the International Tropical Timber Organization, and the Convention on Biodiversity.288 Little now takes place in environmental negotiations without taking account of WTO rules.289 State trade

288 This count is through Sept. 30, 1999, and the provision of reports continues. These include reports on developments in: (i) the Commission on Sustainable Development responsible for the UNCED follow-up; see, e.g., EMIT, UNCED Follow-up: Results of the First Session of the Commission on Sustainable Development and Other Related Activities: Note by the Secretariat, TRE/W/14 (July 21, 1993); CTE, UNCED Follow-up: Results of the Third Session of the Commission on Sustainable Development: Note by the Secretariat, WT/CTE/W/7 (May 18, 1995); (ii) the Working Group of Parties to the Montreal Protocol; see, e.g., CTE, Trade Measures for Environmental Purposes Taken Pursuant to Multilateral Environmental Agreements: Recent Developments: Note by the Secretariat, WT/CTE/W/12 (Oct. 10, 1995) [hereinafter CTE, Trade Measures for Environmental Purposes]; CTE, The Montreal Protocol on Substances that Deplete the Ozone Layer: Recent Developments: Note by the Secretariat, WT/CTE/W/68 (Nov. 14, 1997); (iii) the Conference of the Parties to the 1992 UN Framework Convention on Climate Change; see, e.g., CTE, United Nations Framework Convention on Climate Change: Note by the Secretariat, WT/CTE/W/74 (Mar. 3, 1998); (iv) the Conference of Parties to the Basel Convention; see, e.g., CTE, Trade Measures for Environmental Purposes, supra; (v) the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora; see, e.g., CTE, Convention on International Trade in Endangered Species of Wild Fauna and Flora: Note by the Secretariat, WT/CTE/W/71 (Nov. 21, 1997); (vi) the Food and Agricultural Organization on fisheries; see, e.g., CTE, Recent Developments: Note by the Secretariat: FAO Code of Conduct for Responsible Fisheries, WT/CTE/W/15 (Dec. 1, 1995) (section entitled “Responsible International Trade” commences “[t]he provisions of this Code should be interpreted and applied in accordance with the principles, rights and obligations established in the World Trade Organization (WTO) Agreement” id. at § 11.1.1); (vii) the UN Ad Hoc Intergovernmental Panel on Forests; see, e.g., CTE, Results of the Ad Hoc Intergovernmental Panel on Forests: Note by the Secretariat, WT/CTE/W/48 (May 14, 1997); (viii) the Conference of Parties to the Convention on Biological Diversity; see, e.g., CTE, Convention on Biological Diversity: Recent Developments: Note by the Secretariat, WT/CTE/W/18 (Jan. 12, 1996); and (ix) work programs in other international economic fora concerning the market access implications of eco-labeling; see, e.g., CTE, Eco-labelling: Overview of Current Work in Various International Fora: Note by the Secretariat, WT/CTE/W/45 (Apr. 15, 1997) (reporting on the work programs in the International Standardization Organization, Codex Alimentarius, the International Trade Center, UNCTAD and UNIDO).

289 The CTE Chairman’s “1995 Summary of CTE Activities” notes that “the Secretariat had received several requests for information and advice from MEAs.” CTE, Summary of Activities of the Committee on Trade and Environment (1995) Presented by the Chairman of the Committee, at 2, WT/CTE/W/17 (Dec. 12, 1995) para. 7. For example, the Secretariat for the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol requested that the WTO Secretariat provide “clarification as to whether certain proposals [which it was considering] were consistent with GATT,” implying they might be altered were this not the case. See CTE, The Montreal Protocol and Trade Measures, at 6, WT/CTE/W/57 (Aug. 28, 1997) para. 25. Similarly, the Secretariat for the UN Convention on the Law of the Sea (UNCLOS) confirms the “deference” of the convention’s provisions on deep seabed mining “to GATT in trade-related matters,” including GATT’s anti-subsidy provisions and its dispute settlement procedures. The submission confirms that “whenever applicable, the authority of free trade agreements and of customs union agreements was also recognized.” See CTE, The 1994 Agreement Relating to the Implementation of Part XI of the 1982 UN Convention on the Law of the Sea: Provisions Dealing with Production Policy for Deep Seabed Minerals, paras. 17, 18, 20, WT/CTE/W/62 (Sept. 16, 1997). Arti-
delegates were able to use the CTE to more effectively ensure that trading interests and trading rules were taken into account in international environmental fora.

The CTE process also provided states with better information about each other’s domestic environmental regulations affecting trade. Early in CTE debates, member states “emphasized the importance for traders and producers of comprehensive and uniform information about trade-related environmental measures and environment-related trade measures.” Ultimately, states’ sole substantive decision in the CTE 1996 Report was to instruct the Secretariat to compile and update a database of domestic “trade-related environmental measures.” The Secretariat has since created a WTO Environmental Database listing all such measures notified to it and periodically expands it based on new notifications. These notifications permit states and their commercial constituents to better monitor the application of domestic environmental measures. Ultimately, states hope to manage the trade impacts of domestic environmental measures at an early stage, before disputes flare.

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

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2 CTE 1996 Report, supra note 86, at para. 192. Again, however, this was not a purely neoliberal initiative, as it was demanded primarily by smaller developed and developing countries disadvantaged by proliferating U.S. and EU requirements. The United States and EU blocked an attempt to require all WTO members to notify each other of all environmental measures not because they were less “neoliberal,” but because it would be more expensive for them to comply with such a requirement given the amount of U.S. and European requirements potentially at issue. As a U.S. delegate stated, “transparency is not without cost.” CTE, Report of the Meeting Held on 14 December 1995, at para. 14. WT/CTE/M/6 (Jan. 17, 1996).
3 This was updated by the Secretariat in 1999. See, e.g., CTE, Item 4: Provisions of the Multilateral Trading System With Respect to the Transparency of Trade Measures Used for Environmental Purposes and Environmental Measures and Requirements Which have Significant Trade Effects, Note by the Secretariat, WT/CTE/W/118 (June 28, 1999).
4 A prototype for such monitoring is the “early warning system” recently negotiated between U.S. and EU representatives to address potential regulatory initiatives before they become law and spark a trade dispute. See Bob Davis, U.S. and EU Agree to Set Up a System To Head Off Potential Trade Disputes, WALL ST. J., June 22, 1999, at A24.
the objective of trade liberalization and environmental protection.”294 As the Egyptian delegate concluded, the CTE 1996 Report was in good measure a public relations document, “a political statement issued largely to address the environmental community.”295 In the end, the result of the CTE process has been more of an attempt to “GATT the greens” than to “green the GATT.” As a CTE Secretariat member observed, “Environmental ministries started to take greater notice of the GATT and trade delegates [were able to] feedback information to domestic ministries.”296

At first glance, this would appear to confirm the predictions of a supranational technocratic perspective. However, this attempt to “GATT the greens” primarily has been an effort by states through the WTO’s agency, not by an independent WTO acting on its own. Moreover, the “GATTing” has been far from successful. Responding to internal domestic pressures, states continue to adopt environmental measures with extraterritorial trade effects, as witnessed by the WTO Shrimp-Turtle dispute.297 They also continue to adopt new environmental agreements with trade-restraining provisions, as witnessed by the Cartagena Protocol on Bio-safety.298 Contrary to the predictions of a supranational technocratic model of governance, states’ positions continue to reflect differing domestic constituency values, priorities and interests.

Thus, the struggle over trade, environmental, and developmental goals continues. State officials may use the CTE to help defend the WTO system in domestic interagency and political debates. Yet northern environmental and other groups continue to target their disdain on the WTO,

294 WTO Trade and Environment Committee Discusses Proposals on Transparency, supra note 290, at para. 19; see also WTO Trade and Environment Committee Continues Discussing Proposals on Recommendations for the Singapore Ministerial Meeting and the Post-Singapore Work Programme, supra note 109, at para. 25.


296 See Shaw Interview, supra note 225. Even in the early EMIT Working Group discussions, “several delegations . . . noted the importance of an educational process occurring in capitals on the subject of trade and environment” to avoid conflicts with GATT norms and rules. See EMIT, Report of the Meeting Held on 10-11 March 1992, at 1, TRE/4 (Apr. 13, 1992). Similarly, in his report to the GATT contracting parties at the end of 1993, the Chair of the EMIT Working Group reports.

Possibilities of conflicts arising in the future over the trade provisions contained in MEAs will be minimised through better coordination between trade and environment officials in national capitals. That remains a sine qua non for cooperative action at the multilateral level. A process of enhanced policy coordination is underway already in many countries; it will certainly contribute to reducing unnecessary tensions in this area.

EMIT Report to the 49th Session, supra note 84, at para. 16.

297 See discussion of the Shrimp-Turtle case in Shaffer, Shrimp-Turtle Dispute, supra note 100.

298 See Pollack & Shaffer, GMOs, supra note 139 (discussing the results of the negotiation of the Cartagena Protocol on Biosafety, which arguably conflicts with the WTO Agreement on Sanitary and Phytosanitary Measures).
as witnessed by the mass demonstrations in Seattle. Although the CTE process has facilitated policy coordination within governments and among intergovernmental organizations, it has not defused entrenched grassroots opposition to economic globalization processes, symbolized in the WTO.

VII. CONCLUSIONS:
THE WTO AS A CONDUIT FOR STATES RESPONDING TO DOMESTIC PRESSURES; THE PROSPECTS OF A WORLD ENVIRONMENT ORGANIZATION

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

NGOs often criticize the WTO as if it were an undemocratic force independent of states. Yet the explanation for the stalemate within the CTE lies in conflicts within and between states, not in any independent action of the WTO. From the standpoint of the pluralist representation of civil interests, the views of northern and southern NGOs on the CTE’s agenda have been most closely aligned with those advanced by their own governments. Although northern business and environmental interests often clashed, they were each more willing than southern NGOs to accommodate an expansion and clarification of GATT’s exception clause to permit certain trade restrictions on environmental grounds. Those issues that were most strongly asserted by southern NGOs, such as recognition of indigenous knowledge as an intellectual property right, were taken up by southern states. Yet here WTO rule changes were blocked by northern states defending northern business interests. Moreover, these southern environmental issues were less strongly endorsed by many northern NGOs whose constituencies were more concerned with the use of trade measures to protect animal life abroad. In short, the CTE served as a conduit for states responding to domestic pressures. In this sense, the WTO is a much more democratically accountable institution than its critics claim.

The WTO Secretariat did not block changes to WTO rules. Ultimately, WTO rule changes desired by northern environmental NGOs were blocked because northern NGOs either failed to win domestic pol-

\footnotesize{299 See supra note 198 and accompanying text. See also supra notes 13, 232, 249, 282.  
300 See supra notes 267–278.  
301 Decision-making in any complex society involving large numbers of constituents raises questions of democratic accountability. All choices are imperfect. Yet in response to democratic critiques of the WTO, it is important to note that, in the absence of the WTO, the U.S., the EU, and other states with large markets would still wield coercive power, and would not be constrained by internationally agreed-upon rules. As Albert Hirschman has noted, the essence of economic power is the capacity to obstruct commercial exchange. See ALBERT O. HIRSCHMAN, NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE 16–17 (photo. reprint 1999) (1945). Enforceable international rules help constrain the exercise of such market power.}
icy debates, or were not able to convince national representatives to offer sufficient side payments to gain developing country support of desired changes in WTO rules. Where there were divisions among powerful domestic constituencies, governments avoided taking a clear stance within the CTE. The United States and EU were simply unwilling to adopt any of the strategies cited by intergovernmental theorists—targeting threats or concessions, linking issues, manipulating information, or offering side payments—to induce developing countries to agree to amend WTO rules in a manner that developing countries justifiably believed would adversely affect their economic interests. Instead, U.S. and EU representatives took issues to the CTE, such as the permissibility of unilateral trade restrictions for environmental ends, about which they felt ambivalent, and which they knew could not be resolved through the WTO political process unless they took a strong stance and were willing to offer trade concessions in return.

In the Uruguay Round of trade negotiations, the United States and EU successfully negotiated new WTO rules mandating the protection of intellectual property rights, despite developing country opposition. Developing countries agreed to the TRIPs Agreement in response to relentless U.S. and EU pressure, as well as U.S. and EU agreement to reduce trade barriers to textile and other products. If U.S. and European environmental interest groups were able to convince their national representatives to give greater priority to environmental issues, then WTO members would be more likely agree to change relevant GATT rules as well. Northern environmental groups were simply unsuccessful in harnessing U.S. and EU clout to attain their aims. Internal divisions within the United States and Europe hamstrung their ability to exercise political and economic power in furtherance of northern environmental groups' goals.

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302 For example, at approximately the same time that demonstrators massed in Seattle against the WTO's treatment of various social issues, U.S. Democratic and Republican legislators proposed amending Section 301 of the Trade Act of 1974 "by establishing a 'hit list' of countries that use health and safety regulations to block imports of U.S. agricultural produce." See Corbett B. Daly, Levin Introduces Measure to Strengthen Section 301, 16 Int'l Trade Rep. (BNA) 1908 (Nov. 24, 1999). A central concern behind the proposed legislation is the EU's banning of products with genetically modified components. Such components may involve health and environment issues. Section 301 provides for the right of businesses to petition the U.S. Trade Representative to challenge foreign trade barriers to their exports. Section 301 of the Trade Act of 1974 (as amended) is codified at 19 U.S.C. §§ 2411-2420 (1988).

303 Similarly, Porter and Welsh Brown note, "The U.S. environmental movement is the largest and best organized in the world, but it was unable in the late 1980s and early 1990s to sway U.S. policy in the negotiation of climate and hazardous waste trade regimes, in part because powerful interests were arrayed against it and it had not been able to influence the outcomes of congressional or presidential elections." PORTER & WELSH BROWN, supra note 24, at 36.
cratic representativeness of U.S. and EU positions within the WTO, it lies at the national level, not within the WTO itself.\textsuperscript{394}

In answer to this Article’s initial question, the \textit{two-level intergovernmental} model best explains how the WTO has addressed trade and environment issues.\textsuperscript{395} Although the WTO’s institutional context creates a framework in which negotiations occur, and the WTO Secretariat can act as a broker within that framework, the WTO is not controlled by an independent, neoliberal ideological elite. Rather, state representatives closely defend their constituencies’ interests within the CTE. Trade-environment issues are high profile items, reported in the news media and heavily lobbied in U.S., European, and other capitals precisely because of their potential environmental and economic impacts. While state delegates may attempt to manipulate domestic processes to enhance their policy-making discretion, they must take into account and respond to domestic pressures. The more issues become politicized, the less discretion state delegates have. From both instrumentalist and constructivist perspectives,\textsuperscript{396} U.S. and European environmental groups have failed to sufficiently shape the CTE’s agenda, to frame its treatment of the issues, or to influence the outcome of CTE debates to accomplish their goals.

Not surprisingly, U.S. and European environmental groups are frustrated. Although they speak of the need to create a more transparent WTO under a \textit{stakeholder} model, they are primarily piqued by results, not processes.\textsuperscript{397} They have tried to intervene at the international level by lobbying delegates in Geneva, submitting amicus briefs on trade-environment disputes before WTO dispute settlement panels, and engaging in mass protests at WTO ministerial meetings. They have also tried to harness U.S. and EU economic and political power to modify WTO rules. Yet they have been thwarted because their interests conflict with those of U.S. and EU export-oriented businesses domestically and with those of businesses and other non-governmental constituents from developing and smaller developed countries. Malcontent U.S. and European environ-

\textsuperscript{394} One study has shown that formal mechanisms at the national level for consultation with NGOs over WTO matters are rare. See Christophe Bellmann & Richard Gerster, Accountability in the World Trade Organization, 30 J. WORLD TRADE 31 (1996) (finding that only 3 governments out of a survey of 30 countries had such formal mechanisms). As to issues of the accountability of the U.S. Trade Representative, as well as of the trade representatives of other WTO members, see supra notes 162-183, 194 and accompanying text. For an empirical study of the relationship between U.S. and European business interest groups and their national trade representatives in WTO litigation, and negotiation within its shadow, see generally, Gregory C. Shaffer, The Blurring of the Intergovernmental: Public-Private Partnerships in the Bringing of US and EC Trade Claims, in TRANS ATLANTIC GOVERNANCE IN A GLOBAL ECONOMY, supra note 16.

\textsuperscript{395} See supra note 17.

\textsuperscript{396} See supra note 39.

\textsuperscript{397} See, e.g., Rossella Brevetti, Ruggiero Meets with NGOs in Effort to Broaden WTO Transparency, 15 Int’l Trade Rep. (BNA) 1874 (Nov. 11, 1998) (discussing the results of the negotiation of the Cartagena Protocol on Biosafety, which arguably conflicts with the WTO Agreement on Sanitary and Phytosanitary Measures).
mental groups consequently critique the WTO as an autonomous neoliberal institution. While their critiques are factually inaccurate, they are strategically adept. By focusing their critiques on the institution that oversees the trade liberalization process, they are able to join forces with an odd array of allies—from isolationist conservatives concerned about sovereignty to labor unions concerned about labor's declining bargaining power. They thereby more effectively oppose U.S. and EU trade liberalization initiatives supported by export-oriented businesses. The U.S. President remains unable to obtain “fast-track” trade negotiating authority. The EU remains unable to monopolize competence over all WTO matters, complicating European decision-making and hampering the Commission's trade liberalization initiatives.

Business interests have long held a preferential position in policymaking. Their role in investment and employment in capitalist economies provides them with a privileged position in dealings with government. Yet the environmental opposition to the WTO, working with other disaffected constituencies, has threatened to successfully impede export-oriented businesses' efforts to further liberalize global markets.

Through their persistent critiques of the WTO and its CTE, U.S. and European environmental groups have won at least a marginal victory. They have opened up the WTO decision-making process and initiated a trend toward greater transparency in WTO operations that is unlikely to change. Greater transparency helps them pressure home governments and enables them to coordinate better with affiliated foreign groups to concurrently pressure foreign governments. However, increased WTO transparency also enables other interest groups to better monitor trade-environment matters, particularly environmentalists' traditional domestic antagonists—business interests. Thus, from a two-level intergovernmental perspective, the likelihood of significant change in WTO trade and environment rules through action by the CTE remains slim.

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

For most of the world's citizens, the deadlock within the CTE may not be a bad outcome. The United States and EU have been unable to

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308 See, e.g., Lindblom, Politics and Markets, supra note 38. This has arguably been enhanced by the globalization of production. See, e.g., Pollack & Shaffer, Transatlantic Governance, supra note 16 (noting the role of business-government resource interdependencies and business' high per capita stakes in transatlantic relations); Dani Rodrik, Has Globalization Gone Too Far? (1997) (assessing the impact of globalization on labor and social protection policies). For commentary on privileged business-government relations in developing countries, see Gareth Porter, Trade Competition and Pollution Standards: “Race to the Bottom” or “Stuck at the Bottom”? June 1, 1999, J. of Env't & Dev. at 133.
modify WTO rules in a way that only they, in practice, could exploit." Yet because of adverse NGO reactions within the United States and Europe, the CTE stalemate has had highly problematic consequences for multilateral trade liberalization initiatives, including developing country demands for the removal of U.S. and European tariff barriers to textiles, agricultural products, and processed goods. In order to defuse environmentalist critiques of the WTO and to facilitate further trade liberalization, even the WTO's former Director-General and staunchly neoliberal publications such as The Economist, now call for the formation of a World Environment Organization.

Would the creation of a World Environment Organization make any difference? If a World Environment Organization were run by a technocratic supranational environmental elite, per a supranational technocratic model of governance, then a World Environment Organization could conceivably serve as an effective counterbalance to a supranational technocratic trade organization. Yet as we have seen, WTO negotiations over trade-environment policy have been dominated neither by international civil servants nor by ideologically single-minded national trade bureaucrats, but by state representatives attempting to advance national interests as determined per a two-level intergovernmental model. Since the primary explanation for the stalemate over trade-environment policy in the CTE is a conflict between states, including between, and within, the WTO's most powerful members (the United States and EU), creating yet another international bureaucracy would arguably fail to resolve the issues that have been debated within the CTE.

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290 See, e.g., Sunita Narain, Remarks, in 1997 Symposium Transcript, supra note 282, at 304 (southern NGOs characterize "the use of trade measures in MBAs as an inequitable level available only to stronger countries").

291 Developing country delegates remark that, whereas the U.S. and Europe pedaled free trade during the 1986-94 Uruguay Round trade negotiations, roles are now reversed. Developing countries now press the U.S. and EU to open their markets to developing country exports, while the U.S. and EU resort to anti-dumping suits and call for tying market access to meeting labor and environmental standards. Interview with Delegate L, a South Asian representative, in Geneva, Switz. (June 12, 2000) (on file with the Harvard Environmental Law Review). See generally DEVELOPMENT DIVISION, WORLD TRADE ORGANIZATION, DEVELOPING COUNTRIES AND THE MULTILATERAL TRADING SYSTEM: PAST AND PRESENT 25 (Mar. 17-18, 1999) (referring to "adverse effects of tariff escalation and tariff peaks both in relation to agricultural products and industrial goods"). available at http://www.wto.org.

While, in theory, environmental ministers could play a larger role in representing state positions before a World Environment Organization than before the WTO, this should not materially change outcomes. As witnessed by the 1992 UN Conference on Environment and Development in Rio de Janeiro ("Rio Conference") and the Kyoto Protocol to the UN Framework Convention on Climate Change, environmental ministers do not determine national positions.312 Rather, national positions in developed countries are coordinated through inter-agency processes. Commercial constituencies, and their representatives in trade, commercial and foreign ministries, seek to ensure that national economic interests are not sacrificed by environmental ministries lobbied by environmental NGOs. Developing country environmental ministries, where they exist, would not dictate national positions on matters affecting their nation’s development. States strive to safeguard their national economic interests in negotiations “where words have consequences.” The mere denomination of the organization should not matter.

Were the explanation of the stalemate within the CTE that governments have been out of touch with civil society stakeholders, then the formation of yet another organization could make a difference. Yet as we have seen, interest group positions on “dollars and cents” trade and environment matters also conflict.313 The views of northern environmental groups and southern development groups have been most closely defended by their own governments within the WTO, per a two-level intergovernmental model.

312 On the politics of the 1992 UN Conference on Environment and Development, see PORTER & WELSH BROWN, supra note 24, at 115–29. In his assessment of the negotiations of the Convention on Biological Diversity, Kal Raustiala maintains that domestic institutions play “an even more prominent role in determining state choices.” Kal Raustiala, Domestic Institutions and International Regulatory Cooperation: Comparative Responses to the Convention on Biological Diversity, 49 WORLD POL. 482, 509 (1997). He confirms, however, that “as the negotiations grew more politicized—reflecting the juxtaposition of environment and development that was the hallmark of the UNCED process—epistemic variables cannot account well for the observed decisions and outcomes.” Id. at 505. For a critique of the Earth Summit as a “debacle” for the environment on account of the role economic and commercial interests played, see Nicholas Hildyard, Foxes in Charge of the Chickens, in GLOBAL ECOLOGY: A NEW ARENA OF POLITICAL CONFLICT 19, 22–35 (Wolfgang Sachs ed. 1995) (arguing that “both North and South, have done everything in their power to protect the interests of their industrial and commercial lobbies”).

313 As Rubens Ricupero, Secretary-General of UNCTAD states,

One can speak about a universal consensus around the concepts of human rights and the environment only in very general terms. But every time we attempt to translate these principles from the abstract to the concrete, from the paper they are written on to reality, we clash with vested political or economic interests that are hard to reconcile with human or environmental goals.

Comment of Rubens Ricupero, in POLICING THE GLOBAL ECONOMY, supra note 179, at 131–32.
While advocates of a stakeholder model often speak in terms of the need to incorporate the views of the “environmental community” as a counterpart to the “trade community” and other “communities,” this is disingenuous.314 These labels merely reflect the denominations of certain well-organized interest groups that would like to enhance their policy-making power. But the labels have no substance in terms of a “civil society.” As members of “civil society,” we all must integrate our views on matters involving the environment, development, trade, human rights, race, gender, equity, efficiency, economic growth, and so on. In light of the immense challenge developing countries face in meeting the basic needs of the majority of their human populations, southern constituencies typically place less weight on the social value of environmental preservation than on economic and social development and poverty eradication.315 Hence, southern interest groups are highly skeptical, if not hostile, to efforts by northern environmental groups to loosen WTO rules to facilitate unilateral trade sanctions in Tuna-Dolphin and Shrimp-Turtle type cases. They realize that such changes would impose costs on southern development without any monetary compensation or other assistance from the developed world.

Until there is more consensus among states and state constituents on fundamental social values and priorities, the notion of a “World Environment Organization” will encounter great skepticism and opposition.316 Developing countries fear that northern environmental groups could use the organization as leverage to press developing countries to privilege environmental conservation over human development. As a Philippine

314 Even trade liberals addressing the concerns of developing countries adopt the term “environmental community” as if it is monolithic. See, e.g., John Whalley, Trade and Environment, the WTO, and the Developing Countries, in EMERGING AGENDA FOR GLOBAL TRADE: HIGH STAKES FOR DEVELOPING COUNTRIES 84 (Robert Z. Lawrence et al. eds., 1996) (“[the environmental community argues that trade policy should no longer come first”).

315 Developing countries made clear in the 1992 Convention on Biological Diversity that its implementation shall “take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties.” Convention on Biological Diversity, June 5, 1992, Art. 20(4), 31 I.L.M. 822, 831 (entered into force Dec. 29, 1993). See also Kitikiti, supra note 272, at 179, 184 (citing a 1986 EU poll showing that 50% of EU citizens placed a priority on environment and only 9% on development). Kitikiti notes that “if a similar poll were carried out in a developing country, it would confirm that the public’s choice there would be economic growth.” Id.

316 A more politically astute title for such an organization might therefore be the “World Sustainable Development Organization.” Yet successfully packaging multiple concepts in a single title does not itself make for consensus. The term “sustainable development” is popular because it is fluid. For northern environmentalists, the term “sustainable” can be a proxy for environmental protection that “development” can threaten to undo. In contrast, for developing countries, the term “development” broadcasts an urgent policy goal that the term “sustainable” can threaten to undermine. Division over a concept’s meaning bodes poorly for its practical implementation.
representative to the WTO remarks, "If only we were elephants, developed countries might be more concerned about us."317

Ironically, the formation of a World Environment Organization faces two fundamentally contradictory challenges: the thought of its success and the thought of its failure. If successful, the organization could facilitate the enactment of global environmental regulation for states to implement, enforced by economic sanctions. A regional model for the enactment of environmental legislation already operates. The EU adopts scores of environmental regulations and directives each year which mandate member state implementation and are typically directly applicable to, and enforceable by, EU citizens.318 At the global level, however, this smacks of global government, something that most of the globe’s citizens do not want. While the EU itself faces internal opposition, there is much greater consensus over social values and social priorities and much more symmetry of economic development within the EU than there is throughout the world.319

Concurrently, some states might agree to the creation of a World Environment Organization because it would not be successful in promoting global environmental regulation. States might use a World Environment Organization to replicate the status quo within the CTE, or even to strengthen their position against trade restrictions on environmental grounds.320 Joint WTO and World Environment Organization pronouncements against unilateral U.S. trade bans could strengthen developing

318 For an overview of EU regulations, directives and enforcement measures, see Jo Shaw, Law of the European Union (2d ed. 1996).
319 See, e.g., Nichols, supra note 5, at 694–95. On the relation between the EU and social values, see Philip Allott, The European Community is Not the True European Community, 100 Yale L.J. 2485, 2499 (1991).
320 Such an organization would not be more accommodating toward unilateral trade bans than are current WTO rules. A World Environment Organization would surely promote implementation of three fundamental principles agreed to in the Rio Declaration on Environment and Development signed at the Rio Conference, namely (i) that developing and developed countries have differing responsibilities to enact domestic measures to protect the environment; (ii) that international transfers are necessary to assist developing countries upgrade their environmental protection measures; and (iii) that unilateral trade measures are to be avoided. For an overview of the Rio Declaration, see Kay Thompson, The Rio Declaration on Environment and Development, in The ‘Earth Summit’ Agreements: A Guide and Assessment 85–95 (Michael Grubb et al. eds. 1993). Principle 7 provides that “[t]he special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority.” Principle 6 affirms that “[t]he special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority.” Principle 12 avows that “[t]rade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.” Id. at 87–88 (emphasis added). The italicized language is taken directly from GATT Article XX. In setting and overseeing implementation of the rules of a World Environment Organization, almost all states would oppose unilateral measures imposed on environmental grounds.
countries' legal position, as well as the WTO's treatment by the media.\footnote{21} This time, since the word "trade" would not appear within the organization's title, it would be more difficult to blame international trade-environment policy on the machinations of an international trade elite. A World Environment Organization could absorb some of the pressure that northern protest groups now aim at the WTO.

This analysis does not imply that no environmental goals could be advanced through the creation of an international environmental organization.\footnote{22} Environmental protection requires positive, discrete actions, whether in the form of reductions in the use of ozone-depleting substances or the adoption of new fishing techniques or logging practices. A World Environment Organization could mediate agreements whereby developing countries accede to some northern environmentalist demands in exchange for U.S. and European funding of desired environmental policies or provision of other economic incentives. On a case-by-case

\footnote{21} For trade liberals, the WTO might be somewhat freed to proceed with facilitating interstate negotiations over the removal of trade barriers. For developing countries, the current environmentalist-labor-nationalist alliance within developed countries against trade liberalization might be somewhat loosened, thereby strengthening their demands that remaining high tariff barriers protecting textile, agricultural and other U.S. and European sectors from developing country imports be removed. For this reason, some developing country delegates support exploring the idea of a World Environment Organization as a WTO counterpart. See, e.g., Shahin, supra note 99, at 35, 60 (discussing the "so-called 'Ruggiero' option presented earlier: a World Environment Organization to be the counterpart to the WTO. This is a pragmatic and likely workable option in view of the difficulties encountered so far").

\footnote{22} There is a vast literature on international environmental governance mechanisms. See generally Oran Young, International Cooperation: Building Regimes for Natural Resources and the Environment (1988); Global Environmental Change and International Governance (Oran Young et al. eds., 1996); Institutions for the Earth: Sources of Effective International Environmental Protection supra note 123; Institutions for Environmental Aid: Pitfalls and Promise (Robert K. Koehane & Marc A. Levy eds., 1996); Chayes & Chayes, supra note 10, at 3 (presenting "an alternative 'managerial model,' relying primarily on a cooperative, problem-solving approach instead of a coercive one"); The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice (David G. Victor et al. eds., 1998); Lawrence E. Susskind, Environmental Diplomacy: Negotiating More Effective Global Agreements (1994).


For a critique of the creation of a WEO because it would likely serve to legitimize the WTO's pursuit of "ever-freer trade," see Sara Dillon, Trade and the Environment: A Challenge to the GATT/WTO Principle of "Ever-Freer Trade," 11 St. John's J. Legal Comment. 351, 387 (1996) ("[f]or an environmental organization to accept all the underlying principles of free trade would nearly guarantee its incompetence for purposes of reversing environmental degradation").
basis, such an organization could help channel funds for the protection of animal life and habitat in developing countries and in the global commons, problems which have been the subject of some of the WTO’s and GATT’s most controversial disputes. By making it more apparent that confrontations involving trade-environment issues are not domineered by an international trade cabal, but ensue from differences in social priorities, social values, and economic interests between and within states, a World Environment Organization could facilitate bargaining on these issues, in addition to ideological posturing. Whereas the debate within the WTO has focused on whether trade sanctions should be permissible on environmental grounds, a World Environment Organization could also address the appropriateness of positive environmental measures in specific cases, such as technology transfers and project financing.\(^{323}\)

An international organization with an environmental component that is dedicated to facilitating the resolution of ad hoc trade-environment disputes as they arise is a decidedly more limited, and more pragmatic, notion than a global government.\(^{324}\) The role of UNEP could, for exam-

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323 The focus of negotiations within the CTE on negative trade measures, as opposed to positive environmental measures to enhance environmental protection is pointed out in Osakwe, Finding New Packages, supra note 100, at 48–53. See also René Vossenaar & Veena Jha, Implementation of MEAs at the National Level and the Use of Trade and Non-Trade Related Measures: Results of Developing Country Case Studies, in TRADE AND THE ENVIRONMENT: BRIDGING THE GAP 66, 82 (Agata Fijalkowski & James Cameron eds., 1998) (noting that “it is important to examine and improve the effectiveness of provisions on positive measures”). Developing countries complain that whereas northern governments support a modification or interpretation of WTO rules to accommodate trade restrictions on environmental grounds, they have failed to keep the promises they made at the UN Conference on Environment and Development in Rio to finance sustainable development projects in developing countries. See, e.g., Shahin, supra note 99, at 36–38 (“developed countries are in effect retreat from the holistic approach to sustainable development agreed at Rio. They now insist on unilateral measures and on environmental conditionality attached to trade and investment”); Environment, International Competitiveness and Development, UNCTAD Secretariat Report, TD/B/WG.6/10 (Sept. 12, 1995) (“Positive measures’ (rather than trade restrictive measures) should be implemented to support the developing countries in their efforts to move towards more stringent environmental standards’); Chinn, supra note 256, at 1760 (advocating a “rewards-based approach” of financial assistance and technology transfer). On the real world difficulties of funding effective positive environmental measures, see, e.g., Robert O. Keohane, Analyzing the Effectiveness of International Environmental Institutions, in INSTITUTIONS FOR ENVIRONMENTAL AID: PITFALLS AND PROMISE, supra note 322, at 3, 25 (“At the most basic level, self-interest is the key constraint on concern: on the willingness of rich countries to fund financial transfers; of recipient governments to take effective action against privileged families or groups that benefit from environmental exploitation; and of international organizations to cooperate with one another”). Yet as Keohane points out on the problem of ineffectiveness, “we must ask, ‘ineffective compared to what?’” Id.

324 Similarly, Ricupero states that the formation of a World Environment Organization is unrealistic in the current political climate and favors a more gradual approach. See Ricupero, supra note 313, at 128. He notes with approval calls for the formation of a “Standing Conference on Trade and Environment,” which appears to be an expansion of the symposia so far organized by the WTO Secretariat, to include representatives of multiple international organizations and international NGOs. Id. at 135. This proposal, however, could be given a more functional application in line with the standing committee proposed below.
ple, be upgraded to assume such a role. 325 Alternatively, a standing committee or agency could be formed under joint WTO-UNEP auspices to address specific trade-environment claims as they arise. 326 The organization could be a forum to engage experts to assess the local environmental, social and developmental issues at stake, negotiate compromise solutions, and raise funds to implement them. 327 Negotiations structured

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

Proponents of institutional reform maintain that a World Environment Organization could offer more coherence on cross-border environmental matters, be located in or near Geneva, and have the capacity potentially to broker deals to defuse trade-environment conflicts, while promoting environmental protection. As Newell and Whalley assert, a World Environment Organization could “(i) act as an intermediary and initiator of cross-country internalisation deals . . .; (ii) extend and deepen treaty commitments . . .; (iii) facilitate environmental and non-environmental policy linkages . . .; and (iv) use an international structure to underpin domestic environmental policy.” See Peter Newell & John Whalley, Towards a World Environment Organization?, 30 IDS Bull., 16, 18–21 (1999). They argue that it could thereby lead to package agreements along the lines that the WTO now operates. Id. at 20.

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

326UNCTAD and/or UNDP could also be co-sponsors of such an agency or committee. Their involvement may be politically important since developing countries would be more confident that these agencies would protect their development interests. The OECD’s Joint Session of the Trade and Environment Committees could serve as an example. On the OECD’s Joint Session, see supra notes 53, 212. In 2000, UNEP and UNCTAD formed a Capacity Building Task Force on Trade, Environment and Development, although with a very modest budget of $4 million. See UNEP-UNCTAD Capacity Building Task Force on Trade, Environment and Development, Communication from UNEP and UNCTAD, WT/CTE/W/138 (Apr. 4, 2000), available at http://www.wto.org. Similarly, there are already joint UNEP/UNCTAD/UNDP and UNEP/UNDP projects. See Benjamin J. Richardson, Environmental Law in Postcolonial Societies: Straddling the Local—Global Institutional Spectrum, 11 Colo. J. Int’l Envtl. L. & Pol’y 1, 22–23 (2000) (referring to a joint UNEP/UNDP project in Africa).

327 Some policymakers might be concerned about conflicts between the WTO dispute settlement system and that of an international environmental organization, an issue which is already identified as Item 5 in the CTE’s agenda. In practice, however, this issue could be of little significance. First, an international environmental organization does not necessarily need a centralized dispute settlement system. As Abram and Antonia Chayes point out, environmental organizations can advance environmental protection without recourse to
to resolve ad hoc trade-environment disputes by facilitating financial transfers to developing countries or the provision of other incentives could be more equitable and, since developing country local environmental and developmental conditions and constituency views could be more closely assessed, more legitimate and democratic than the alternative of unilateral U.S. and European sanctions. A standing committee or agency would also more likely be supported (and financed) by a wary U.S. Congress and other northern governments than would a more ambitious World Environment Organization.

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

judicial enforcement. See CHAYES & CHAYES, supra note 10. Moreover, the WTO Appellate Body, in its application of current WTO rules governing environment-based trade restrictions, already focuses on the process through which restrictions are implemented. In the U.S. Shrimp-Turtle case, the WTO Appellate Body held against the U.S. precisely because it did not take “into consideration different conditions which may occur in the territories of... other Members,” and had not seriously attempted to negotiate an agreement with the developing country complainants. See Shrimp-Turtle Appellate Report, supra note 128, at paras. 164, 166–70. The advantage of a parallel international environmental forum is precisely that it could serve these two functions. Such an organization could help conduct and finance environmental assessments and broker negotiated solutions. Deliberations could be open to the public, with financial assistance provided to assure input from local constituencies.

338 One could criticize the idea of a standing committee to address trade-environment disputes by arguing that environmental priorities would be set through trade disputes triggered by pressure from northern constituencies. However, donor countries already play a central role in determining priorities, often to appease northern constituencies. See Barbara Connolly, Incentives for the Earth: The Politics of Environmental Aid, in INSTITUTIONS FOR ENVIRONMENTAL AID: PITFALLS AND PROMISE, supra note 322, at 327, 329–33 (“donors... determine which problems will receive aid, how those problems will be defined, and what solutions aid programs will seek to implement... [d]onors do not always provide aid in order to solve environmental problems. Often, aid programs are about solving political problems”). The issue of fairness ultimately must be addressed through an assessment of institutional alternatives. Certainly case-by-case multilateral negotiations under the auspices of a WTO-UNEP standing committee or an international environmental organization would take better account of developing country conditions and stakeholder interests than would an amendment of WTO rules to accommodate U.S. unilateral sanctions against developing country imports on environmental grounds.
As the multifaceted agenda of the CTE demonstrates, trade-environment frictions proliferate. They will be managed by neither quick nor easy institutional or procedural panaceas—whether in terms of civil society/stakeholder models or desired more friendly "environmental" fora. Simplistic calls for "democratizing" the WTO will not provide the answer. While creation of a World Environment Organization could serve to somewhat shield the WTO from criticism, and although it could help channel resources from northern states and stakeholder groups to confront southern environmental problems, it would not eliminate trad-environment conflicts. Ultimately, these conflicts are grounded in differing environmental and developmental values and priorities and differing financial stakes. In line with a two-level intergovernmental model of governance, decisions will be made by states, reacting to input from their constituencies, and using their political and market power as leverage to pursue their perceptions of state interests. However, northern environmentalist critiques of the WTO, though misleading in fact, may be one way in practice to spur the United States and Europe to fund further international environmental institutional development and environmental protection efforts abroad.